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WITH KEY-NUMBER ANNOTATIONS

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PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

APRIL — MAY, 1913

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

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¹ Recess appointment expired March 4, 1913.

² Confirmation appointment, April 24, 1913, to succeed John M. Cheney.

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| | |
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¹ Recess appointment expired March 4, 1913.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS
THE DISTRICT COURTS, AND THE
COMMERCE COURT

MURCH BROS. CONST. CO. v. JOHNSON.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,239.

1. TRIAL (§ 177*)—QUESTIONS OF LAW OR FACT—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES.

A motion by both parties for a directed verdict constitutes a stipulation that there are no issues of fact for the jury and authorizes the court to determine both issues of fact and law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.*]

Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to Love v. Scatterd, 77 C. C. A. 8.]

2. APPEAL AND ERROR (§ 927*)—REVIEW—INFERENCES.

Where both parties moved for a directed verdict, and the court directed a verdict for plaintiff, the Court of Appeals, on a writ of error, would adopt that view of the facts expressly proved or reasonably inferable which was most favorable to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

3. MASTER AND SERVANT (§ 316*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR.

The doctrine of independent contractor is that one who lets work to be done by another according to the methods of the latter, and without being subject to the employer's control except as to the result of the work, is not liable to third persons for injury resulting from the negligence of the contractor or his servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Who are independent contractors, see note to Atlantic Transport Co. v. Coneys, 28 C. C. A. 392.]

4. MASTER AND SERVANT (§ 318*)—SERVANT OF SUBCONTRACTOR—LIABILITY OF PRINCIPAL CONTRACTOR.

Where defendant principal contractor for the construction of a building controlled the work as it progressed through a superintendent, and permitted a subcontractor to pile marble in one of the uncompleted rooms in such a manner as to be dangerous to employes of subcontractors, who were in the habit of eating their lunches in the room, he was not relieved

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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from liability for injury to one of such servants while in the room during the lunch hour because the danger was caused by the negligence of the servants of the subcontractor in improperly piling the marble.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

5. MASTER AND SERVANT (§ 318*)—INDEPENDENT CONTRACTOR—CARE REQUIRED.

Defendant general contractor, through a superintendent, retained general control of the construction of a building while different parts of the work were being performed by subcontractors. The subcontractor for the marble work was permitted to store marble in a room where the employes generally ate their lunches, and so negligently piled certain of the marble that, as an employe from a different building not connected with defendant was walking through the room during the lunch hour, he so jarred a pile of marble that it fell on plaintiff, a servant of another subcontractor, and injured him. *Held*, that plaintiff was a licensee, and that defendant, having intrusted the subcontractor with the performance of its duty to see that the marble was safely stacked for the protection of the persons working in the building, was responsible for the discharge thereof, and that defendant was negligent in failing to see that the marble was properly stacked, or that the workmen were warned.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 318.*]

6. MASTER AND SERVANT (§ 322*)—DANGEROUS PREMISES—CAUSE OF INJURY.

The admission of strangers into the building not having been forbidden, and visitations by workmen from another building having been frequent and with defendant's knowledge, it was not relieved from liability because the fall of the slab that caused plaintiff's injury resulted from the act of such servant in walking along the plankway in the building in which plaintiff was employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1263; Dec. Dig. § 322.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Andrew Johnson against the Murch Bros. Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Metcalf & Metcalf, of Memphis, Tenn., for plaintiff in error.

F. S. Elgin, of Memphis, Tenn., for defendant in error.

Before KNAPPEN, Circuit Judge, and SATER and SESSIONS, District Judges.

SATER, District Judge. [1, 2] The plaintiff in error (hereinafter called the defendant) seeks a reversal of the judgment in favor of the defendant in error (hereinafter called the plaintiff) for personal injuries. At the conclusion of all the evidence both parties moved for a directed verdict. The court in accordance with the rule announced in *American Nat. Bank v. Miller*, 185 Fed. 338, 107 C. A. 456, directed for the plaintiff and instructed the jury to fix the amount of damages. In reviewing the case we must therefore adopt that view of the facts, expressly proved or reasonably inferable, which is most favorable to the plaintiff. Observing such rule, we find the facts to be as follows:

On September 2, 1909, the defendant, as general contractor, engaged with the Central Bank & Trust Company to furnish all the labor and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

material for the erection of, and to erect for it, according to the plans and specifications, a bank and office building in Memphis, Tenn. It sublet the marble work to a marble company and the concrete work to a firm, both of which subcontracting parties were admittedly independent contractors. The defendant, however, had entire charge, custody, and control of the building from the time it was begun until it was completed, delivered to, and accepted by the Trust Company, and kept a superintendent on the premises for several hours each day to supervise its construction. He also had control of the placing of the various kinds of material brought into the building preparatory to its installation. The plaintiff at the time he was injured was in the employ of the above-mentioned subcontracting firm as a day laborer on concrete work, and had been thus employed for some four or five weeks, during which time the workmen employed about the building, without the defendant's express authorization but with its knowledge and acquiescence, repaired at the noon hour to the room on the ground floor designed for banking purposes to eat their dinners. The room had been prepared by them for such purpose. They were accustomed to seat themselves when eating at such places as suited their convenience, without suggestion or direction from the defendant. As marble for the building arrived, it was necessary to store a portion of it temporarily in the building. With permission of the defendant's superintendent, it was placed by the marble company in the bank room until the portions of the building for which it was intended were ready to receive it. The defendant exercised no supervision or control over such company's employes, nor did it give any instructions as to how the material should be arranged. The places at which it was located within the room were designated by the defendant's superintendent. Some of it was placed on its edge lengthwise on the floor and leaned against the wall. Another portion, consisting of slabs, was stacked in an inclining position against a column. The slabs were about five or six feet in length, from one and a half to two feet in width, and about two inches in thickness. Their lower ends, to avoid chipping, were placed on a plank, used with defendant's permission, which rested loosely on the concrete floor, and lay against another plank used as a run or walkway. There is no prescribed method of piling marble, but the safer way, when the material is of the dimensions named, is to place it lengthwise on its edge, instead of upright on its end. The slabs were plainly visible to any one in and about the room and were seemingly harmless, but, in fact, were insecurely placed, and liable to fall, if jostled, and each was of such weight as might seriously injure any one whom it might strike. Both the plaintiff and one of the Murch brothers were present in the room at the time and after the slabs were thus stacked, but the plaintiff was wholly inexperienced as to handling and piling the same, and did not know and was not warned of any danger incident thereto. On the opposite side of the street there was another building in process of erection, with which, however, none of the parties herein mentioned had any connection. The workmen from such building at noon intermissions frequently came to the bank building, with the knowledge of the defendant and without its objection, to visit persons there employed. On the day of the accident, which was some three or four days subsequent to

the stacking of the marble as above mentioned, one of the visiting workmen from the building across the street, while walking on the plank runway near the stacked marble, near which the plaintiff was sitting on a tool chest eating his dinner, struck with his foot or shook the plank on which the marble slabs rested, causing some of them to fall, one of which struck the plaintiff edgewise on or about the knee, inflicting an injury. He thereupon sued the defendant for damages.

The defendant's principal contentions are: (1) The plaintiff's injury was due to the collateral negligence of an independent contractor, for which the defendant as a general contractor is not liable, the present case not coming within any of the exceptions which affix liability to a general contractor; (2) the proximate cause of the plaintiff's injury was the intervening act of a trespasser in the building at the lunch hour on an errand of his own and who was not in the employ of any one connected with the building in the course of construction. The plaintiff's insistence is that it was the defendant's duty to keep the building in a reasonably safe condition for all employes therein, and that such duty was not delegable.

[3, 4] The doctrine of independent contractor is that one who lets work to be done by another according to such other's own methods and without being subject to the control of his employer, except as to the result of his work, is not liable to third persons for injury resulting from the negligence of the contractor or his servants. In the present case, however, the defendant's control of the building into which, through its assent, there was introduced by its subcontractor a newly created danger, rendered the defendant liable to one who, without fault on his part, was injured in consequence, if the defendant's duty was to protect the injured person from such danger and there was personal fault and neglect of duty on its part. *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164, 171, 13 N. W. 499, 43 Am. Rep. 456.

[5] The practice of the workmen about the building to congregate in the bank room to eat their dinners was well defined and continuous, and with the knowledge and acquiescence of the defendant. Conceding, without deciding, that, while not engaged in the course of their employment, they were not entitled to the protection of employes from their respective masters, they nevertheless were not mere strangers to the defendant to whom no duty was owing. The defendant, knowing that the room was thus used and failing to object thereto, impliedly licensed them to use it for that purpose. *Ellsworth v. Metheny*, 104 Fed. 119, 122, 44 C. C. A. 484, 51 L. R. A. 389 (C. C. A. 6). Until the marble was stored in it, the room was apparently free from peril and reasonably fit and safe for the use to which it was appropriated. In view of the defendant's knowledge of and continued implied assent to the daily use of such place for the purpose stated, it was bound to anticipate the presence of the workmen there at the noon hour, and having consented that the situation might be changed by the introduction of marble into the room, it was bound to see that care commensurate with the circumstances was exercised in so stacking it as to avoid injury to them. As it suffered the change to be

so made as to import into a place of former safety an element of peril, of which the plaintiff was ignorant and could not know in the exercise of due care to avoid injury, its duty was to give reasonable warning of the danger to be encountered. The defendant could not, by employing the marble company, free itself of its own duty to its licensees, although they were servants of independent contractors. The defendant having intrusted to that company the performance of its duty to see that the marble was safely stacked for the protection of its licensees, such duty was performed by it through such company, and it is responsible for the discharge of the same. Had the obstruction created in the room been purely collateral to the work contracted to be done and entirely the result of the wrongful acts of the marble company, the defendant would not be liable. But the obstruction which occasioned the injury to defendant was the direct result of an act which the marble company was authorized to do, and the defendant, who awarded to it the contract for the marble work and authorized it to bring the marble into the building and store it there, is liable for the injury due to its negligent stacking, although the marble company may also be required to answer in damages. *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Bailey, Pers. Inj.* (2d. Ed.) 122. The injury was not due to the sole negligence of the marble company. It resulted from a cause which could have been prevented by the defendant, and which it ought to have foreseen and against which it ought to have guarded. That the performance of the entire marble work rested on an independent contractor did not, under the circumstances of this case, absolve the defendant from seeing that the marble was so stacked as not to inflict injury on the workmen or reasonably warning them of the added peril. Having failed to discharge its duty in these respects, and such failure having been, without plaintiff's fault, the direct and proximate cause of the injury to him as one of its licensees, the defendant was guilty of active culpable negligence, and was rightfully adjudged to respond in damages. It was the defendant's negligence of this character which fixes its liability. The liability of a person, situated as the defendant was, for active as distinguished from passive negligence, is pointed out with great clearness and force by Judge (now Mr. Justice) Lurton in the following language in *Felton v. Aubrey*, 74 Fed. 350, 358, 359, 20 C. C. A. 436, 444:

"It seems to us that many of the American cases which we have cited failed to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by reason of subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises, and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of *Corby v. Hill*, 4 C. B. (N. S.) 562, and is a distinction which should not be overlooked. If there be any substantial difference between the legal consequence of permitting another to use one's premises and inviting or inducing such use, the distinction lies in the difference between active and the merely passive conduct of such a proprietor. It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of the premises should not be held liable to one who gets upon another's premises for his own uses, and sustains some injury by reason of the unfitness

of the premises for such uses, not subsequently brought about by the active interference of the owner. If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which will pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively change the situation by digging a pit-fall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered."

The rule so stated has been observed by this court in *Ellsworth v. Metheny*, supra, *Tutt v. Ill. Cent. R. Co.*, 104 Fed. 741, 744, 44 C. C. A. 320, *Wright v. Stanley*, 119 Fed. 330, 332, 333, 56 C. C. A. 234, *Dishon v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.)* 126 Fed. 194, 206, *De Haven v. Hennessy Bros. & Evans Co.*, 137 Fed. 472, 476, 69 C. C. A. 620, and *Winters v. B. & O. R. Co.*, 177 Fed. 44, 50, 100 C. C. A. 462. See, also, *Northern Pac. Ry. Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205 (C. C. A. 9), and *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361 (C. C. A. 8).

Ellsworth v. Metheny is instructive and closely in point. There was evidence that Metheny was killed in an entry in a coal mine where the miners were accustomed to go at noon for the purpose of eating their dinners and for social intercourse. Indulgence in this practice was with the knowledge of and without objection from the owner. Although Metheny was not, during such noon hour, engaged in the course of his employment and consequently not entitled to the protection accorded an employé, he was, nevertheless, a licensee using the entry with the implied consent of his employer. Some three weeks prior to his death the mineowner had introduced into and strung along the wall of such entry a highly dangerous electric wire, with which the workmen might come in contact when passing back and forth. It was thought that the mineowner might not, without responsibility, actively change a situation of previous safety by introducing a highly dangerous device into a place thus used with his consent, and that sound morals and just treatment demanded that the licensee should have had notice of the new danger which he was likely to encounter in using the premises. It was said that if, on a rehearing of the case, the testimony should warrant the finding that the electric apparatus as actually introduced into the mine was dangerous to the life and safety of the employés and they were ignorant of that fact, or could not know it in the exercise of ordinary care to avoid injury, and the same was placed with the knowledge and consent of their employer in a part of the mine which the men were accustomed to use and occupy during the hour of rest and refreshment when not actively engaged in their duties, a duty was imposed upon the employer in thus introducing into his mine a new and dangerous element properly to guard and protect the men, or to give notice of the danger to those whom he should reasonably apprehend were likely to be brought into contact therewith.

Another and recent case in which the rule here invoked was applied and with the same result is *Wilson v. Hibbert*, 194 Fed. 838, 114 C. C. A. 542.

[6] That the fall of the slab was caused by a workman from another building does not operate to relieve the defendant from liability. The admission of strangers to the bank building had not been forbidden, and visitations by workmen from across the street had been frequent and with the defendant's knowledge. The conduct of the one who, in walking by the stacked marble on an established plankway in daily use, so jostled it as to cause the falling of the slab which struck the plaintiff, was not unusual, and the passage of any other person over such plankway in the course of his employment might well have produced the same result. Had the slabs been laid lengthwise on the floor, or otherwise safely placed, the accident would not have occurred. Within the rule stated in *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 94 C. C. A. 244 (C. C. A. 6), the proximate cause of the plaintiff's injury was the dangerous method in which the marble was stacked.

Other errors are assigned and argued, but they are not well taken, and are not deemed of sufficient importance to warrant extended consideration.

No error appearing on the record, the lower court is affirmed.

In re BERKELEY.

Appeal of BUSHBY.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 77.

1. BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

Evidence considered on the hearing of a petition in involuntary bankruptcy, and *held* insufficient to establish any indebtedness of the alleged bankrupt, except, perhaps, to the original sole petitioner, or to show that he was insolvent at the time the petition was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

2. EQUITY (§ 394*)—MASTERS—COMPENSATION.

Where the rules of court fix the per diem compensation of a master, unless an additional allowance is made, a stipulation by which the parties to a suit agree to pay him an increased amount is in violation of such rules, and will not be sanctioned.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 857-859; Dec. Dig. § 394.*]

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

In the matter of Lancelot M. Berkeley, alleged bankrupt. Appeal by James C. Bushby from a decree dismissing petition. Affirmed.

The following is the opinion of the District Court, by Hough, District Judge:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The petition herein was filed April 21, 1910, as a one-creditor petition. Subsequently there appeared as copetitioners Daniel D. Bailey, as executor of Elbert Bailey, and Leo Levy, as assignee of Herman Scheideberg.

Quite early in the proceeding Judge Hazel required Bushby, Levy, and Bailey to file bills of particulars, setting forth what, if any, indebtedness they claimed against Berkeley. Bailey specified as his claim \$400 of costs received by Berkeley as his (Bailey's) attorney. It may be that Berkeley owes Bailey some very small amount—what amount it is impossible to ascertain from the record—but it is plain that he does not owe Bailey what Bailey said he did.

Mr. Levy specified as Scheideberg's claim assigned to him \$23.30 of costs, for which an execution had been issued and returned "No property." I discover nothing in the record to substantiate this claim; but, on the contrary, it is made to appear that before the execution had been issued the action out of which it grew had been totally discontinued, without costs to any party as against the other. Thus this contest should rather be entitled *Bushby v. Berkeley*, and requires an examination into the past relations of the parties much more thorough than is shown by the master's report.

For some considerable time before December, 1906, Messrs. Bushby and Berkeley had been copartners in the practice of the law. In the month named their partnership was dissolved by mutual consent, and it seems that most of the business of the firm was to be continued and wound up by Berkeley; he paying to Bushby a specified portion of the proceeds of each unclosed litigation. A considerable part of the business of the firm seemed to have been the promotion, on contingent fees, of suits against railway companies for injuries to abutting owners by reason especially of the erection by the New York Central Railway of the Park avenue viaduct; but they also dealt in claims (of the familiar kind) against the elevated railways of this city. Berkeley continued to perform the terms of dissolution and, as alleged by Bushby in his petition, paid him, during the year 1907, the considerable sum of \$17,699.60 as his share of divers litigations.

The documents evidencing the dissolution agreement suggest, if they do not prove, a spirit of hostility between the former partners existing as early as December, 1906, but certainly by 1908 hatred arose between them.

Toward the end of that year the Appellate Division of the First Department decided, in *Re Larney*, 128 App. Div. 902, 927, 112 N. Y. Supp. 1134, that, under the terms of retainer given to Bushby and Berkeley by one Larney, any allowance for costs obtained by Bushby and Berkeley upon the settlement of the Larney claim belonged to the client, and not counsel. No opinion was filed by the Appellate Division, but it is evident that decision must have been founded on the terms of that particular retainer.

It is obvious from the evidence before me that this decision greatly alarmed both Bushby and Berkeley; for if Larney could obtain relief of this kind, why could not every other client whose retainer was in similar language?

It is also obvious from the record that such was the condition of hostility between the ex-partners that each believed the other was trying to avoid his share of this possible liability; and Berkeley believed that Bushby, whose partnership share of losses and profits was the greater, was seeking to avoid ultimate payment of such share by seeking out clients and inciting them to pursue Berkeley. Berkeley also charges that Bushby sought to render himself "execution proof" by conveying property to his wife.

This is all immaterial, except in so far as it shows the spirit in which this bankruptcy matter has been carried on; and it also accounts largely for the extent and quality of this record, over the accumulation of which the master seems to have exercised no authority whatever.

One result of Berkeley's view of Bushby's attitude regarding the possible claims by former clients of both of them was that Berkeley refused to continue to pay to Bushby his pro rata of completed business, alleging breaches of Bushby in respect of the dissolution agreement and the necessity of protecting himself against possible claims of former clients. Thereupon, and some time prior to April, 1909, Bushby brought an action for an accounting against Berkeley, in which an interlocutory judgment was had, and pursuant

thereto Berkeley filed an account, which is in evidence. This interlocutory judgment was reversed on appeal, and thereafter, and subsequent to the filing of this petition in bankruptcy, it was tried again, and interlocutory judgment again directed for Bushby; and thereupon another account was filed by Berkeley (in September, 1910), which is also in evidence. In these accounts Berkeley admits receiving from divers litigations sundry sums of moneys out of which he declares that Bushby would be entitled to a considerable part, had he performed his agreements. In each of these accounts Berkeley stated, not as a debt due by him, but as an offset against amounts claimed by Bushby:

"Sums collected by the firm of Bushby & Berkeley as costs in litigated cases and not paid to clients (the said firm being under the impression that they had the right to retain said costs), about \$50,000, of which the share of J. C. Bushby is about \$30,000."

This declaration evidently covers not only outstanding claims in process of collection through Berkeley, but the entire business of the firm, so far as it might be affected by the decision in *Re Larney*.

In the spring of 1910 Bushby seems rather to have had the best of it in litigation growing out of this disgraceful professional squabble. The accounting suit had been tried for the second time before Judge Brady on March 17 and 18 and April 4, 1910; and it is inferred from this record that the intimations were quite strong that plaintiff would again get an interlocutory judgment. Bushby then seems to have noticed with alarm that in December, 1909, and January, 1910, certain deeds had been recorded in this county, which transferred title to apparently valuable pieces of real property from L. M. Berkeley to Robert C. Berkeley, and thereupon this petition in bankruptcy was filed, alleging that Berkeley had less than 12 creditors; that he was indebted to Bushby in a sum exceeding \$8,000 (provable debts); and that Berkeley had conveyed, with intent to hinder, delay, and defraud his creditors, within four months of petition, and while insolvent, the real property above referred to. (The fraudulent assignment of a certain fund is also alleged, but no further attention will be paid to this allegation.)

Of this petition it is first to be noted that, if Bushby believed that he and Berkeley owed very numerous clients of their firm large sums for costs, he must have known that he was swearing to an untruth in alleging that Berkeley had less than 12 creditors.

On the other hand, the evidence warrants the inference that if he believed that Berkeley had no more than 12 creditors, then, on the evidence, Berkeley had no other creditor except Bushby himself. To this petition Berkeley filed an answer, in which he denied any indebtedness to Bushby, denied insolvency, and left undenied and unalluded to an allegation of the petition to the effect that certain moneys in which both Bushby and Berkeley were interested had been deposited with the chamberlain of this city, in order to protect the interests of both.

The effect of the pleading, therefore, is that Bushby alleges and Berkeley admits an asset in the alleged bankrupt, at the date of petition filed, of approximately \$1,000.

On these issues the parties went to trial. It must be obvious that this case could have been tried in one of two ways: Either (1) Bushby could have been content with proving his asserted claim of approximately \$8,000 and the apparently fraudulent nature of the transfers to R. C. Berkeley, and then left L. M. Berkeley to prove solvency, if he could; or (2) He could have shown, not only his own claim, but those of the clients of the firm, and then proceeded as before.

With respect to the second method of trial, no effort has been made to demonstrate the existence, amount, or provability of the alleged clients' claims, except to put in evidence the accounts furnished by Berkeley in the accounting proceeding above alluded to and quoted from.

No client (except Bailey, whose effort is a failure) has come forward to show his own claim, while it is made to appear that in November, 1909, an effort was made to put the claims of clients into the hands of a committee, which committee had employed Forster, Hotaling, and Klenke as attorneys

to collect the same from Bushby and Berkeley. It also appears that these attorneys took summary proceedings against Bushby and Berkeley on behalf of certain alleged clients named Nicholas, Bach, and Bullenkamp. These motions came on before Judge Blanchard, and were denied, and no further proceedings have ever been had. This was in the spring of 1910.

It is on such testimony that Bushby, asks that Berkeley be held bankrupt, unless he can show that, exclusive of transferred or concealed property, he was worth at the time of filing petition more than \$50,000, plus the \$8,000 advanced by Bushby as his personal claim.

On this point, which is a vital point in the matter, the report of the master is silent. I am not informed as to the grounds of Judge Blanchard's decision; and it is but an inference from this record that the judgment of the Appellate Division in *Re Larney* must have proceeded upon the terms of the retainer. When no other client, except Larney, has come forward with a demand for costs, except those who were defeated a year and a half ago, and have acquiesced in defeat, it is certainly a far cry to hold that Berkeley (and, of course, Bushby also) is indebted in \$50,000 to people not one of whom can be found in this proceeding to advance and prove the debt.

Bushby denies that he owes anything to clients, either individually or as a partner, yet on his own showing, if Berkeley owes the money, he (Bushby) must also owe it. Such a position on his part does not induce belief in the actual existence of debts to this amount.

As for the admission contained in the account filed by Berkeley, the whole account must be taken as rendered; one part is just as good as another, and no better, for purposes of evidence against Berkeley.

On the whole document it is plain that he was endeavoring, not to declare his relation to ex-clients, but his relations to an ex-partner, and that was all he was obliged to do. What it means is this: That when he settled with Bushby he insisted upon settling also their relations to their clients. Whether he had a right to insist upon this in that particular suit is not a matter that concerns this court, but it does govern the interpretation of the document. It is therefore held that there is no sufficient proof in this case that Berkeley is indebted to anybody, unless it be to Bushby.

Into the pecuniary relations between Bushby and Berkeley I do not find it necessary to go at length. Most of the record is made up of the recriminations of these two members of the bar, oftentimes acting as their own counsel and testifying as witnesses at the same moment. If any evidence were needed of the impropriety of such procedure, this record furnishes it in abundance.

I shall assume, but not find, that Berkeley was, on April 21, 1910, indebted to Bushby in the sum of not more than \$8,000.

It may be noted here, however, that no ground is seen for asserting as a debt provable on April 21, 1910, Bushby's costs in the accounting proceeding. They have never been taxed; they have never even been awarded; non constat that they ever will exist. Certainly there was no form of proceeding in which Bushby could have asserted his right to these costs against Berkeley at the time he filed his petition in bankruptcy.

Bushby must show, first, that the acts of bankruptcy alleged in the petition were committed. Admittedly the transfers were made, admittedly the transferee was the alleged bankrupt's father, and the conduct of Berkeley when he was examined as to these conveyances was plainly such as to encourage belief in his intention to put the real estate in question beyond the reach of creditors, present or future. Upon the whole case I am of opinion that the transfer from son to father was a conveyance in fraud of creditors, and am of opinion that such conveyance was made in order to prevent, if possible, what Berkeley believed to be at the time Bushby's intention, namely, to saddle him with all the claims from ex-clients that he (Bushby) could induce or procure to advance and press their claims. Whether this suspicion of Bushby was correct is not to the point, and no finding is made thereon; but I am convinced that this was Berkeley's motive, and it was in contravention of the statute.

From this it results that it was incumbent on Berkeley to show that, within the meaning of the bankruptcy statute he was solvent on April 21, 1910,

and on this point the finding of the master is against him. Some testimony has been taken since report filed, but even without that evidence I am of opinion, as matter of law, that Berkeley was worth more than \$8,000 on April 21, 1910. He had at that time a note of Mr. George Gordon Battle's for \$2,000 and a mortgage on property in Virginia for \$3,000. Both of these securities were worth par, and the amounts thereof were subsequently collected.

It is true that when they were collected the proceeds thereof were put into the account of "Estate of S. M. Waugh, L. M. Berkeley, Administrator"; and it is admitted that this was done in order to prevent creditors from getting at said proceeds. This may be very wrong, but it is entirely beside the point. The fact that the proceeds were concealed some months after petition filed is no proof that the securities themselves were not in the possession of and assets of Berkeley on April 21, 1910.

At or before petition filed Berkeley was also the owner of a \$6,000 mortgage on property shown to be worth more than that amount and situated on Longwood avenue, in this city. This mortgage had been in existence for some years, and had vested in Berkeley by the conveyance to him of Bushby's interest, which had been joint with Berkeley's. While Berkeley owned this mortgage, he received conveyance of the fee from one Baldwin, who held the same. The conveyance of Baldwin to Berkeley is subject to this \$6,000 mortgage, and two days later Berkeley conveyed the fee to his father, subject to the same mortgage. In this transaction, put through nearly two years before petition filed, the master finds such lack of "absolute good faith" that "the ruse should not succeed." The force of this reasoning is not perceived; a deed carries no more than it purports to, and merger of title is a question of intent. So far as intent is concerned, if, in June, 1908, Berkeley was intending to conceal his property in the name of his nonresident father, it would certainly have been more appropriate to use words which confirmed instead of prevented merger, and not to leave on the record the title to a \$6,000 mortgage outstanding in himself.

Documents, however, are produced showing that Berkeley, before taking Baldwin's deed, assigned the mortgage to a friend, and after conveying the fee to his father took a reassignment of the mortgage. Such a proceeding as this is entirely consistent with the language of the deeds by Baldwin to Berkeley and Berkeley to his father. The assignment and reassignment, however, are attacked as having been concocted long after the actual conveyance, and to be in effect forgeries. On this vital point the master expresses no opinion. He apparently assumes that the attacked documents are valid, but sweeps them away with the proposition that the whole apparatus of papers "wrought no actual change of title." If they wrought no actual change of title, then the title remained in the alleged bankrupt. Decision here, however, is rested, first, on the proposition of law that there was no merger of mortgage in fee, and, second, on the finding of fact that the evidence regarding the falsity or forgery of assignment and reassignment of mortgage is not convincing.

It results that on April 21, 1910, Berkeley was worth, exclusive of property conveyed in fraud of creditors:

| | |
|---|----------|
| The Battle note..... | \$2,000 |
| The Minor Virginia mortgage..... | 3,000 |
| The Longwood avenue mortgage..... | 6,000 |
| Moneys deposited with the chamberlain of New York, alleged to be his in the petition..... | 1,000 |
| Total | \$12,000 |

Therefore he was solvent without any reference to fraudulently transferred property, so far as all the provable debts shown in this proceeding are concerned.

[2] There is one other matter in this record which demands attention. The first page of a volume of testimony amounting to 714 pages contains a stipulation that "the fees of the special master herein be increased from the rate allowed by law to the rate of \$10 per hour or fraction thereof devoted by him

on any day to the taking of testimony and preparing his report herein." It does not appear whether the special master availed himself, or sought to avail himself, of this stipulation. It is therefore only noted that such a stipulation as this is in violation of the rules of this court and those of equity practice. A master is entitled to \$5 a day for his services, or to such extra or additional compensation as the court may award. It is probably not within the power of the court to prevent the voluntary payment of additional compensation. It is within the province of the court to mark the receipt of such additional compensation, without the sanction of the court, as something wrong. These statements are made after consultation with the other Judges of this court. The almost inevitable result of an agreement such as this is shown in the diffuse and ill-regulated proceedings contained in the volume of evidence submitted.

It would ordinarily be a matter of course to dismiss this petition, with costs. In this case, however, costs and expenses have been piled up by both parties equally. Especially have many of defendant's refusals to answer been calculated to excite suspicion and protract the proceedings. As it is, the petition will be dismissed, without costs, and the order of dismissal will contain a proviso that the \$5,000 produced in court by Berkeley on argument, and now deposited with the clerk of this court, be returned to him.

H. B. Singer, of New York City (Max D. Steuer, of New York City, of counsel), for appellant.

L. M. Berkeley, of New York City, pro se.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The District Judge has discussed at considerable length the various questions presented in this long record. We fully concur in his reasoning and conclusions.

The decree is affirmed.

REBER v. CONWAY.

(Circuit Court of Appeals, Third Circuit. February 18, 1913.)

No. 1,640.

LANDLORD AND TENANT (§ 157*)—FIXTURES—CONSTRUCTION OF LEASE—"DETACHED."

Where property which had been previously used as a large and modern livery stable was leased to be used as an ice cream factory requiring many structural changes in the building, so that, on the termination of the lease, the property would not be suitable for use again as a livery stable, a provision in the lease that all improvements or additions made by the lessee should not be detached from the property, but should remain for the benefit of the lessor, covered all machinery and other trade fixtures attached to the property by the lessee, and was not limited to mere structural changes in the building; the word "detached" being used as the antithesis of "attached" to cover property attached to the building, etc.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572, 574-607; Dec. Dig. § 157.*

For other definitions, see Words and Phrases, vol. 3, p. 2034.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of bankruptcy proceedings of Bahls Ice Cream & Baking Company. From an order sustaining a referee's determination, awarding certain fixtures to the landlord under the lease (195 Fed. 986), J. Howard Reber, trustee, appeals. Affirmed.

J. B. Colahan, of Philadelphia, Pa., for appellant.

H. Edgar Barnes, of Philadelphia, Pa., for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

GRAY, Circuit Judge. This is an appeal from an order of the court below, sitting in bankruptcy, affirming the report of the referee in bankruptcy and decreeing that the property which is the subject of this dispute did not belong to the appellant, J. Howard Reber, Receiver and Trustee in Bankruptcy, but to Thomas Conway, Jr., the owner of the premises on which said property is installed.

By an agreement dated January, 1910, Albert H. Manwaring let the premises, on which was situated a large brick structure, to a partnership trading as Bahls & Co. At the time the lease was made, the building was fitted up and adapted to use as a large and modern stable. The lease provided that the premises should be used as an "ice cream manufactory." Bahls & Co. went into possession and entirely converted the building from its previous condition into a structure specially adapted to the single purpose of an ice cream manufactory. The changes involved the construction of a raised concrete floor, three or four feet above the street level, extending the length of the building, and the installing of a system of connecting exposed and unexposed piping, the building of an elevator shaft and the installing of a complete equipment for ice cream manufacture, with freezers, mixer, motors and pumps, an ice crusher, &c. These machines were afterwards replaced by larger and heavier machines, which required for their accommodation extensive changes in the building and large brick supporting piers under the floors.

Subsequently, October 24, 1910, a corporation called the "Bahls Ice Cream & Baking Company" was created under the laws of Pennsylvania, which bought out the partnership of Bahls & Co., including the leasehold of the premises, and attorned as tenant, paid the rent reserved in the lease and remained in possession of the premises under the lease, until the receiver for the company, pursuant to the proceedings in bankruptcy, was appointed on January 10, 1912.

After the adjudication of the company as a bankrupt, March 1, 1912, Reber, the said appellant, became in due course trustee of the estate of the said Bahls Ice Cream & Baking Company.

On October 31, 1911, the owner, Manwaring, gave 90 days' notice to the lessee of his intention to terminate the lease February 1, 1912, the date of the expiration of the term, because the rent had fallen in arrears.

The premises were conveyed to the appellee herein, Thomas Conway, Jr., by deed of the lessor, on January 12, 1912, and the claim for arrears of rent was made on the same day by the said company.

On January 19, 1912, notice was given to the lessee of the forfei-

ture of the lease for the nonpayment of rent, and a copy of the notice was sent to the receiver, with a request that possession of the premises, their improvements and additions, be surrendered. The receiver refused to surrender the premises and laid claim to the improvements made thereon, being the property now in dispute.

February 16, 1912, on petition of the receiver, the court made an order for a special reference, to determine the ownership of the property mentioned. On March 1, 1912, the corporation was adjudged a bankrupt, and Reber, the receiver and appellant, was appointed trustee in bankruptcy. The report of the special referee was filed on March 7, 1912, which found that the ownership of the property in dispute was in the lessor and owner of the premises. This report was affirmed by the court on April 19, 1912, and a decree entered on May 15, 1912, dismissing the exceptions thereto, from which decree this appeal has been taken.

The lease contains the following provision:

"And it is hereby covenanted between the lessor and the lessee for themselves, their respective heirs or successors and assigns, as follows:

"(3) The lessee shall keep the demised premises in good condition during the continuation of this lease, remove all ashes, rubbish and refuse matter therefrom, and with the termination of this lease to deliver up the said premises to the lessor in as good condition and repair as the same now are, reasonable wear and tear and damage by accidental fire excepted. All improvements or additions made by the lessee shall not be detached from the property, but shall remain for the benefit of the lessor."

The report of the learned referee contains a clear and adequate discussion of the law and facts involved in the question presented, and the opinion of the court below dismissing the exceptions thereto and affirming the report of the referee is no less clear and emphatic in its approval of the reasoning upon which the conclusion of the referee is founded.

We do not question that, under the generally accepted law in this regard, as well as under the decisions of the Pennsylvania courts, all of the items embraced in this dispute are trade fixtures and, in the absence of any contract to the contrary, are removable from the premises, by the lessee. But, as said by the Supreme Court of Pennsylvania in *Isman v. Hanscom*, 217 Pa. 135, 66 Atl. 329:

"The question of trade or tenant fixtures does not enter into the case, and hence need not be considered. The lease, which is the contract between the parties, determines the ownership of the property in question, and hence the rights of the parties thereto depend entirely upon the proper interpretation of the instrument. * * * In such case, the contract is the law made by the parties themselves, and that must determine their rights."

What, then, does the lease mean, and how is the law of the contract thus made by the parties themselves to be interpreted?

It is to be noted that the building at the time of the lease was a stable, and was to be fitted by the lessee for an ice cream manufactory. To accomplish this, the whole character of the building had to be changed, and the lease contemplated that it should be so changed. At the termination of the lease, it could not be used as a stable, and it was therefore evidently contemplated that it should return to the

owner's hands as an ice cream manufactory. In view of such a situation, the clause of the lease in question was framed, that "all improvements or additions made by the lessee shall not be detached from the property, but shall remain for the benefit of the lessor." Though awkward and somewhat obscure, grammatically, the meaning of this clause is sufficiently plain, and the evident intention of the parties can be gathered therefrom.

The referee states the situation as follows:

"In fact all the items claimed by the trustee, which are 1 twin mixer, 4 freezers, 1 washer and sterilizer, all motors, shafting and belting, brine pump, german silver connections between mixer and freezers, are attached by bolts and nuts, as described, but though they can be removed without injury to the freehold as it stands, yet the building having been converted from a stable to a building especially adapted for the purpose of manufacturing ice cream, after the removal of the property claimed by the trustee, it would be unfit for either a stable or a residence, and would be manifestly in an unrentable condition."

Clearly the language of this clause could only be applied to property that was thus attached to it, and was therefore of a character to be "detached." No such language was necessary to prevent the tenant from taking out floors, beams, and structures which had been incorporated and made part of the building. One does not speak of such things as being either attached or detached. The word "detached" is the antithesis of "attached." The property forbidden to be detached by the lessee was necessarily property that had been attached. In this respect, the law of the contract differed from the common law as to trade fixtures. In order that the contention on behalf of the trustee be sustained, it would only have been necessary to have left this clause out entirely and the common law would have protected in favor of the owner all the permanent additions and improvements that went into the structure of the building itself and permitted the only articles to which the clause could apply to be removable by the lessee as trade fixtures.

We agree with the court below that the ratio decidendi of *Isman v. Hanscom*, supra, must be recognized as controlling in the present case, although, as this court says in the *Montello Brick Co. Case*, 167 Fed. 482, 484, 93 C. C. A. 118, 120:

"No general principles of law are involved. The case turns on the meaning of this particular lease."

The case of *Lindsay Bros. v. Curtis Pub. Co.*, 236 Pa. 229, 84 Atl. 783, decided by the Supreme Court of Pennsylvania and not yet officially published, has been carefully examined and we find nothing therein to modify the opinion that we have already expressed. This case, too, stands upon its own peculiar facts and may be easily distinguished from the case of *Isman v. Hanscom*, as also from the present case. It therefore cannot be considered as a decision overruling or modifying the law as declared in the *Isman Case*.

The judgment of the court below is therefore affirmed.

MARKS et al. v. MERRILL PAPER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,899.

1. CORPORATIONS (§ 189*)—SALE OF PROPERTY—RIGHTS OF MINORITY STOCKHOLDERS—RESCISSION—DELAY.

Where minority stockholders delayed for nearly a year in instituting suit to set aside a sale of the corporation's assets to another company, and in the meantime rights of innocent bondholders and other creditors had intervened, such minority stockholders were barred by laches from having the transfer rescinded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

2. CORPORATIONS (§ 182*)—SALE OF ASSETS—MINORITY STOCKHOLDERS—FRAUD.

Where a corporation in desperate financial straits and without power of recuperation sold its property to another company without fraud as against the rights of the minority, the majority having volunteered to make provision for those who were financially unable to meet the requirements to enable them to participate in the transfer and consolidation, the transfer was not invalid as to the minority as inequitable and prejudicial to their property rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler v. Abilene Nat. Bldg. Co.*, 89 C. C. A. 482.]

3. CORPORATIONS (§ 318*)—TRANSFER OF ASSETS—IDENTITY OF GOVERNING OFFICERS.

Where the officers of an insolvent corporation without power of recuperation, with the consent of the majority stockholders, transferred all its property to another corporation having the same governing officers, such identity of officers did not invalidate the transfer, provided it was made in good faith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. § 318.*]

4. WITNESSES (§ 29*)—FEES—FEDERAL COURTS.

Where a witness from without the state voluntarily presented himself and testified without subpoena, he was only entitled to mileage to the extent of the running of the writ of subpoena, to wit, 100 miles.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 67-69; Dec. Dig. § 29.*]

Appeal from the District Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

Bill in equity by Fred J. Marks and others against the Merrill Paper Company and others. From a decree (*Marks v. Merrill Paper Mfg. Co.*, 188 Fed. 850) for defendants, plaintiffs appeal. Modified and affirmed.

Appellants, herein termed "complainants," minority stockholders in the Merrill Paper Manufacturing Company, herein termed the "Merrill Company," filed the present bill on December 6, 1907, against the two corporation defendants, the Merrill Company and the Grandfather Falls Company, and certain individual defendants, majority stockholders of the Merrill Company, and also stockholders of the Grandfather Falls Company, to have the transfer of the property of the Merrill Company to the Grandfather Falls

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Company of January 15, 1907, declared to be fraudulent and void and set aside, and that said Merrill Company be reinvested with title thereto, that an injunction restraining the Grandfather Falls Company from disposing of said property be granted, and that pending a hearing a receiver be appointed to conserve the property.

From the evidence it appears that the plant was operated by water power; that through some miscalculation this was found to be grossly inadequate (so much so that the plant could not produce a quarter of the pulp required); that it became necessary to purchase the greater part of the needed pulp; and that continued operation of the plant would incur heavy loss. At that time the court found that its investment amounted to \$444,000. Complainants' counsel assert that there was not to exceed \$293,000 invested. This seems to accord with the November, 1905, trial balance, from which, however, certain items were omitted. To provide adequate water power, the Merrill Company purchased the power site at Grandfather Falls for \$62,500, and paid down \$2,500 in February, 1906. Attempts were then made to raise means to pay the balance, which was drawing 6 per cent. interest. The stockholders were appealed to in vain, and this scheme was abandoned. Thereafter, certain of the largest stockholders of the Merrill Company organized the corporation defendant, the Grandfather Falls Company. This was on June 1, 1906, and its object, among others, was the developing of that water power. This company then proposed to the Merrill Company to buy its rights and interest in the Grandfather Falls site, and on June 14, 1906, this offer was accepted by the Merrill Company's stockholders on the following terms, viz., the payment of the \$2,500 advanced and the assumption of the debts on said Grandfather Falls site. It was further agreed that the Merrill Company should have water power from said power site at \$25 per horse power up to 2,000 or more horse power for three years, whenever the dam was completed,—which would require at least a year's time. In the meantime, the affairs of the Merrill Company were in a very critical condition. It owed \$68,393 of pressing claims, and \$33,000 of its bonds were past due. Other bonds aggregating, approximately, \$50,000 were up as collateral to loans.

The court found the value of the Merrill Company's property to be \$25,000 less than its indebtedness. Its credit was entirely exhausted. In this situation the Grandfather Falls Company made a proposition to purchase all of the Merrill Company's property for the amount of its indebtedness. The officers of both companies were the same, and all the stockholders of the Grandfather Company were stockholders in the Merrill Company. The proposition of the Grandfather Falls Company was accepted without opposition at a duly called meeting of the Merrill Company stockholders on December 15, 1906, at which 1,510 out of 2,000 shares of stock were represented. The deed was delivered January 15, 1907, for an expressed consideration of \$186,000. The proposition of the stockholders of the Merrill Company with reference to said sale was set out in the following instrument, viz.:

"We, the undersigned, do each for himself, alone, separately and severally subscribe for and agree to purchase and pay for in cash, at par value, the number of shares of the capital stock of the Merrill Paper Manufacturing Company set opposite our respective names here following. On condition, however, that the owners of not less than 95 per cent. of the present outstanding capital stock of said company each in like manner subscribe for additional stock of said company equal in each instance to not less than 75 per cent. of his present holdings. And in case said condition shall not be complied with within 15 days, then we agree to incorporate and organize a corporation under the laws of Wisconsin, to be known as the Grandfather Falls Company, for the purpose of purchasing the lands and water power facilities at Grandfather Falls heretofore owned in common by Messrs. Anson, S. Heinemann, B. Heinemann, Harmon, O'Day and Daly Estate, and providing boomage facilities, improving navigation, developing water power thereon, and purchasing and holding the stock of the undersigned in Merrill Paper Manufacturing Company and other stock in manufacturing corpora-

tions likely to need or use said power, and for such other purposes as may be agreed upon. And upon such incorporation being effected this subscription shall as to each subscriber stand as a subscription and agreement to purchase at par value the same amounts, respectively, of the capital stock of said Grandfather Falls Company, and we each severally agree to pay our respective subscriptions on demand of the proper board of directors."

Later, the Grandfather Falls Company issued a stock dividend of 133⅓ per cent. of the holdings of its stockholders based upon the shares in the Merrill Company held by its company. This, the court held, was a matter of form, and not of substance, to enable the stockholders to make a better showing for loaning purposes and otherwise. Complainants did not participate in the foregoing enumerated proceedings, though advised that such propositions were to be acted on. After the suit had been instituted, and at the beginning of the taking of the evidence, defendants offered to let complainants and all minority stockholders in on the deal upon the same terms as those accorded to the majority, plus interest accruing since the time when the majority stockholders had paid in their money. In the meantime, the Grandfather Falls Company had issued and sold its bonds to persons having no knowledge of the complainants' demand. As above stated, this suit was not instituted until about a year after the Merrill Company had sold out.

The complainants attack the bona fides of the sale, charging that the method of doing business by the Merrill Company was not interrupted; that the sole purpose was to deprive the minority stockholders of their rights in case they declined to make further investments in the premises.

The court on the hearing found that the sale was fair, that no advantage was thereby gained by the majority stockholders over the minority stockholders, and that the bill was without equity. Thereupon the court dismissed the bill for want of equity at complainants' costs taxed at \$386.35. Included in the items taxed as costs is the allowance of \$176.10 in favor of the witness Brazeau, who was brought by defendants from Seattle, and who appeared without subpoena. The mileage was fixed at 5 cents per mile on 3,522 miles, covering the travel of coming and going. From which decree this appeal was prosecuted. For errors, complainants assign the following, viz.:

That the court erred in holding that the majority stockholders and officers of the Merrill Company, being also officers and stockholders of the Grandfather Falls Company, might lawfully transfer the property of the former company in the manner proposed to the latter, to the exclusion of the minority stockholders of the former, if done at a fair sale and without fraud, or undue advantage; that the court erred in holding that the sale in the present case was fair to complainants; and that there was error in the taxation of costs by the court. Further facts are set out in the opinion.

Almon W. Bulkley and C. E. More, both of Chicago, Ill., for appellants.

Edward M. Smart, of Milwaukee, Wis., and R. N. Van Doren, of Merrill, Wis. (B. R. Goggins, of Grand Rapids, Wis., of counsel), for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The findings of fact made by the trial judge are, in substance, supported by the evidence. The record conclusively establishes the fact that, at the date of the sale by the Merrill Company of its entire plant to the Grandfather Falls Company, the former was in desperate financial straits, without power of recuperation. Through what at this time seems to have been deplorable lack of foresight, its substance had been expended in securing a vast factory equipped with every facility for

doing business, except the means for putting it in motion. In so doing, and in its various attempts to remedy this fearful neglect, its ability to provide a remedy was, for all practical purposes, exhausted. Ordinarily, the promoters of such an undertaking, finding themselves hopelessly involved, would have abandoned the enterprise. From the record, it appears that among the stockholders were a number of men who were unwilling to carry the stigma of failure and were therefore disposed to make further sacrifice, and thereby supply the missing means of propulsion and other needed features. Strenuous effort was made to enlist the co-operation of all the Merrill Company's stockholders. The action taken was effected without any apparent opposition.

[1] Delay, such as is shown in the present action of complainants, instituted as it was about one year after the sale, and at a time when the success of the enterprise seemed likely, and when rights of innocent bondholders and other creditors had intervened, has been held to bar the minority stockholder from his remedy through rescission. *Johnson v. Railway Co.*, 227 Mo. 423, 127 S. W. 63; *City Bank v. Merchants' Bank*, 105 S. W. (Tex. Civ. App.) 338; *Thompson on Corporations* (2d Ed.) §§ 4511, 4512; *Mechem on Modern Law of Corporations*, § 1582; *McCann v. Welch*, 106 Wis. 149, 81 N. W. 996; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; *Sullivan v. Ry. Co.*, 94 U. S. 806, 811, 24 L. Ed. 324.

"Laches is not like limitations, but is a question of the inequity of permitting a claim to be enforced, and it depends on whether, under all the circumstances, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." *Venner v. Ry. Co.*, 236 Ill. 349, 86 N. E. 266; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383.

[2] If, however, there was fraud in effecting the sale, or if the majority took such means for doing an inequity to the minority stockholders, and thereby gained an advantage over them, other remedies may be decreed. *Leavenworth County v. R. I. & P. R. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631 (the later case citing many other cases). Indeed, this rule is too well established to need citation of authority. But under the facts of this case no such condition existed. There was no property right of complainants to be destroyed, unless a pro rata interest in a deficit can be called such. It is of no consequence in such a case as was there presented that the plant had cost more than the actual indebtedness—if that were true. The bald proposition was that, with money and credit exhausted, there was no hope of saving it without the advance of further and very considerable funds. Had the minority stockholders joined in the plan to save the investment, there would have been no need of a sale. The majority volunteered to make provision for those who were financially unable to meet the requirements of the new scheme. It would have been unconscionable to compel the majority to advance funds for the benefit of the minority, who were able to pay their proportion and would not. The latter seem to have rested supinely upon what they conceived the

majority would have been compelled to do for them in order to protect their own interests. Their attitude was justified neither by the law nor good business sense. From all that appears, the price paid was fair. No other likely scheme was presented. It seemed to be literally that or nothing. Under the circumstances, we are of the opinion that no advantage was taken of complainants or of any other stockholder, or attempted. If that be so, it makes no difference that the sale was to another corporation, composed of practically the same directors and stockholders. The only question involved is that of fairness and good faith. The Wisconsin statute under which the Merrill Company was organized has been construed by the Wisconsin Court in *Werle v. N. F. & S. Co.*, 125 Wis. 534, 104 N. W. 743, to place no other limitation on the power of a corporation to sell its property to pay its debts under like circumstances to those here presented. There, the sale was made to a stockholder, and the property was conveyed by him to another corporation organized by him and other stockholders for the purpose. The objecting stockholder raised the point that it was in effect a sale by stockholders to themselves. To this contention the court said:

"But, as indicated, it was in good faith and with the knowledge of all the stockholders, each of whom was at liberty to bid on the sale and become a purchaser if he saw fit to do so. The company could only sell to some one willing to purchase. * * * No creditor is here complaining, but only a stockholder who had the same right and opportunity to purchase as any other stockholder. The result of the transaction was to pay and satisfy all the debts of the corporation. It was in effect for the benefit of the creditors of the corporation."

In *Leavenworth County v. Ry. Co.*, supra, the court says of a similar state of facts:

"Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their own corporate capacity, and they could sue and be sued by each other in regard to these contracts, and the question is not, could they do these things, but, have the relations of the parties, the trust relation, if indeed such exist, been abused to the injury of the Southwestern Company?"

[3] The authorities are numerous and controlling to the effect that the mere fact that the sale of property of one corporation to a new corporation, the majority of whose governing officers are the same, will not per se vitiate the sale. The question is always one of good faith and fairness, except in cases where public policy intervenes. The facts in the present case bring it within the language of the court in *Harts v. Brown*, 77 Ill. 226:

"The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence, but this they refused to do; and as it could not be preserved, and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale.

"They were under no moral or legal obligation to advance their own means, pay the debts, and preserve the property for the use of the other shareholders, who had declined to join in making pro rata advances to relieve it from debt. Appellants seem to have acted fairly, as they purchased at a sum sufficient to pay all the debts of the company. They chose to do so rather

than make an effort to obtain all of the property for the debts secured by the trust deed and the certificate of purchase. On the contrary, they gave many thousand dollars more, that honest creditors might be fairly paid, and the company wrong no one. This does not have the appearance of fraud. Appellants had faith that the enterprise could be carried out with success, and that they could thus save the means they had advanced; but appellees, by the course they adopted, manifested an entire want of confidence in its ultimate success. They were even offered the opportunity to come in, for a considerable period afterwards, and share in the new enterprise, by advancing a ratable portion of the means, but they all declined; but, when success was achieved, they then saw the advantages they had lost and then sought to set aside the sale and have the property restored to the old company, and thus reap the benefits arising from the enterprise and means advanced by others. To do so, they should show fraud or a want of power to make the sale or the purchase by appellants, neither of which has been done."

[4] So far, we find no error in the decree of the trial court. With reference, however, to the taxing of costs, we deem the rule laid down by Judge Jenkins in *Eastman et al. v. Sherry* (C. C.) 37 Fed. 844, to be the correct one. In that case the witness also presented himself without a subpoena. The court held he was in attendance "pursuant to law"; that he was entitled to mileage only to the extent of the running of the writ of subpoena, viz., 100 miles, and disallowed mileage for the distance traveled by the witness in attending in excess of 100 miles. So here, we are of the opinion that the amount of mileage taxed in excess of \$10 was improperly taxed. We see no error in allowing witness fees to the two nominal defendants. They were compelled to attend by the command of the several subpoena, when their own interests did not make it necessary; and have the right to be indemnified to the extent of the regular witness fees. No error was assigned to the allowance of items for postage, telephoning, telegraphing, and express charges aggregating \$8.65. We are unable to say on the record that the trial judge abused the discretion vested in him in such case. Further assignments of error to the taxing of costs, we do not deem well taken. The amount of mileage taxed and allowed to Brazeau in excess of 5 cents per mile for 100 miles and return, to wit, \$166.10, may be deducted from the allowance of costs, on the authority of *Pine River Logging Company v. U. S.*, 186 U. S. 279-297, 22 Sup. Ct. 920, 46 L. Ed. 1164.

Otherwise the decree of the trial court is affirmed.

THE SEVEN BROTHERS NO. 1.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 144, October Term, 1912.

SHIPPING (§ 143*)—DISCHARGE OF VESSEL—INJURY TO CARGO—FAILURE TO FURNISH COVERS—PERSONS LIABLE.

Where the agent of a steamship company, in order to facilitate discharge, employed a lighter without covers, and agreed on behalf of himself and the steamship company to furnish covers, which he failed to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

do, resulting in injury to the cargo from rain, the lighter was not liable in rem, but the agent was primarily, and the steamship company secondarily, liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 489; Dec. Dig. § 143.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Libel in admiralty by Willett & Co. against the Texas City Steamship Company and lighter Seven Brothers No. 1, her tackle, etc., the Chiarello Bros. Company, and Sidney A. Metcalfe, impleaded. Judgment for libelant, and the Chiarello Bros. Company appeals. Modified.

M. A. Ryan, of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and C. I. Clark, both of New York City, of counsel), for appellee Texas City Steamship Company.

Curtis, Mallet-Prevost & Colt, of New York City (A. H. Strickland, of New York City, of counsel), for appellee Metcalfe.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellees Willett & Co.

Before LACOMBE, COXE and WARD, Circuit Judges.

WARD, Circuit Judge. Willett & Co. filed a libel against the Texas City Steamship Company to recover \$5,000 for damage by rain to a shipment of 950 bales of wool under a through bill of lading from Texas City to Boston. The wool was discharged from the respondent's steamer Ossabaw at Pier 15, into the lighter Seven Brothers No. 1, to be transported to Pier 19 North River, and there delivered to a steamer of the New England Navigation Company bound to Boston; it being the duty of the Steamship Company under the bill of lading to do this. The Steamship Company brought in the lighter as a party under the fifty-ninth rule in admiralty, charging it with liability in rem for failure to supply proper covers to protect the wool from the rain. Chiarello Bros., owners of the lighter, filed an answer and a petition to limit liability, alleging that the lighter had been hired by one Metcalfe, the agent of the Steamship Company, both knowing that she was a lumber lighter not intended to carry such cargo as wool and not provided with covers; that Metcalfe promised to supply the same; and that the damage was due to the negligence of himself and his principal, the Steamship Company, in failing to do so. They also filed a petition to bring in Metcalfe as a party under the fifty-ninth rule, alleging that he had hired the lighter with knowledge of the foregoing facts and had promised to supply her with covers, and that the damage to the wool was due to the negligence of himself and of the Texas City Steamship Company in failing to do so.

Chiarello Bros., besides owning lighters, were the regular stevedores of the Steamship Company, in charge of loading and discharging its steamers. Metcalfe was the agent of the Steamship Company in charge of obtaining lighters necessary for its use and of assigning to the lighters the places where they should lie and the cargo they should receive. He did this under the superintendence of McMahon the su-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

perintendent of the Steamship Company. He also owned lighters, and it was arranged between him and the Steamship Company that he should always employ first the lighters of the Bee Line, next his own, and then those of Chiarello Bros., or any outsider. He was paid no regular salary, but was allowed for his services an office on Pier 15 free of rent, a commission of 6 per cent. on the receipts of the Bee Line lighters, all the receipts of his own lighters and nothing for lighters of Chiarello Bros. or other outsiders.

On this occasion the Steamship Company, having engaged to put the steamer on dry dock the next morning, was very anxious to discharge her cargo. Metcalfe, with McMahon, the superintendent of the Steamship Company, applied to Chiarello Bros. for lighter No. 1. They replied that she was already engaged to the Clyde Line, and, besides, was not fit to carry wool, because she had no covers. McMahon said he would get the Clyde Line to let the lighter go. Metcalfe said he would supply covers from his own lighter Charlotte and Chiarello Bros., having got the lighter released by the Clyde Line, put her at the service of the Steamship Company, and as stevedores began to load August 31st at 10 a. m., and completed the loading of the wool by 1 a. m. September 1st. Rain had been threatening from 10 p. m. of August 31st, and Luciano Chiarello, in charge of the loading, applied several times to the master of the Charlotte for covers, who refused to lend them because he had received no order from Metcalfe. Thereupon he used such covers as he could get on the steamer and on the pier, which, however, were insufficient both in number and condition. Light rain began to fall at about 1:20 a. m. and continued for 12 hours, often very heavily, resulting in the damage complained of by the libelants.

The sole charge which the Steamship Company made against the lighter was that she was at fault for not protecting the cargo with proper covers, substantially a charge of unseaworthiness. No other charge was pleaded nor developed at the trial. The District Judge, however, held the lighter primarily liable in rem because her owners had relied upon Metcalfe's personal promise to furnish covers, for which promise the Steamship Company was not responsible. He drew this conclusion from the conversation between Chiarello, Metcalfe, and McMahon, as follows:

"McMahon said in substance, 'Now Metcalfe has promised you the covers, give him the boat. If you have trouble, I will call up the Clyde Line, and ask them to release you from your engagement.' This is rather the language of one who asks another to rely upon the promise of a third person than of one who adopts such a promise as his own. It is as though McMahon said, 'Now you have Metcalfe's assurance, that should satisfy you.' Had McMahon supposed the steamer was engaged to furnish the covers, he would more naturally have said, 'Now that we have promised you the covers, give us the boat.' He was Metcalfe's superior, and would hardly have referred to an engagement which he recognized to have been made on behalf of their common principal as though it were Metcalfe's."

We think this assumes too great nicety in an ordinary water-front conversation. What was said should be construed with reference to the relation of the parties to each other and the situation they were

contracting about. The Steamship Company was in urgent need of the lighter. Metcalfe, as agent of the Steamship Company, was trying to hire her, not for himself, but for the company. Chiarello was willing to let the company have it if covers were supplied. It seems to us quite obvious that when McMahon said, "Give the lighter to him," he meant to Metcalfe as the company's agent in charge of the lightering, and that, when he said that Metcalfe would furnish the covers, he meant that he would do so for the company, and that the company for that reason would be willing to employ the lighter, although it had no covers. It is in the highest degree improbable that Metcalfe, who was acting as agent of the company, and who was entirely without interest, intended to assume a personal liability to Chiarello, or that Chiarello, who was hiring the lighter to the company, was looking to the agent personally for the covers. The presumption is that Metcalfe was promising covers for the company within his authority as agent to hire lighters, and that the Steamship Company was willing to take the lighter relying on Metcalfe to supply them.

The District Judge next proceeded to hold that the damage was really caused by the negligence of Chiarello Bros. in continuing to load after the weather became threatening, and in not returning the bales already loaded to the covered pier. With this, however, the lighter, as lighter, had nothing to do. It was her duty simply to transport the wool as bailee, and not to load or discharge it. Negligence in loading, if any, was negligence of Chiarello Bros. as stevedores under their independent contract with the company, for which there would be no lien upon the lighter. When loading and discharging is part of a contract of carriage, there will be a lien on the vessel for negligence in performing it. If the lighter had belonged to a third party, no doubt would exist in anybody's mind upon this point. The master could not have controlled the loading in any way. The conclusion is, however, exactly the same in this case of the stevedores owning the lighter they were loading, when it is sought to establish a lien against the lighter in rem; she and not her owners having been brought in as parties. They have appeared as claimants only to protect their property, and for no other purpose.

Our conclusion is that the failure to provide covers was that of the Steamship Company and not of Chiarello Bros. as owners of the lighter. The lighter is therefore not liable in rem. The question whether they are personally liable as stevedores for failure to take reasonable care in loading depends upon many considerations not presented, as, for example, in respect to continuing to load, whether there was a fair indication of heavy rain; whether there was reason to expect it soon; whether the covers supplied might have been fairly expected to be sufficient for the rain reasonably to be anticipated, and in respect to returning the wool already loaded to the pier, how long it would take to do so; whether there was room for it; whether it or any of it would be wet in that operation and various other considerations which will readily suggest themselves. It is but fair that, if the intention were to hold Chiarello Bros. personally for negligence in loading, it should have been asserted in an action brought against

them in personam on that ground. But Metcalfe has been made a party, has appeared and answered the libel, admitting that the damage to the wool was caused by the lighter's lack of covers, but charging that insufficiency to her and her owners. The trial judge found as a fact that Metcalfe did promise to supply covers from his own lighter Charlotte and that he was at fault in not arranging with his master to lend them to Lighter No. 1. We are of the same opinion.

It follows that the libelants are entitled to recover in full of the Steamship Company and Metcalfe, and that between the Steamship Company and Metcalfe the latter is primarily liable. The decree must be modified by awarding to the libelants their damages with interest and costs against the Steamship Company and Metcalfe, to be collected in the first instance of Metcalfe and any deficiency of the Steamship Company, and by dismissing the petition making the lighter Seven Brothers No. 1 a party, with costs against the Steamship Company.

PRENTIS v. SEU LEUNG.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,901.

1. ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—SUMMARY PROCEEDINGS.

Under Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), to regulate the immigration of aliens into the United States, a Chinese alien who enters the United States unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—HABEAS CORPUS—FAIR HEARING.

Where a Chinese person, in deportation proceedings, had a fair, though summary, opportunity to establish his right to remain within the United States, the federal District Court had no jurisdiction to pass on his right to remain on a writ of habeas corpus.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—CHINESE PERSONS—DEPORTATION—HEARING.

The first examination of a Chinese alien, when apprehended in deportation proceedings, is a part of the hearing prescribed by Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), to regulate the immigration of aliens; and hence the statements of the alien at that time may be properly considered in determining the truthfulness of a subsequent conflicting statement as to the place of his birth, etc.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 93-95; Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Habeas corpus by Seu Leung against P. L. Prentis, immigrant inspector in charge at Chicago. From an order discharging petitioner from custody, the inspector appeals. Reversed, with directions.

On November 23, 1910, appellee, a Chinaman, was arrested by Immigrant Inspector Thompson as he alighted from a train at Sixty-Third street, Chicago, Ill., and taken to the immigration office in Chicago, where he was sworn and examined for the purpose of showing whether or not he was lawfully entitled to be and remain in the United States. Not being able to understand the English language, he was examined through an interpreter. The questions and answers of appellee on this hearing were reduced to writing and forwarded to the Secretary of Commerce and Labor, and are made part of the return of P. L. Prentis, immigration inspector of the United States in charge at Chicago, which return was not traversed by appellee. At this hearing appellee stated that he was born in China in the village of Sue Chong, District of Hoy Yuen; that his father was once here, but that his mother never was; that he was married in China in 1901, and first came to this country in 1902, when he was smuggled in; that he sailed from San Francisco for China in 1908; that he landed at Vancouver, Canada, where he paid a head tax of \$100, the receipt of which he had thrown away; that after one week he came to the United States two or three days before making the statement; that he lived in Toronto, Canada, just before he came to the United States; that he and one Sue Wah You, whom he had met in China, were rowed across the river by a white man, to whom each paid \$40; and that he took a train at night to Ann Arbor, Mich., where he met Chin Coon Poy and remained a few hours.

On this information a warrant was issued by the Acting Secretary of Commerce and Labor for the arrest of appellee, with directions to the said inspector to give him a hearing to enable him to show cause why he should not be deported. Appellee was arrested under said warrant, and taken before the inspector and granted a hearing. He was represented at this latter hearing by counsel, and produced several witnesses and his own interpreter. Sue Wah You, one of his witnesses, swore that he and appellee came together from Vancouver to Windsor, Canada, where they remained about two months; that they came across the river with a white man in a row-boat at night; that they were to pay one Hin Lun of Detroit \$50 for the rower and \$150 when they reached Chicago; that they were taken to Ann Arbor in a trolley car by one Lee Wah, who paid their fares; that they took the train from Ann Arbor to Chicago, and left the train at Sixty-Third Street.

Appellee testified that he was born in San Francisco, and otherwise disowned his first statement on vital points, claiming that he could not understand the interpreter on his first hearing, though he was the same one who was interpreter in the present case, and that he did not remember making the statements attributed to him on the first hearing. The other witnesses, Suey Sai Chon, Sui Quay, and Eugene Sin, gave corroborating testimony. The evidence on this second hearing, together with the report of the inspector, and the said statement under oath of appellee made November 23, 1910, was submitted to the Secretary of Commerce and Labor, whereupon the warrant of deportation complained of was issued under and by virtue of Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by the act approved March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 500). Thereupon appellee filed his petition herein for writ of habeas corpus. The return of the inspector Prentis thereto sets out all the evidence taken on the first and second hearings as aforesaid, and the submission thereof to the Secretary of Commerce and Labor, and contained the further statement that appellee had been brought to Chicago by one W. S. Lee, another Chinaman, who had theretofore pleaded guilty in the District Court for the Northern District of Illinois, Eastern Division, to the charge of importing appellee. None of the allegations of the return were traversed. On the hearing no claim was made that appellee had not been given a full and fair hearing. No evidence other than that set out in the petition and return was heard by the District Court. Such further proceedings were had in said cause that on March 22,

1912, appellee was ordered discharged from custody, from which judgment of the court the inspector prayed and obtained this appeal.

For errors, appellant assigns: (1) that the District Court should have limited its inquiry in the first instance to the question, "Was appellee given a fair hearing by the Secretary of Commerce and Labor, and did he have an opportunity to present evidence in his own behalf?" (2) that, without determining that matter, the District Court proceeded to weigh the evidence produced and dispose of the case upon the merits; and (3) did not give due weight to the finding and order of deportation of the Secretary of Commerce and Labor.

John F. Voight and James H. Wilkerson, both of Chicago, Ill., for appellant.

Benjamin C. Bachrach, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). [1] Under the act of February 20, 1907, to regulate the immigration of aliens into the United States, any Chinese alien who enters the United States unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. *United States v. Wong You et al.*, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, decided by the United States Supreme Court on January 22, 1912. In *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, the court says:

"But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In the same case it is said:

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired or a fair though summary hearing, the case can proceed no further."

Substantially to the same effect is *Tang Tun v. Edsell*, Chinese Inspector, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606, under Act Aug. 18, 1894, c. 301, 28 Stat. 390 (U. S. Comp. St. 1901, p. 1303), and Act Feb. 14, 1903, c. 552, 32 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 114).

[2] In *Prentis v. Di Giacomo*, 192 Fed. 467, 112 C. C. A. 605, we held that the finding of the executive department and its order therein "is not subject to judicial review or intervention through the writ of habeas corpus or otherwise, except for failure or denial of the administrative hearing intended by the act." To the same effect are *Prentis v. Cosmas*, 196 Fed. 373, 116 C. C. A. 419, and *Prentis v. Stathakos*, 192 Fed. 469, 112 C. C. A. 607, both decided by this court.

It was held in *Yamataya v. Fisher*, 189 U. S. 101, 23 Sup. Ct. 614, 47 L. Ed. 721, that one of the principles of "due process of law" is that:

"No person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular set occasion and according to the forms of judicial procedure, but one that will

secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act."

"We cannot," says the court in *Lee Lung v. Patterson*, 186 U. S. 176, 22 Sup. Ct. 798, 46 L. Ed. 1108, "assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

In *Frick, U. S. Immigrant Inspector, v. Lewis*, 195 Fed. 693, 115 C. C. A. 493, it is held by the Circuit Court of Appeals for the Sixth Circuit that:

"Where a fair, though summary, hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge involved in a case like this, it is not open to courts to consider either admissibility or weight of proof according to ordinary rules of evidence, even if it believe the proof was insufficient and the conclusion wrong. The question is whether anything was offered that tends, though slightly, to sustain the charge."

Therefore, if the hearings given appellee by the Secretary of Commerce and Labor were such hearings as were intended by the act, and appellee had a fair, even though it may have been a summary, opportunity to establish his right to remain within the United States, the District Court was without authority to dispose of the same on the merits.

There is no question here as to what was before the Secretary. That evidence is all made a part of the petition for and the return to the writ, and the statements of the latter are not traversed. From this it appears that the statements of appellee, together with the testimony of his witnesses, were all before the Secretary when the warrant of deportation was issued. Among these was appellee's original statement, in which he admitted that he was born in China and smuggled into the United States. The earlier statement was made a part of the record of said so-called second hearing. It can hardly be contended that the Secretary was not at liberty to accept the first statement and disbelieve the second. If this worked wrong upon appellee, he has only himself to blame.

[3] We are of the opinion that this first examination was a part of the hearing contemplated by the statute, and that the Secretary was at liberty to so treat it, even to the extent of disbelieving the second and more deliberate statement. No reason is perceived why appellee can claim that he was taken advantage of, or why he was unable to tell the truth on the first examination. The second thought, taken after advice of counsel, cannot have the probative weight that initial and uninstructed statements have under circumstances such as here exist. The hearing provided by the statute is such a hearing as gives the accused an opportunity to acquaint the department with the facts of his case. Appellee had abundant facilities afforded him for that purpose. The hearing before the inspector, taken together with the original statement, was without any unfair influences or impositions upon appellee. The department has the power to make such investigations as were here made, otherwise deportation must await the tedious processes of

a court hearing, which was never contemplated by the act. We are unable to see how the Secretary could make the examination more formal. The District Court should have refused to consider the matter upon the merits, and, after hearing the facts as above stated, should have denied the writ.

For these reasons, the judgment of the District Court is reversed, with direction to quash the writ, and dismiss the petition for habeas corpus at petitioner's cost, and to remand the petitioner to the custody of the inspector.

In re MARCUS.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 165.

1. BANKRUPTCY (§ 408*)—DISCHARGE—OPPOSITION—TRANSFER OR CONCEALMENT WITH INTENT TO HINDER, DELAY, OR DEFRAUD CREDITORS.

A bankrupt within four months prior to bankruptcy paid \$4,500 to his wife in settlement of a debt for money borrowed from her, from which she returned \$1,250 to him to enable him to go to Europe to raise further capital to put into the business. *Held*, that such transfer did not constitute a transfer or concealment with intent to hinder, delay, or defraud creditors, and was therefore insufficient to bar the bankrupt's discharge on that ground.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—FALSE OATH.

That a bankrupt in the course of an extended examination made a misstatement concerning his want of knowledge of his insolvency at a particular time was insufficient to warrant a denial of a discharge on the ground that he made a false oath.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 409*)—DISCHARGE—FAILURE TO KEEP BOOKS.

A bankrupt's stock consisted in part of a stock of goods which he had brought over from a former business, and, the partners in the new business being unable to agree on the discount to be made from the cost price, the items of such stock were valued at cost and set down in lead pencil in the inventory, so that by making a proper discount from the items so entered the exact status of the firm could be determined at any particular time. *Held*, that the failure to take stock and inventory the value of all the assets at the end of each year did not show that the firm's books were improperly kept, for the purpose of concealing its true financial condition, so as to bar the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

4. BANKRUPTCY (§ 409*)—DISCHARGE—FAILURE TO KEEP BOOKS.

Where the books of a firm were kept by a competent bookkeeper, who was not interfered with by either member of the firm, and there was no showing of an intent on the part of the bankrupt to conceal his financial condition, the fact that the books were inaccurate on account of misunderstanding, inadvertence, or mistakes was not ground for the denial of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of bankruptcy proceedings of Morris Marcus. From an order granting the bankrupt a discharge (192 Fed. 743), Thomas F. Molloy and another, as administrators, and certain other creditors, appeal. Affirmed.

Noble & Camp, of New York City (W. Cleveland Runyon, of New York City, of counsel), for appellants.

Myers & Goldsmith, of New York City (E. J. Myers, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. There were three specifications of objection to discharge.

[1] 1. It was contended that Marcus had within four months prior to bankruptcy paid \$4,500 to his wife, who had thereafter given \$1,250 of that sum to the bankrupt to enable him to go to Europe and see friends there, with a view to obtaining further capital to put into the business. The special master held that, so far as the evidence showed, the payment to the wife was for borrowed money due to her; and that, although the payment might have been preferential, it did not constitute a transfer or concealment with intent to hinder, delay, or defraud creditors. What she might do with the money after she received it in payment of the debt to her was, of course, her own affair. The District Judge confirmed the special master's report, and we find no sufficient basis in the record for holding that Marcus concealed assets from the trustees.

[2] 2. It is contended that Marcus made a false oath in this proceeding. The District Judge has discussed this objection at some length, and we concur in his disposition of it. The particular answer relied upon was to a question directed to his financial condition at a particular time. The condition of insolvency is a complex one, and we would hesitate to hold a man guilty of false swearing, because in the course of an extended examination he made some misstatement of his want of knowledge of his insolvency at a particular time. In the present case it is difficult to say that the bankrupt testified with any positiveness as to his knowledge of insolvency at a particular time and then denied it. We are not satisfied from the evidence that the bankrupt swore falsely, and then corrected it by making a true statement. We see no reason to reverse the decision below on this objection.

[3] 3. The last objection is that the bankrupt, or rather his firm, with intent to conceal its financial condition, failed to keep books of account or records from which such condition might be ascertained. There seems to be no criticism of the general manner of keeping the books. The bookkeeper was a competent man, and did his work faithfully. The criticism stated in the brief is that no such inventory was ever made as would enable the condition of the firm to be shown accurately. The evidence shows that what is meant by this statement merely is that there was not each year a stock-taking and inventory on which the merchandise in hand was stated not at cost, but at its

value at the time the annual inventory was prepared. It appears, however, that when the firm was organized, about five years before, Marcus contributed a stock of goods which he brought over from his former business. The items of this stock, valued at cost, were all set down in the books, but these entries were made in pencil, because there was some dispute between the partners as to what discount there should be made from the cost price. From the beginning a merchandise account was kept, and the evidence indicates that from the original pencil entries and the merchandise account it was possible at any time to prepare an inventory which would show with substantial accuracy what goods the firm had on hand. This would not show the "exact status" of the firm, as appellant calls it, because it would not give the value of the merchandise at the time the inventory was made. But we do not understand that the bankrupt act requires a new inventory to be taken every time there is some fluctuation in the actual selling value of the stock on hand, so that the revised estimates of value may be from time to time recorded on the face of the books. It seems to us that the books of this firm were so kept as to show what goods they had on hand, stated at their cost value, and that a person familiar with the particular trade could estimate with reasonable accuracy what discount there should be made from cost, in order to ascertain the financial condition.

[4] But, even if the financial condition could not be accurately determined from the books, it does not follow that the objection should be sustained. The firm employed a thoroughly competent bookkeeper, and left the books in his charge without themselves interfering with the manner in which he performed his skilled duties. There is nothing to show that either member of the firm was an experienced bookkeeper, or that either of them supposed that the man they employed for the purpose was not doing his work properly. The act does not refuse discharge because the books have been so kept as to make it difficult, if not impossible, to get an exact financial condition without further examination. The failure to keep sufficient books of account must have been with intent on the part of the bankrupt to conceal his financial condition. Such books may be inaccurate on account of misunderstanding, inadvertence, mistakes, and other reasons consistent with a desire that they should truthfully show the real conditions. There is no evidence in this record which would warrant a finding that the books were kept as they were—whether complete or incomplete—with intent on the part of Marcus to conceal his financial condition.

The order of the District Court is affirmed.

In re LACHENMAIER.

GERMANIA NAT. BANK OF MILWAUKEE v. LACHENMAIER.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,906.

1. BANKRUPTCY (§ 51*)—VOLUNTARY AND INVOLUNTARY PROCEEDINGS.

Where, after the institution of an involuntary bankruptcy proceeding, the bankrupt filed a voluntary application for adjudication, under which he was adjudged a bankrupt and his estate settled, the proceedings taken in the voluntary proceeding could not be attributed to the involuntary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. § 51.*]

2. BANKRUPTCY (§§ 44, 81*)—PROCEEDINGS—VOLUNTARY AND INVOLUNTARY.

In an involuntary petition in bankruptcy, the creditors must allege, in addition to jurisdictional facts, that the defendant is insolvent, and has committed an act of bankruptcy within the preceding four months, while a voluntary petitioner need only aver that he owes debts which he is unable to meet and that he desires to take the benefits of the bankruptcy act; he not being required to admit that he is insolvent, or that he has committed any act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43–46, 59, 113–118, 125; Dec. Dig. §§ 44, 81.*]

3. BANKRUPTCY (§ 99*)—DISCHARGE—RES JUDICATA—INVOLUNTARY PROCEEDING—DISMISSAL.

If an alleged bankrupt resists an involuntary proceeding, a judgment of dismissal is not res judicata of the right of the bankruptcy court to administer his estate, and is not a bar to a voluntary proceeding which is founded on a different right.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 136, 146; Dec. Dig. § 99.*]

4. BANKRUPTCY (§ 47*)—NATURE OF PROCEEDING—INVOLUNTARY PETITION—PENDENCY—EFFECT.

Mere pendency of an involuntary bankruptcy petition does not deprive the court of jurisdiction to receive and consider a voluntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 165–183, 257; Dec. Dig. § 47.*]

5. BANKRUPTCY (§ 100*)—VOLUNTARY PETITION—PENDING INVOLUNTARY PROCEEDING.

The filing of a voluntary petition in bankruptcy cannot be made a lawful basis for entering an adjudication or taking any other step in a pending involuntary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

6. BANKRUPTCY (§ 49*)—INVOLUNTARY PETITION—VOLUNTARY PROCEEDINGS.

It is only where, by reason of the time elapsed between the filing of an involuntary bankruptcy petition and the filing of a voluntary petition, creditors, through the trustee, might not be able to recover property and avoid preferences, that the court will suspend the voluntary petition or set aside proceedings based thereon in order that the involuntary proceeding might be expedited.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 49.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

In the matter of bankruptcy proceedings of Fred Lachenmaier. From an order granting the bankrupt a discharge, the Germania National Bank of Milwaukee appeals. Reversed and remanded.

Emil J. Gehrz, W. H. Austin, and Gustave G. Gehrz, all of Milwaukee, Wis., for appellant.

David E. Johnson, of Milwaukee, Wis., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. An objecting creditor appeals from an order granting the bankrupt a discharge. Objection was under section 14b (5) (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) that within six years the bankrupt had been granted a discharge in voluntary proceedings.

Whether steps in the prior proceedings were taken in fact (apart from the legal effect of the steps) on a voluntary or on an involuntary petition is readily determined by the record.

February 7, 1910, at 10 a. m., three creditors filed their petition in an involuntary proceeding against Lachenmaier, and at the same time placed in the marshal's hands for service a subpoena and an order to show cause why the prayer of the petition should not be granted. Both were made returnable on February 12th, and were served on the defendant at some unstated time on February 7th. Marshal's return was filed on February 11th. The record discloses no further steps in said involuntary proceeding.

February 7, 1910, at noon, Lachenmaier filed his voluntary petition, with schedules of debts and of property.

February 7, 1910, at 1:30 p. m., the District Judge entered an order that, "the petition of Fred Lachenmaier that he be adjudged a bankrupt having been heard and duly considered, the said Fred Lachenmaier is hereby declared and adjudged a bankrupt accordingly," and at the same time entered a further order reciting that "Fred Lachenmaier on February 7, 1910, was duly adjudged a bankrupt upon a petition filed in this court by him on February 7, 1910," and sending the case to the referee for "such further proceedings therein as are required" by the Bankruptcy Act. And it was upon the court's confirmation of proceedings before the referee under said order of reference that Lachenmaier's discharge was obtained.

[1] We have found nothing in the provisions or in the purpose of the bankruptcy act that would attribute to the involuntary proceeding, the adjudication of bankruptcy and the further steps resulting in the discharge, which were actually had in the voluntary proceeding.

[2-4] Though both proceedings aim at the same general result, there is a material difference between an involuntary and a voluntary petition. In the involuntary petition the creditors must allege, in addition to jurisdictional facts, that the defendant "is insolvent" and "has committed an act of bankruptcy" within the preceding four months. Section 3b. Of the five acts of bankruptcy defined in section 3a, the first three are fraudulent acts of the defendant, the fourth is his having made a general assignment or applied for a receiver, and

the fifth is his prior written admission of his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. But the voluntary petitioner need only aver that he "owes debts" which he is unable to meet and that he desires to take the benefits of the Bankruptcy Act. Section 4a. He does not have to admit that he is "insolvent," much less that he has committed any "act of bankruptcy" within the preceding four months. If a defendant resists an involuntary proceeding, a judgment of dismissal therein is not res adjudicata of the right of the bankruptcy court to administer the defendant's estate, and is not a bar to a voluntary proceeding, which is founded on a different right. And so the mere pendency of an involuntary petition could not deprive the court of jurisdiction to receive and consider a voluntary petition. *Re Flanagan*, 5 Sawy. 312, Fed. Cas. No. 4,850; *Re Stegar* (D. C.) 113 Fed. 978.

[5] Nor can the filing of the voluntary petition be a lawful basis for entering an adjudication or taking any other step in the involuntary proceeding. Not only does the voluntary petition lack all professions of being an appearance and answer in the involuntary proceeding, but, in effect, it repudiates the material and necessary allegations of the involuntary petition.

[6] Ordinarily it is in the interest of creditors to have the adjudication entered at once upon the voluntary petition. They thereby obviate the expense, difficulty, and delay incident to establishing issues which the defendant may vigorously oppose. It is only where, by reason of the time elapsed between the filing of the involuntary petition and of the voluntary, creditors through the trustee might not be able to recover property and avoid preferences, that the court will suspend the voluntary petition or set aside proceedings based thereon, in order that the involuntary proceeding may be pushed. In such cases the bankruptcy court undoubtedly has full power to do equity. *Re Dwyer* (D. C.) 112 Fed. 777; *Gleason v. Smith*, 145 Fed. 895, 76 C. C. A. 427.

In the present case, not only did the creditors fail to move to set aside the proceedings on the voluntary petition, but it is apparent that there was no legal or equitable ground on which to bottom such a motion, for, the petitions having been filed on the same day, the creditors lost no advantage, but, on the contrary, had the benefit of an adjudication without delay or expense and of their debtor's being unable to get another discharge within six years. And, of course, the voluntary petitioner is equally bound, for he neither moved nor had cause for moving to vacate and dismiss his own proceeding.

The prior proceedings resulting in the discharge of Lachenmaier were therefore had and entered in law as well as in fact upon the voluntary petition.

The order is reversed, and the cause remanded for further proceedings in consonance herewith.

CITY OF ST. JAMES v. STACY.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1913.)

No. 3,734.

1. MUNICIPAL CORPORATIONS (§ 788*)—SIDEWALKS—DUTY TO MAINTAIN.

A city owes to the traveling public the duty of exercising reasonable care to keep its sidewalks in a reasonably safe condition, but, in order to render it liable for injuries for failure to perform such duty, it must appear that the city knew, or had reasonable cause to know, of the defective condition of the walk for a sufficient length of time before the accident to enable it to put it in repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE SIDEWALKS—GRATING—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A grating extending nearly across a sidewalk was defective in that the edge of one of the sections was elevated above the other where they joined. Plaintiff, a cripple who walked with crutches, was familiar with the grating and with its defective condition. On the occasion of his injury the sidewalk and the adjacent road were icy, and he undertook to cross the grating, in the way he had frequently done before, by getting a solid foothold as he approached it and then stepping or swinging over it on his crutches. In some manner he struck the end of one of his crutches against the elevated edge of one of the sections of the grating and fell and was injured. *Held*, that he was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

In Error to the Circuit Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by Lute A. Stacy against the City of St. James. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff below, while walking along on one of the public sidewalks in the city of St. James, encountered an iron grating extending transversely across substantially all of the sidewalk. This grating covering a hatchway consisted of two parts or sections, each being hinged to opposite sides of the opening, and when shut their edges came together near the middle of the opening so as to form a joint extending practically across the entire sidewalk. In this way it was adapted, if properly constructed, to permit an uninterrupted and safe crossing by pedestrians. The two sections of this covering, however, when closed, did not make a good joint; but the edge of one of them stood an inch or more higher than that of the other, and this constituted such an obstruction in the highway as would naturally trip up a pedestrian who might, without extraordinary attention, attempt to cross it.

The plaintiff was a cripple and walked with crutches. He was familiar with this grating and with the defective condition of the joint. In fact, he had frequently passed over it and had noticed that the edge of one of the sections was more elevated than the other; but on this occasion the sidewalk and the adjacent road were icy and slippery, and he undertook to cross the grating in the way he had frequently done before—getting a solid foothold as he approached it, and then stepping or swinging over it on his crutches—but in some manner, not necessary to be detailed here, he struck the end of one of his crutches against the elevated edge of one of the sections of the grating and fell and received an injury. He recovered a judgment below, and the city prosecutes this writ of error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edward C. Farmer and Jens L. Lobben, both of St. James, Minn. (W. S. Hammond, of St. James, Minn., on the brief), for plaintiff in error.

J. W. Schmitt, of Mankato, Minn. (H. L. Schmitt, of Mankato, Minn., on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). [1] The city owes to the traveling public the duty of exercising reasonable care to keep its sidewalks in a reasonably safe condition. In order, however, to render it liable for injuries for failure to perform its duties in this regard, it must appear that the city knew, or had reasonable cause to know, of the defective condition of the grating a sufficient length of time before the accident occurred to enable it to put it in a state of repair. The learned trial court submitted this issue to the jury very clearly—certainly in such a way that the city can have no ground of complaint and makes no complaint on this account. The verdict of the jury being against the city necessarily concludes this issue in favor of the plaintiff below and establishes for the purposes of this case the requisite negligence to entitle plaintiff to recover, unless for other reasons he cannot do so.

The stress of the argument at bar and in the brief is that plaintiff was guilty of such contributory negligence as precludes recovery. It is said he was familiar with this raised joint, had often passed over it and necessarily knew its condition, and that the attempt to cross it on the occasion in question was an unwarrantable exposure and prevented recovery, and that the trial court erred in not instructing a verdict for the defendant according to the prayer of defendant's counsel.

[2] We are unable to give our assent to this contention. We cannot now review the correctness of the finding of fact by the jury. Our sole duty is to ascertain whether there was any substantial evidence upon which that finding can be sustained. Of this we have no doubt. A person who was entitled to use the sidewalk, and who might reasonably assume it was in a fairly safe condition for use, came upon the obstruction; the adjacent ground was icy and slippery, and it might well be that the raised joint in the grating presented a less dangerous impediment to his crossing than the icy surroundings would have presented if he had attempted to go out into the street and avoid crossing the grating.

The question is: Did he exercise ordinary care and prudence under all the circumstances in attempting to cross over the grating? In other words, Did he fail to exercise the care and prudence which ordinarily prudent persons would have exercised under similar circumstances? We are unable, in view of all the facts and circumstances in the case, to say as a proposition of law that the plaintiff did not exercise that prudence which ordinary persons would have exercised under like circumstances. Whether he did or not was a question of fact for the jury under proper instructions. This case is quite similar

in its facts to that of *Mosheuvell v. District of Columbia*, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170.

On familiar principles of general law, reinforced by the authority of the case just cited, we have no hesitancy in affirming the judgment, and it is so ordered.

In re FEDERAL BISCUIT CO.

(Circuit Court of Appeals, Second Circuit. Feb. 10, 1913.)

No. 149.

1. BANKRUPTCY (§ 105*)—PENDING ACTIONS—STAY.

The power to stay actions pending in the state courts against a bankrupt is given only for the benefit of the bankrupt's estate, and, if the estate has no interest in the suit, it cannot properly be stayed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156-158, 162; Dec. Dig. § 105.*]

2. BANKRUPTCY (§ 217*)—ACTIONS IN STATE COURT—ATTACHMENT—STAY.

An attachment suit having been instituted in the state court against a bankrupt within four months prior to adjudication, the attachment was discharged by a surety bond. A director of the bankrupt company to procure the bond executed an indemnity agreement with the surety company, and to secure him against loss the bankrupt conveyed as a part of the same transaction certain real property to be held in trust for him. *Held* that such conveyance, being in good faith, was neither fraudulent nor a preference, and hence, as the prosecution of the attachment suit would operate indirectly as an appropriation of the bankrupt's estate, the trustee was entitled to a stay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

In the matter of bankruptcy proceedings of the Federal Biscuit Company. On petition of Edward C. Vick to revise an order enjoining the prosecution of an action supported by attachment in the state court. Affirmed in part.

The petitioner commenced an action in the Supreme Court of the State of New York against the Federal Biscuit Company upon a claim provable in bankruptcy. A warrant of attachment was issued in such action and an attachment made which was discharged by a bond or undertaking given by a bonding company. One Anger, a director of the Federal Company, entered into an indemnity agreement with the bonding company and to secure him against loss the Federal Company conveyed certain real property to be held in trust for him. Within four months after the beginning of the attachment action a petition in bankruptcy was filed against the Federal Company and it was adjudged a bankrupt.

An order was entered in the District Court which, among other things, enjoined the prosecution of the action in the state court. To revise such order the present petition was brought.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. M. Gardner, of New York City, for petitioner.

Rosenberg & Levis, of New York City (J. N. Rosenberg and W. J. Barr, both of New York City, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] The bankruptcy act authorizes the District Court as a court of bankruptcy to stay suits against the bankrupt founded upon provable claims pending in state courts at the time of the bankruptcy. It also authorizes such stays in attachment actions instituted within four months of the bankruptcy, the lien of the attachment being invalidated thereby. But the power is given in both cases only for the benefit of the bankrupt estate. If the estate have no interest in the suit or action it cannot properly be stayed. As this Court said in *In re Mercedes Import Co.*, 166 Fed. 427, 92 C. C. A. 179:

"As the trustee in bankruptcy has no interest whatever in the claim against the surety, we think the creditor's rights and equities are questions to be disposed of by the state court."

[2] In the Mercedes case the facts were somewhat similar to those appearing here. An attachment suit had been brought in a state court against a corporation which subsequently became bankrupt. A bond was substituted for the attachment. The District Court stayed the action but this Court reversed the order upon the ground indicated in the extract quoted, viz: that the bankrupt estate had no interest in preventing proceedings in the state court which looked only to enforcing the obligation of the surety company upon the attachment bond. But in the Mercedes case the attachment was made more than four months before the bankruptcy and, what is particularly important, no property of the bankrupt estate was held directly or indirectly to indemnify the surety. In the present case, on the other hand, the attachment was made within four months of bankruptcy and if Anger has a right to the property transferred for his benefit the trustee has a substantial interest in the attachment action. If the surety company is held it can look to Anger for indemnity and he may avail himself of the property of the estate. Thus if a stay be not granted a suit against a bankrupt on a provable claim brought within four months of bankruptcy may result in a depletion of the assets of the estate—a result clearly in contravention of the purpose of the bankruptcy act.

The appellant seeks to avoid the conclusion stated by urging that Anger has no right to the property held in trust for him; that the arrangement for his benefit is illegal. We think, however, that this contention is not well founded. No positive fraud is shown. There is nothing in the record to show that Anger acted in bad faith in indemnifying the surety company or participated in any scheme to give the plaintiff in the attachment suit a preference. He acted upon a present consideration. The conveyance to him was contemporaneous with his indemnity to the surety company and so far as the record shows it was neither fraudulent nor a preference. *McDonald v.*

Clearwater R. Co. (C. C.) 164 Fed. 1007; Young v. Upson (C. C.) 115 Fed. 192; In re Wolf (D. C.) 98 Fed. 85.

It follows, then, that as the result of the prosecution of the attachment suit will be the appropriation indirectly of property of the bankrupt estate the trustee is interested in it, and the case is distinguishable from the Mercedes case and is one in which the protection of the estate requires a stay. So much of the order, therefore, as grants a stay will be affirmed. We think this measure of relief all that is called for at the present time and sufficient to determine the rights of the parties. The other portions of the order are, however, set aside without prejudice to further proceedings if necessary. No costs are awarded in this court.

GREATER NEW YORK FILM RENTAL CO. v. BIOGRAPH CO. et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 157, Oct. Term, 1912.

INJUNCTION (§ 3*)—RIGHT TO WRIT—CONTRACT.

Where, in a suit for conspiracy between defendants to injure complainant's business, it did not appear that defendant B. Company had any contract by which it was bound to furnish complainant with moving picture films for any period of time, complainant was not entitled to a preliminary mandatory injunction restraining the B. Company from refusing to deliver films of its own manufacture as complainant might from time to time order. [Ed. Note.—For other cases, see Injunction, Cent. Dig. § 3; Dec. Dig. § 3.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suit by the Greater New York Film Rental Company against the Biograph Company, impleaded with the General Film Company. From an order granting complainant a preliminary injunction against defendant Biograph Company, it appeals. Reversed.

Leventritt, Cook & Nathan, of New York City (David Leventritt, Harold Nathan, and Franklin H. Mills, all of New York City, of counsel), for appellant.

Rogers & Rogers, of New York City (G. A. Rogers and S. E. Rogers, both of New York City, of counsel), for complainant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The complainant is a so-called film rental exchange engaged in the business of leasing motion picture films from the manufacturers thereof and subleasing them to exhibitors. The Biograph Company is engaged in the business of manufacturing motion picture films. The General Film Company is another film rental exchange engaged in the same business as the complainant. The relief demanded in the complaint is that both defendants be enjoined from conspiring and confederating with each other and with other named persons (individual and corporate) to injure or interfere with the business of complainant by causing the supply of films from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Biograph Company to the complainant to be in any way curtailed or diminished, or in any other manner to interfere with the business of the complainant. An injunction is prayed for against the Biograph Company forbidding it to deliver any film to the General Film Company, unless the Biograph Company shall continue to furnish such film in equal quantities and upon the same terms to the complainant. An injunction is prayed for against the General Film Company forbidding it from leasing films from the Biograph Company unless the latter company shall continue to furnish films to complainant. Certain other injunctive relief is prayed for against the General Film Company, which need not be referred to.

The motion for preliminary injunction came on to be heard on the bill of complaint and supporting affidavits, and also affidavits submitted by defendants. No preliminary injunction was issued against the General Film Company. The injunction issued against the Biograph Company ordered it to deliver films of its own manufacture to complainant as the latter might from time to time order. Details as to prices and payment need not be here stated. The injunction was mandatory only and the one thing it commanded was that the Biograph Company should sell films to complainant.

The averments as to the details of the conspiracy alleged in the complaint are voluminous, and the argument as to whether or not complainant has made out a cause of action involved much discussion, and suggested various theories. Upon this appeal, however, we are concerned solely with the question whether the specific relief, granted temporarily by the order appealed from, should have been granted.

It is asserted by defendant appellant that at no time prior to the institution of this suit was there any contract between it and complainant, whereby it had agreed to continue to supply complainant with films of its manufacture for any period of time. We find nothing in the record to indicate that there was any such contract, and we do not understand that complainant contends that there was.

This being so, we are satisfied that if all the facts averred in the bill were proved at final hearing and all the inferences of fact which complainant contends for were drawn from the facts thus proved, and that if upon some theory or other of those suggested it were held by the trial court that complainant had suffered wrong at the hands of those whom it alleges conspired to injure its business, and that for such wrong it was entitled to some relief against the conspirators or some of them, it could not obtain specific relief of the sort accorded by this preliminary injunction, viz., a decree compelling the Biograph Company to sell films to complainant against that company's wish. That being so, we are satisfied that this preliminary injunction should be reversed. It cannot be sustained merely on the ground that its continuance until final hearing will injure defendant less than its dissolution will injure complainant.

This may be a hardship to complainant, but it may be noted that seven months have elapsed since the decision in the District Court, and, had complainant been reasonably expeditious, the cause might now be ready for final hearing.

The order is reversed.

J. D. RANDALL CO. v. FOGLESONG MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,410.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR STUFFING HORSE COLLARS.

The Collett and Rennie patent, No. 949,293, for a machine for stuffing horse collars with tangled straw, was not anticipated, discloses patentable invention, and possesses great utility; also, *held* infringed.

2. PATENTS (§ 238*)—INFRINGEMENT—UTILIZATION OF MATERIAL FOR ACCOMPLISHMENT OF RESULT.

In an action for infringement of a patented machine for stuffing horse collars with tangled straw, a contention by defendant that in its machine it had no means for rotating its hopper, and that to accomplish that result it utilized the straw—the material on which the machine operated—and that the material cannot be considered a part of the mechanical means of the combination which constituted the machine, *held* unsound.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 376; Dec. Dig. § 238.*]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Foglesong Machine Company against the J. D. Randall Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 200 Fed. 741.

Murray & McCallister, of Cincinnati, Ohio (W. F. Murray, of Cincinnati, Ohio, of counsel), for appellant.

Border Bowman, of Springfield, Ohio (Paul A. Staley, of Springfield, Ohio, of counsel), for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. [1] The appellee (hereinafter called the plaintiff) is the owner of patent No. 949,293, issued to Collett and Rennie February 15, 1910, for a machine for stuffing horse collars with tangled straw. The trial court having decreed that the machine made by the appellant (hereinafter called the defendant) infringed the first, second, third, and fifth claims of such patent, the case is brought here to secure a reversal. It will be sufficient to quote the first claim:

"In a stuffing machine, the combination of a rotatable hopper, a feed pipe, a reciprocating feed rod extending below said hopper and into said feed pipe, means for rotating said hopper, and means for reciprocating the feed rod during the rotation of the hopper."

In the stuffing of horse collars by means of devices antedating that of Collett and Rennie, straw of short lengths only, costing from \$18 to \$24 per ton, can be used. The preparation of the straw by cutting it into lengths involves loss of time and much expense. The hoppers in which the straw is placed are in some such devices circular, as shown in the Estes patent, No. 916,543, issued March 30, 1909, the Allen patent, No. 767,196, issued August 9, 1904, and the original Randall machine. In others they are rectangular, as shown in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Foglesong patent, No. 275,624, issued April 10, 1883. In all of the foregoing prior mechanisms the hopper is stationary, and not rotatable, and is obstructed by means located within it to bring the straw in contact with the toothed reciprocating stuffing rod at its bottom, which delivers the straw in a doubled condition through a tube to and packs it in the collar. Estes, in his invention, for instance, to feed the straw downwardly against the rod, employs a series of bars or fingers so arranged in planes one above another at an appropriate angle as to constitute a spiral formation whereby the straw at the upper portion of the hopper moves downwardly from within the plane of one finger into that of the next, until it reaches the rod. Allen avails himself of horizontally disposed arms on whose lower sides are a series of teeth. These arms move the straw to the passage leading to the feeding chamber, to which chamber it is then carried by feed saws, where it is caught by the stuffing rod. Foglesong's patent calls for a pair of reciprocating toothed bars, which, pushing back by their forward movement a swinging flap on the front side of the hopper, permits the straw, which has been brought into contact with them, to fall to the bottom of the hopper, where it is caught by the hooks on the feed rod, and is then drawn into the stuffing tube for delivery to and packing in the collar.

The principal object sought by Collett and Rennie in stuffing horse collars was to substitute for prepared straw tangled or machine-threshed straw, costing only about one-third as much, and involving no expense in cutting it into required lengths. They employed, as did their predecessors in the art, a feed tube, reciprocating feed rod and hopper, but, to accomplish their purpose, they made marked changes in the hopper and its manner of operation. On the outer end of a heavy frame they affix a circular stationary base, so located with reference to the right side of the frame as to permit a power-driven toothed reciprocating rod, which is also on the right side of the frame, to cross such base at the center of its bottom in a recess or groove. On the front of the base is attached the tube through which the straw is fed into the collar. The hopper, preferably circular in form, is mounted on the base, and, instead of being stationary, is rotated by means of gear teeth or cogs on a ring which extends around the lower periphery of the hopper and rides upon the base member, the teeth meshing with those of a power-driven pinion at the rear of the hopper and to the left of and above the reciprocating rod. The interior of the hopper is freed from all central obstructions in the form of devices for working the straw down to the reciprocating rod—a condition essential to the use of tangled straw as it comes from the bale. After the tangled straw is put in the hopper, it is so compactly pressed down by a heavy metallic disc or iron plate, counterbalanced by a weight regulated by pulleys, that the friction between the straw and the hopper causes them to rotate together. The importance of the disc to the successful operation of their device is such that the friction of the straw against the hopper, in the absence of such disc or induced by one that is too light, would be so slight that the straw would remain stationary as the hopper revolves. Three small pins projecting from the inner surface of the hopper near its bottom prevent the disc from coming in contact with the reciprocating rod and

assist in rotating the straw with and at the same rate of speed as the hopper. The straw, being carried around by the rotating hopper, is presented to the reciprocating rod in an ever changing position, and in consequence is picked in its original lengths by the toothed rod from the bottom of the mass at the bottom of the hopper, and is driven through the feed tube into the collar. The reciprocating rod, when in its most rearward position, is slightly past the center of the hopper. Consequently the entire lower surface of the straw comes in contact with the rod during the revolution of the hopper. The actual operation of the machine gradually forces the straw to the outer circumference of the hopper, and, as it accumulates at the bottom, it assumes a form much like that of a bird's nest, and, notwithstanding its being placed in the hopper in a more or less tangled condition, is caught by the feed rod at approximately right angles, and, being folded by it, is thus packed in the collar. Collett and Rennie's device is a patentable invention, and is distinguishable from and is an advance over anything known to the prior art, in that (1) it has a hopper which is rotatable, free from central obstructions and with mechanical connections at its circumference for its rotation, which are driven from the same shaft as that which drives the rotating rod, the hopper rotating continuously and simultaneously with the reciprocation of such rod; and (2) it permits, as the result of its manner of construction, the use of tangled or machine-threshed straw. Its advantages and the demand for it were such that, following its introduction, it was sold to manufacturers of horse collars at prices as much as six times that received for other machines made for the same purpose.

The machine which the defendant placed on the market in competition with plaintiff's differs from the latter in the following respects: The defendant, instead of employing a toothed ring affixed to or made a part of the lower end of the hopper, severs the hopper above the ring, and thus makes the ring a separate part. It rests the ring on a shoulder in the base close to and beneath, but not in contact with, what it terms the hopper, and, unlike the plaintiff's, incloses its ring by an upward turn of the base and hides it from view, except at the point at which its cogs mesh at its circumference with those of the pinion. It projects inwardly from the inner surface of the ring three pins about three times as long as those in plaintiff's hopper, their distance from the reciprocating rod being apparently the same as that of plaintiff's pins from its feed rod. The defendant, in its effort to distinguish its device from that of plaintiff, characterizes its (the defendant's) toothed ring as a pinion independent of the hopper, which, when its machine is engaged in stuffing collars, through the instrumentality of the pins projecting from its interior surface causes the straw to rotate and with it the hopper.

What the defendant has done and all that it has done, as regards the operative parts of its mechanism, is to divide the hopper into sections and lengthen the inwardly protruding pins near its bottom. Its toothed ring is as much a part of the hopper as is the toothed ring which surrounds the lower periphery of the plaintiff's hopper. The diameter of the two circumferences is the same and their inner

surfaces are in alignment. Neither the plaintiff by its patent nor the defendant by any requirement is limited to a hopper of any particular height. The lower or ring section of the defendant's machine is and is intended to be a straw-containing receptacle. Were this not so, the pins would have been affixed to the upper section. If the latter section be removed or its use wholly abandoned, the defendant's machine, excepting as to the height of the hopper, is then the same as plaintiff's, and performs the same work in the same way and with the same result. It will be less efficient, because the hopper will have to be more frequently replenished with straw, but this disadvantage may be measurably, if not entirely, overcome by increasing the height of the ring or the weight of the disc, that a greater quantity of straw may be held in position.

The defendant's intention is, as stated by its expert, and it is essential to the successful operation of the defendant's machine as a merchantable device, that the entire hopper shall rotate. For this reason the toothed revolving ring is made its base section to receive power, as the plaintiff's does, to produce such rotation. The plaintiff is not restricted to the precise means stated in the patent for the rotation of its hopper or applying power to produce that result. But this fact is not of controlling consequence, for in both machines the power is applied to the circumference of the hopper by the same means, through their respective toothed rings, to rotate the entire hopper continuously and simultaneously with the reciprocation of the feed rod. The plaintiff's ring being adherent to and made a part of the hopper, its entire hopper rotates with a speed which bears a definite relation to the speed of the reciprocating rod. The defendant's ring being separate from the upper section of the hopper, the power applied directly to it and therefore to its pins as a part of it operates indirectly through the compact disc-laden straw to rotate the whole of the hopper, but the upper section revolves less rapidly than the lower and with diminished speed as the supply of straw becomes exhausted. As regards the rotation of the upper portion of the hopper, the defendant, by the use of the same means as the plaintiff employs, accomplishes imperfectly by indirection what the plaintiff accomplishes perfectly by direction. The defendant's entire hopper will not rotate in the absence of the disc for want of sufficient friction between the straw and the hopper's inner surface, nor will the straw rotate, as shown by Lause's experiment, unless the hopper rotates at the same time. It is true, as urged, that the upper section of the hopper will not rotate if there be no straw in the hopper, but this proves the important part played by the disc in its rotation. Moreover, the hopper was made for use in stuffing collars, and not to operate idly. The defendant having retained and utilized the mechanical power-driven pinion which meshes with the toothed ring or base of the hopper, and the pins which project into and tend to rotate the compact mass of straw and serve to stay the downward course of the superimposed weight and to present the straw at substantially a right angle to the feed rod, and also the heavy disc whose purpose is to produce friction between the straw and hopper so great as to cause them to rotate to-

gether, has so pirated the plaintiff's device as to constitute manifest infringement, as found by the learned trial court.

[2] The defendant also asserts that it has no means for rotating its hopper; that it utilizes the straw—the material on which the machine operates—for that purpose; that the material cannot be considered a part of the mechanical means of the combination which constitutes the machine; and that, therefore, the rule announced by this court in *Union Paper Bag Mach. Co. v. Advance Bag Co.*, 194 Fed. 126, 114 C. C. A. 204, applies and relieves it from infringement. This contention is unsound. It appears from that case that Dulin made as an element of each of his combination claims a lower central gripper, one of whose purposes is to draw the blank downward until the diamond-fold is gripped between certain rolls. The patentee of the defendant's machine dispensed with the gripper, and did not substitute in its stead any mechanical equivalent. Instead of employing such a gripper to effect the downward movement of his blanks, he did not sever them as did Dulin, but by preserving them in a series by central tab connections or tangs at their ends, until later in the process of manufacture, caused the blanks to move downward, and so had no use for a central lower gripper. In the instant case the defendant does not omit from its machine any element of any of the plaintiff's combination claims in question whose function is performed by the material upon which the machine operates. The defendant has not only retained and used all of the elements found in such claims of the plaintiff's patent, but has added none other.

The interference proceeding discussed in the briefs does not affect the plaintiff's patent, and need not therefore be considered.

Infringement clearly appears, and the lower court therefore is affirmed, with costs.

In re BECKWITH.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1913.)

No. 1,966.

1. COURTS (§ 265*)—APPELLATE COURT—ENFORCEMENT OF DECREE—MANDAMUS.

The Circuit Court of Appeals, having affirmed a judgment for complainant in a suit for patent infringement and remanded the case to the District Court for an accounting, had jurisdiction of a petition for mandamus to compel the trial court to overrule an objection to a master's summons requiring the defendant to render a sworn statement of account in accordance with Equity Rule 79 (New Rule 63, 198 Fed. xxxvii, 115 C. C. A. xxxvii); it appearing that the effect of withholding the writ would be to deprive complainant of relief.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 802-805; Dec. Dig. § 265.*]

2. PATENTS (§ 318*)—INFRINGEMENT—NATURE OF LIABILITY OF INFRINGER.

An infringer of a patent is a trustee ex maleficio for the owner of the exclusive right protected by the patent, and as such is bound to account for profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 318*)—INFRINGEMENT—ACCOUNTING—DEFENDANT'S LIABILITY—EQUITY RULE—FURNISHING SWORN ACCOUNT.

Under Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395), providing that in case of an infringement of a patent the complainant shall be entitled to recover the profits to be accounted for by the defendant, defendant's duty to account in detail is within Equity Rule 79 (New Rule 63, 198 Fed. xxxvii, 115 C. C. A. xxxvii), providing that all parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party as the master shall direct, though the burden of proof of establishing profits is on the complainant and the making of the account will impose expense on defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

Petition by Arthur K. Beckwith for writ of mandamus to the Judge of the District Court. Granted.

See, also, Beckwith v. Malleable Iron Range Co., 195 Fed. 291; 201 Fed. 518.

This is an application for a writ of mandamus to the judge of the District Court to enforce proceedings for an accounting, pursuant to the mandate of this court, in the cause entitled Malleable Iron Range Co. v. Beckwith, 189 Fed. 74, 110 C. C. A. 638; and the hearing arises upon the petition filed by the complainant therein, as relator—under leave granted by this court in conformity with an opinion filed November 5, 1912—and the answer thereto of the defendant below, "as the party in interest for and on behalf and with the consent of the" District Judge referred to. The material facts involved are stated in the opinion.

Harry C. Howard and Fred L. Chappell, both of Kalamazoo, Mich., for petitioner.

Arthur L. Morsell, of Milwaukee, Wis., and Thomas A. Banning, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). [1] The respondent's answer renews the objection raised against leave to file the petition, that the writ of mandamus is unauthorized for the relief sought by the petitioner. Although this challenge of jurisdiction was then considered and overruled in the opinion filed thereupon, we have re-examined the question, in the light of the present argument and authorities cited, and are impressed with no doubt of jurisdiction in the premises. The ruling complained of amounts to a denial of the accounting on the part of the respondent (defendant below), which is required by our mandate on appeal from the adjudication of infringement, if Equity Rule 79 is applicable to such accounting. It is averred in the petition and admitted by the answer, in substance: That, on reference to the master for an accounting under the decree, the master issued a summons to the defendant to "render a sworn statement of account, in writing, of the ranges which contained or embodied in any manner the device" of the patent claim whereof infringement was adjudged, specifying in purported conformity with the above-mentioned equity rule matters to be included in such statement; that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceedings thereunder were arrested and the master's summons was quashed by the District Judge (then presiding), on certification by the master of "the question of requiring the defendant to comply with the summons," under a ruling, as stated in the answer, "that Equity Rule 79 had no application to accountings in patent cases," but the burden (both "legal" and "financial") must be placed upon the petitioner "to make the investigation and establish the facts which he claims will show or establish such profits" in use of the patent. So, while it appears from the opinion filed by the District Judge that the master was to proceed with "the accounting" (so called), his summons to the defendant for statements thereof was not only quashed as entirely unauthorized, but he was enjoined from procedure in any manner under the rule referred to, as requiring the defendant "to assume the burden of proving complainant's case for him," and from imposing "any undue burden of expense" upon the defendant in the matter. This ruling, therefore, obviously withholds the remedy of accounting as established in equity jurisprudence—which embraces as well various branches of relief in business relations and money transactions between the parties, and accountability for conversion or misuse of the property of another, real or personal, in all cases cognizable in equity—so that enforcement of the mandate in question is withheld, if the required accounting for profits and damages comes within the above-mentioned doctrine and rule for its administration. In such event, we are of opinion that the jurisdiction of this court extends to enforcement thereof by mandamus as the only available remedy. *McClellan v. Carland*, 217 U. S. 268, 279, 30 Sup. Ct. 501, 54 L. Ed. 762; *Ex parte Chicago Title & Trust Co.*, 146 Fed. 742, 77 C. C. A. 408; *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 952, 66 C. C. A. 55, 67 L. R. A. 761. The opinion in *Barber Asphalt Pav. Co. v. Morris*, *supra*—cited approvingly in *McClellan v. Carland*, *supra*—furnishes ample review of the authorities in support thereof, and the objection for want of jurisdiction is overruled.

Coming to the issue upon the merits of the petition, we believe the determination must hinge upon the inquiry whether the accounting required of this defendant, under the mandate, is within the above-stated general provision of equity for the remedy of accounting. That Equity Rule 79—made rule 63 in the new rules (198 Fed. xxxvii, 115 C. C. A. xxxvii) recently promulgated—is both applicable to such general provision and mandatory in its requirements, cannot be open to question.

[2, 3] The status of an infringer of a patent is well recognized as that of "a trustee ex maleficio for the owner of the exclusive right protected by the patent." *Wales v. Waterbury Mfg. Co.*, 101 Fed. 126, 128, 41 C. C. A. 250. See, also, *Root v. Railway Co.*, 105 U. S. 189, 190, 26 L. Ed. 975; *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 613, 618, 32 Sup. Ct. 691, 56 L. Ed. 1222. Moreover, section 4921, R. S. (3 U. S. Comp. Stat. p. 3395), provides, in effect, "that in case of infringement the complainant shall be entitled to recover the 'profits to be accounted for by the defendant.'" *Westinghouse Co. v. Wagner Co.*, *supra*. Therefore, when the cause is equitable and

infringement is decreed, we believe the nature of the liability and statutory purpose (referred to) concur in fixing the accounting for profits thereupon to be within the above-mentioned provision of equity, and we do not understand the general rule of patent law, in respect of the burden resting on the complainant to prove profits "attributable to the patented feature" (*Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371), to be inconsistent with the foregoing interpretation of the accounting. Confusion appears to have arisen, as we believe, in the application of the rule of *Garretson v. Clark* to the method of accounting in equity, as prescribed both by Equity Rule 79 and by the statute above cited. In the recent case of *Westinghouse Co. v. Wagner Mfg. Co.*, supra, the meaning of the rule as to the burden of proof, when the invention is used by the infringer in a structure combining other improvements and means and "creates only a part of the profits," is well explained and limited in its application; and the opinion quotes with approval like limitation stated in the ruling of the Circuit Court of Appeals for the Sixth Circuit, in *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 Fed. 472, 476, 89 C. C. A. 392. Thus understood, while the burden rests on the complainant to establish both fact and amount of profit attributable to the infringement—wherein he is entitled, as of course, to an examination of the defendant and his books of account and other means of information for proof thereof—we are of opinion as well that equity confers the right to the statement of account on the part of the defendant, required of the accounting party under rule 79, irrespective of the doctrine referred to as to the burden of proving profits. No substantial ground appears or is suggested which should exempt the accounting in patent causes from such equity rule, and we understand it to be well recognized by the authorities as applicable thereto. *Wales v. Waterbury Mfg. Co.*, 101 Fed. 126, 41 C. C. A. 250; *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 Fed. 472, 89 C. C. A. 392; *Goss Printing Press Co. v. Scott* (C. C.) 148 Fed. 393; *Walker on Patents*, § 740; *Hopkins on Patents*, § 412.

The purpose "of requiring the accounting party to bring in his account in the form of debtor and creditor is to compel discovery from him as to the details of the transaction under investigation." 2 *Bates on Fed. Eq. Prac.* § 759. See, also, 1 *Pomeroy, Eq. Jur.* §§ 223-239. So, ascertainment of the profits attributable to the infringement requires such discovery, not alone of the gross sales, but of all items of cost entering into the production and sale, which are presumptively within the knowledge or means of information possessed by the infringing manufacturer. In reference to these items, it is rightly averred in the defendant's answer that they involve "many factors and considerations which do not enter into ordinary accountings"; that to ascertain the profits "many deductions are allowed to the defendant" for various expenses, including "proportional overhead expenses" entering into the production and sale. Nevertheless, they are plainly capable of specification in the form of debits and credits for the purposes of the accounting, and the complications mentioned, together with the fact that the items are within the exclusive knowledge and possession

of the defendant furnish ample ground for such specification in conformity with the equity rule. It cannot reasonably be assumed that these items entering into the cost appear in detail in the ordinary books of account; but, in whatever form the information is preserved or may be obtained by the manufacturer, we believe it to be both the purpose of the rule and in accord with equity to require the defendant, at the outset of the accounting, to make the needful investigation and state the items in detail—having effect, as well, of his admissions of fact and of statements under oath—and thus perform his just part in narrowing the issue upon the accounting to items and matters which are in actual controversy between the parties.

The answer does not deny possession of the information referred to, and, if not equivalent to an admission thereof, it may reasonably be inferred that the defendant, engaged extensively in the manufacture and sale of the products in question, in accord with the well-known need and practice of manufacturers generally, has information of the various items of cost entering therein as required for fixing the value and price of products. Complaint is made, however, that large expense and labor would be involved in preparing the statements, imposing a burden upon the defendant which should be borne by the complainant under the general rule referred to. But this contention is without force, in the light both of the equities thus far settled and of the rule of equity thereupon.

We are neither required nor authorized to determine the questions suggested in the argument, either whether the master's summons includes requirements not within rule 79, or which thereof seem to be questionable. As indicated above, requirements appear therein which are within the rule, and the summons was quashed for the reason alone that the District Judge denied application of that rule to the accounting. It is for the chancellor presiding therein to determine the matters of account to be stated by the defendant under the rule, in the form of debtor and credit items, when found to be applicable to such accounting.

We are of opinion, therefore, that the petitioner is entitled to the writ to require obedience to the mandate for an accounting by the defendant, pursuant to Equity Rule 79 and the foregoing ruling upon its applicability, and the alternative writ issued herein is accordingly made peremptory.

KNIGHT v. RIEGER et al.

(District Court, D. Maryland. February 21, 1913.)

PATENTS (§ 328*)—INVENTION—MAUSOLEUM.

The Knight patent, No. 979,965, for a mausoleum having improved means of ventilation and drainage, is void for lack of invention, in view of the prior art.

In Equity. Suit by Maurice L. Knight against Henry P. Rieger, John Drobisch, Henry P. Rieger & Co., Incorporated, Laura Praeger,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—4

and Christian B. Ohrenschall. On final hearing. Decree for defendants.

E. Hayward Fairbanks, of Philadelphia, Pa., and William R. Barnes, of Baltimore, Md., for complainant.

James W. Chapman, Jr., and William B. Smith, both of Baltimore, Md., for defendants.

ROSE, District Judge. On December 27, 1910, letters patent No. 979,965 were issued to the complainant. He still owns them. By his bill filed February 1, 1911, he alleged that the defendants had infringed the claims thereof. He asked for a preliminary injunction. The patent had not been adjudicated. It had but recently been issued. There had been no long general acquiescence in its validity. Nevertheless, the affidavits seemed to show the existence of some special circumstances which made a preliminary injunction proper as against some of the defendants. It was issued. The patent has relation to the construction of vaults or mausoleums for the dead. The patentee says that his invention consisted of improved means for ventilating, draining, closing, and sealing the crypts of such mausoleums and in other novel features of construction. No specifications of such novel features are made. They are supposed to be writ large on the face of the patent and of the claims, and to be recognizable by that ideal person, a man skilled in the art. It has not been suggested that there are in fact any novel features about the method of closing and sealing crypts. At the hearing of the motion for a preliminary injunction it was vigorously contended that the way of ventilation and drainage shown in the patent is both new and useful. It will be necessary to describe what that method is. It is adapted to mausoleums of the usual construction. In these the crypts are oblong stone or slate boxes, each of a size sufficient to contain a single burial casket. The crypts are arranged one above the other. One of the sides of each crypt is towards the interior of the mausoleum. It is through this side when open that a casket is placed in the crypt. The opposite side is parallel to the inner side of the external wall of the mausoleum. The problem is to afford means of ventilating and draining the crypts into the open air, while preventing all escape of air or liquids from them into the interior of the mausoleum. For the accomplishment of the former of such purposes, the patent directs that there shall be a space of some inches in breadth between the back walls of the crypts and the inner face of the exterior walls of the mausoleum. In the back wall of each crypt there are vents, one or more on the plane of the upper surface of the bottom slab or floor of the crypt, and one or more near the plane of the under surface of its top or cover. These vents open into the air space between the crypts and the mausoleum wall. The wall is pierced with one or more openings at or near the surface of the ground and with one or more at the top of the wall. It may also be desirable to have the ceiling fit closely upon the top of the crypts, and to leave between it and the roof proper an air space connecting with the air chambers between the crypts and the inner wall or walls of the mausoleum. In order that none of the

air from the crypts shall escape into the interior of the mausoleum, it is necessary to close by a suitable slab or wall all possibility of communication between these air chambers and such interior.

At the final hearing it was practically admitted that there was nothing novel in this method of ventilating and draining the crypts. It was old at the time of the plaintiff's alleged invention.

At the argument at the bar the contention of the plaintiff practically resolved itself into the claim that it was new to combine with this method of ventilation the arrangement by which each shelf of each crypt was secured in the wall of the mausoleum.

The plaintiff is able to preserve the old ventilating system with its air chamber, and to secure the crypt shelves in the mausoleum walls by the simple expedient of cutting out of the rear edge of each shelf for the greater portion of its length a rectangular strip of the approximate width of the desired air chamber. This rectangular cut does not extend to either end of the shelf. There is, therefore, left at each end a projecting tongue which bridges the air chamber and is secured in the mausoleum wall. It is not shown that any burial vault arranged precisely in this way had ever been made before the complainant applied for his patent or had ever been theretofore described in print or otherwise.

It is admitted that no part of defendants' shelves extend into or across the air chambers. Complainant claims, however, to find in defendant's construction the equivalent of such shelf extension. It is admitted that in defendant's mausoleum there are a number of bricks wedged in the air chamber and between the back wall of the crypt and the inner surface of the outer wall. Such bricks are secured in place by plaster of paris, and, as complainant contends, in some instances at least by wiring and other means. Defendants deny that these bricks form any part of their scheme of construction. According to their contention, the bricks were placed where they were at the time the crypts were constructed for the purpose, and solely for the purpose, of holding the back walls in position while the workman was engaged in securing them permanently to the top and bottom shelves. The bricks had no other purpose, and, when that was accomplished, their usefulness was at an end. It is not necessary to spend time in inquiring what was the purpose of these bricks. Complainant has no right to a patent so broad that it will cover any means of securing the shelf of a crypt to the wall of a mausoleum or of supporting a shelf by a wall. He is not entitled to a decree in this case, unless his rights are infringed whenever the old method of ventilating and draining the crypts is used and the crypt shelves are secured in or to the mausoleum wall. He relies on the familiar rule that a new combination of several old things may be patentable.

It is not in any wise suggested in the evidence that the projecting tongues of the crypt shelves in complainant's device play any part in ventilating or draining the crypts. That system of ventilation will work just as well whether the shelves are secured in the back wall or not. While it was old, it might conceivably have been found objectionable in practice because the crypt shelves were not secured to the

mausoleum wall. If such had been the case, it could not have been made practically useful until some way of overcoming this difficulty had been provided.

I find nothing in the testimony to show that there ever had been any such difficulty. The securing of the shelf to the wall does not in any way contribute to the ventilating and draining of the crypts. The crypts are drained and ventilated precisely as they were in the prior art. The shelf is secured in the back wall in the way in which many shelves time out of mind have been secured in all sorts of structures. Under such circumstances, what the patentee claims is not a combination but an aggregation. It is difficult to say what may not amount to invention. A want may have been long felt. Many may have attempted to meet it without success. Some one solves the problem. The solution then appears to be simplicity itself. For all that there may be invention. It would take clear and convincing evidence that the need had been appreciated and that others had tried to supply it before I could personally feel that there was any invention in securing a shelf to a wall in the way described in the patent in suit. In point of fact there is nothing in the record to suggest that any one had ever before tried and failed to accomplish what the patentee says he has done.

In view of the admitted state of the prior art, I can find nothing even remotely suggestive of invention in anything which the plaintiff claims to have done. One cannot appropriate to himself a part of the public domain, unless he pays for it by contributing something to the world's store of useful knowledge. The case has thus far been dealt with upon the assumption that a mausoleum of a particular construction was something which when new and useful was patentable. For the reasons already stated, it becomes unnecessary to inquire whether this assumption is well or ill founded. The learned author of *Walker on Patents* (4th Ed.) p. 13, contends that the word "manufacture" as used in the patent law should be given a construction broad enough to cover everything made by the hands of man and not a machine or a composition of matter. The weight of the decided cases is to the contrary. *Jacobs v. Baker*, 7 Wall. 295, 19 L. Ed. 200; *Fond du Lac County v. May*, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; *American Disappearing Bed Co. v. Arnaelsteen*, 182 Fed. 324, 105 C. C. A. 40; *International Mausoleum Co. v. Sievert* (D. C.) 197 Fed. 936.

It is not expedient to attempt to draw the line between the kinds of things for which a patent may properly issue and those for which it may not, unless the drawing of such line is absolutely necessary to the proper decision of the case. There is no such necessity presented by this record.

The preliminary injunction heretofore granted will be dissolved and the bill of complaint dismissed.

UNITED ELECTRIC CO. v. CREAMERY PACKAGE MFG. CO. et al.

(District Court, E. D. Wisconsin. March 3, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—INTERFERENCE WITH ANOTHER'S BUSINESS—INJUNCTION.

It is within the right of the owner of a patent, notwithstanding the pendency of suits against the manufacturers of alleged infringing articles, to notify users of such articles of its claims, and its intention to protect its rights by suits against users, provided such notices contain no misstatements of fact and are sent in good faith, and not for the purpose of unnecessarily injuring defendant's business; and the sending of two or three such letters is not sufficient to establish such a wrongful intent as will justify a court in granting an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

In Equity. Suit by the United Electric Company against the Creamery Package Manufacturing Company and others. On petition by defendant company for an injunction. Denied.

Harry Frease, of Canton, Ohio, and Erwin & Wheeler, of Milwaukee, Wis., for complainant.

Luther L. Miller, of Chicago, Ill., for defendant Creamery Package Mfg. Co.

GEIGER, District Judge. The complainant filed its bill, seeking to restrain infringement of letters patent and alleged acts of unfair trade. The defendant Creamery Package Manufacturing Company, after answering the bill, presented its petition herein, charging that, contemporaneously with the institution of this, another suit, identical as to parties and subject-matter, was begun by complainant in the District Court for the Northern District of Illinois; that since the commencement of such suits complainant, through its attorney, for the purpose of injuring and destroying defendant's trade in vacuum cleaners (charged to be in infringement of complainant's patent), has by means by threatening letters, advertisements, and circulars attempted to influence past or prospective customers of defendant from using or purchasing its product.

The petition specifies letters written to one Long, at Akron, Ohio, who had purchased from defendant, notifying him that complainant claimed such machine to infringe complainant's device, that the above-mentioned suits had been instituted, that complainant would fully protect its rights, that users as well as makers of infringing articles are liable, and requesting said Long to desist from further use and to settle with complainant. A second letter was sent, reiterating the substance of the first, but further notifying him that, unless by a time specified he desisted using such machine, suit for infringement would be instituted against him. Such suit was in fact begun, and defendant charges that the bill therein is identical with that herein. It is averred generally that the suits thus begun and threatened, and the letters sent, were not intended for the protection of complainant's legitimate rights under its patent, but to annoy and harrass defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complainant, its exceptions to the jurisdiction of the court having been overruled upon the authority of *Warren Featherbone Co. v. Landauer* (C. C.) 151 Fed. 130, *Commercial Acetylene Co. v. Avery Portable Lighting Co.* (C. C.) 152 Fed. 645, and other cases, demurred in part to, and answered the remainder of, the petition; and the matter was heard upon these pleadings and affidavits presented by the parties.

The answer to the petition specifically and positively denies that the suits were instituted, or the circulars and letters sent, for any purpose except the protection of the complainant's rights under its patent, or threats to bring other suits against users or dealers, excepting that two at Akron, Ohio, were so notified, which suits, however, have not been brought, because one of such users had given assurance that he did not in fact use or purpose to use the alleged infringing device, and, against the other, suit has been deferred pending the outcome of suits already pending. Such answer further responds to the allegation of the petition respecting the sending of other threatening letters, and the insertion of an advertisement in the Akron, Ohio, paper by denying specifically that any letters whatsoever had been sent, except those referred to in the petition and those admitted in the answer, and that the advertisement in the paper contained nothing more than a fair and legitimate statement of complainant's claims respecting infringement of its patent.

Upon the hearing, no proofs were introduced to meet the denials and explanations of the complainant's answer to such petition; and the only question for determination is whether the admitted facts will sustain clearly any inference that complainant has been guilty of conduct such as is in general terms charged to it. We assume that complainant is before the court to be dealt with in respect of any conduct disclosing a purpose to harass and annoy the defendant; but the burden rests upon the latter to show that the alleged conduct of the complainant is not reconcilable solely with the purpose of enforcing and protecting its legal rights as a patentee. The pleadings and the proofs, as they now stand in this case, fall short of this in two particulars:

First. The letters set out in the petition, and admitted to have been sent, do not disclose anything inconsistent with the assertion by the complainant of its legal rights, and possibly its duty to notify persons of its claims of infringement. Such letters are unmistakable in their terms, contain no misstatement of fact, and convey to the sendee no information which a patentee is not justified in sending, not only to the trade, but particularly to those whom it conceives to be trespassing upon its rights.

Secondly. For the purpose of this application it must be taken as true that the complainant did not in fact send out letters or circulars other than those specified in its answer; and in this respect, therefore, the claim of the petitioner as to the extent of complainant's conduct in circularizing the trade—and from which would be drawn the inference of a desire to oppress—fails.

The authorities, while recognizing the power of the court to deal with a situation such as that claimed by the defendant, uniformly declare that unfairness and an intentional disposition unnecessarily to

injure another's business are at the foundation of the right, in a suit of this kind, to invoke the protection of the court through an injunction against the complainant. The Circuit Court of Appeals of this circuit has given its views in the following language:

"Undoubtedly one claiming that his patent is being infringed should take steps to advise the public of his rights as provided by statute; provided, however, that if it is made to appear that under the pretense of so doing he is pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious, and he brings himself within the rule of law obtaining in cases of unfair competition in trade, and subject to injunction." Per Kohlsaat, J., *Racine Paper Goods Co. v. Dittgen*, 171 Fed. 631, 96 C. C. A. 433.

As indicated, the case, as it now stands, is not brought within the letter nor the principle of the rule thus stated. The complainant has given an explanation of the institution of suits both at Milwaukee and Chicago, which, in the absence of clear proof to the contrary, justifies its conduct. It has pointed out the necessity of acquiring jurisdiction over all of the defendants, and that this is impossible in a single suit because of the diversity of residence of such defendants. It has met squarely and unequivocally the accusation respecting the malicious sending of threatening letters and circulars, and the defendant petitioner has failed to produce the necessary proof; and it seems to me that, even though the zeal of the complainant may give rise to a suspicion respecting the singleness of its purpose to protect its legal rights, the power of restraining by injunction its right to institute further suits, or to further advise alleged infringers of its rights, should not be exercised, except upon a showing which, as in an original proceeding, is sufficiently clear to justify resolving doubts against the complainant.

For these reasons, and because the necessary proofs are lacking, the application of the defendant will be denied; and an order may be entered accordingly.

ATCHISON, T. & S. F. RY. Co. et al. v. UNITED STATES (INTERSTATE
COMMERCE COMMISSION et al., Interveners).

(Commerce Court. February 26, 1913.)

No. 61.

1. COMMERCE (§ 95*)—INTERSTATE COMMERCE COMMISSION—RATES—COMMERCE
COURT—JURISDICTION.

The Commerce Court cannot consider evidence taken before the Interstate Commerce Commission for the purpose of determining in the first instance whether a particular freight rate is inherently unreasonable; such determination being within the jurisdiction of the Commission as a condition precedent to the exercise of its right to fix reasonable rates for the future.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 145; Dec. Dig. § 95.*]

2. CARRIERS (§ 26*)—INTERSTATE COMMERCE—RATES—DETERMINATION—REASONABLENESS.

An order of the Interstate Commerce Commission establishing a rate of \$1 a hundred on lemons from California to Atlantic Coast points *held* not inherently arbitrary or unreasonable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

3. CARRIERS (§ 26*)—INTERSTATE COMMERCE—RATES—REASONABLENESS.

The fixing of a freight rate by the Interstate Commerce Commission at a sum not exceeding the bare out-of-pocket expense of the service would be arbitrary, unreasonable, and an improper exercise of the Commission's jurisdiction, in the absence of extraordinary circumstances and conditions justifying it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

4. CARRIERS (§ 26*)—INTERSTATE COMMERCE—FREIGHT RATES—REASONABLENESS.

Where an interstate freight rate on lemons fixed by the Interstate Commerce Commission was such as to afford considerably more than the out-of-pocket expense of the service and even exceeded the part of the entire operating costs fairly apportionable to the particular traffic, contributing to some extent to the payment of interest, charges, and dividends, it was neither unreasonable nor arbitrary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

5. CARRIERS (§ 26*)—INTERSTATE COMMERCE—RATES—REASONABLENESS—CONFISCATION.

A rate on a particular commodity fixed by the Interstate Commerce Commission was not objectionable as confiscatory, in violation of the fifth amendment to the federal Constitution, as depriving the carrier of property without due process of law and taking its property without just compensation, on the theory that the carrier was entitled to a rate on each class of articles sufficient to bear the fair proportionate part of the service and some profit in addition thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.*]

Petition by the Atchison, Topeka & Santa Fé Railway Company and others against the United States, and the Interstate Commerce Commission, and the Arlington Heights Fruit Company and others, intervening respondents, to enjoin the enforcement of a rate on lemons from the Pacific to Atlantic Coast points of one dollar a hundred,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as confiscatory. On motion to strike out evidence taken before the Interstate Commerce Commission and on final hearing. Petition dismissed.

For opinion of Interstate Commerce Commission, see 22 Interst. Com. Com'n R. 149.

Winfred T. Denison, Asst. Atty. Gen. (Thurlow M. Gordon, Special Asst. Atty. Gen., on the brief), in support of the motion to strike out evidence.

Robert Dunlap, T. J. Norton, and H. A. Scandrett, all of Chicago, Ill., and C. W. Durbrow, of San Francisco, Cal. (Gardiner Lathrop and F. C. Dillard, both of Chicago, Ill., W. F. Herrin, of San Francisco, Cal., and A. S. Halsted, of Los Angeles, Cal., on the brief), for petitioners.

Blackburn Esterline, Special Asst. Atty. Gen. (Winfred T. Denison, Asst. Atty. Gen., on the brief), for the United States.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Asa F. Call, of Los Angeles, Cal., and Wm. E. Lamb, of Chicago, Ill., for intervening shippers.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Associate Judges.

MACK, Judge. The facts in this case are fully stated in the opinion of this court rendered in *Atchison, Topeka & Santa Fé Railway Co. et al. v. I. C. C.* (Com. C.) 190 Fed. 591, in which the original order of the Commission reducing the car load blanket rate on lemons from California to the Eastern territory from \$1.15 to \$1 per hundred pounds was annulled, because in the judgment of this court it was not based upon a determination by the Commission that the \$1.15 rate was unreasonable, but upon other considerations.

[1] While there had been a full hearing granted by the Commission, and while a great mass of conflicting testimony bearing upon this question had been presented to it and was preserved in the record, it was beyond the province of this court to consider this testimony for the purpose of determining in the first instance whether the \$1.15 rate was inherently unreasonable. Such a determination by the Commission itself is a statutory condition precedent to the exercise of its power to fix reasonable rates for the future. *Atl. Coast Line R. Co. v. I. C. C.* (Com. C.) 194 Fed. 449; *L. & N. Ry. Co. v. I. C. C.* (Com. C.) 195 Fed. 541; *I. C. C. & U. S. v. L. & N. Ry. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. —.

In annulling the order, this court stated that it was without prejudice to a reopening and reconsideration of the original proceedings before the Commission. Thereupon the Commission reopened the proceedings, took some additional testimony, and again reduced the rate to \$1. In the report accompanying the order, it is expressly stated that the \$1.15 rate was inherently unreasonable on transportation considerations alone, irrespective of any question of tariff protection.

The present petition aims to have this order annulled: First, on the ground that the finding of the Commission that the \$1.15 rate was

unreasonable is a mere subterfuge and without evidence to support it; second, that the Commission acted arbitrarily and in disregard of the evidence in fixing the \$1 rate; third, that this rate is confiscatory.

[2] First. The original order was annulled, not because in our judgment the Commission could not have found the \$1.15 rate inherently unreasonable on the evidence before it, but because it had not done so. Inasmuch as there was a very considerable mass of testimony which, if believed by the Commission, would have justified such a finding in the first instance, the condition precedent to the exercise of the power to fix reasonable rates has been met.

Second. The same testimony which in the judgment of the Commission demonstrated the unreasonableness of the \$1.15 rate was amply sufficient to relieve the Commission from any charge of having fixed the \$1 rate arbitrarily in the sense that there was no substantial evidence before it in support of its conclusion. The very history of the lemon rate, the shippers' version of the causes that kept the \$1 rate in force for nearly six years just preceding the change, the relation between it and the orange rate during most of this time, the shorter average haul of lemons as against oranges in the past, which, to some extent at least, would probably continue in the future, were all facts bearing upon the intrinsic reasonableness of the rate and the reasonableness of fixing the lemon lower than the orange rate, especially under an order permitting a higher minimum loading to be enforced for lemons than for oranges, when shipped under ventilation. The weight to be accorded this evidence as against evidence offered by the carriers tending to the conclusion that a \$1 rate would not afford the carrier all the revenue which this particular traffic ought justly to yield and the determination of what would be a reasonable rate were within the exclusive jurisdiction of the Commission and are not subject to our review, unless the Commission, in fixing the rate at \$1, acted arbitrarily or in such an unreasonable manner as to give the petitioners the shadow but not the substance of a conclusion based upon the evidence before it.

[3] If the Commission had professed to fix a rate at not exceeding the bare out-of-pocket expense, it would be the duty of this court in this case, where no such extraordinary circumstances and conditions are shown as might otherwise justify such action, to annul the order, as evidencing an arbitrary and unreasonable exercise of the Commission's power. *Southern Ry. Co. v. St. Louis Hay Co.*, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. 112.

[4] Here, however, it is not only clear that the \$1 rate is very considerably in excess of the mere out-of-pocket expense, but, in the judgment of the Commission, based upon the evidence before it, it even exceeded that part of the entire operating costs fairly to be apportioned to this particular traffic, and thus, in its judgment, contributed, to some extent, to the payment of interest charges and dividends.

That the Commission, in reaching this conclusion, failed to follow the expert evidence offered by the railroads in the matter of proportionate operating cost would not justify this court in annulling the

order, especially as it is concededly impossible to determine with accuracy the fair proportionate cost of transporting any single kind of merchandise.

Indeed, only the clearest evidence that the Commission had completely misconceived the testimony or had willfully disregarded it could sustain the charge of an arbitrary or unreasonable discharge of the statutory and constitutional duties imposed upon it. No such evidence is to be found in this case.

[5] Third. While it is alleged that even under the \$1.15 rate the entire revenues of some of the companies do not reach the minimum to which they are constitutionally entitled, the proof was not directed toward and is entirely inadequate to sustain this charge.

The charge of confiscation, however, is based primarily upon a claim of constitutional right to a rate for each distinct service—that is, for the carriage of each class of articles—which shall not be less than the fair proportionate cost of the service and some profit in addition thereto.

The constitutional protection is afforded by the fifth amendment, in the clause reading:

“Nor shall any person * * * be deprived of * * * property without due process of law; nor shall private property be taken for public use, without just compensation.”

It is unnecessary to determine in this case whether a public service corporation is constitutionally entitled under all circumstances to a rate equal to its out-of-pocket expense (see *St. L. & San Francisco Ry. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Atlantic Coast Line v. N. Car. Corp. Com'n*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398) inasmuch as the \$1 lemon rate is clearly far in excess of such a return.

That relative freight rates have not been based upon the fair proportionate cost or the value of the service alone or in combination is demonstrated by the entire history of freight classification. The carrier cannot complain of a violation of its constitutional rights if, not to favor some person or class, but for the general welfare, it is compelled to make a rate for some particular service which, though in excess of the out-of-pocket expense, would nevertheless be confiscatory if it were applied to all of its freight; that is, the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expenses. *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *St. L. & S. F. R. Co. v. Gill*, supra; *Atl. C. L. v. N. C. Corp. Com'n*, supra.

Even, therefore, if it had been clearly proven that the \$1 rate on lemons, though in excess of the out-of-pocket cost, did not yield its full proportion of the entire operating expenses of the road, no claim of confiscation in the sense of a violation of constitutional right could be based thereon.

In view of the conclusions reached, it is unnecessary to consider the motion of the United States to strike out certain testimony offered in this court.

The petition will be dismissed.

HART v. EMMERSON-BRANTINGHAM CO.

(District Court, E. D. Missouri, N. D. February 10, 1913.)

No. 30.

BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALES.

Where property delivered to a bankrupt under a contract of conditional sale reserving title in the seller until paid for, although not recorded as required by the laws of the state to render it valid as against certain creditors was good between the parties, and prior to the bankruptcy, but within four months, the seller took back the property, it is not recoverable by the bankrupt's trustee under Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438) as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), giving him as to such property "the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied," nor as property preferentially transferred by the bankrupt, since it never became his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

At Law. Action by Charles K. Hart, trustee of John F. Reece, bankrupt, against the Emmerson-Brantingham Company. Judgment for defendant.

Bresnehen & West, of Brookfield, Mo., for plaintiff.

E. S. Ellis and Frank W. Yale, both of Kansas City, Mo., for defendant.

DYER, District Judge. This is a suit brought by Charles K. Hart, trustee of the estate of John F. Reece, bankrupt, as plaintiff, against Emmerson-Brantingham Company, as defendant, seeking to recover certain property, or its value, alleged to have been transferred by the bankrupt to the defendant as a preference under the bankruptcy law.

The evidence shows that, during the years 1909 and 1910, the defendant sold certain farming implements to the bankrupt, pursuant to the terms of written contracts, wherein it was provided that the bankrupt would pay a stipulated price for the goods, would execute notes in settlement of the accounts, and each contract further provided:

"That the title to all goods shipped under this contract is to remain in Emmerson-Brantingham Company, until it shall have received the money for same, and, upon failure to make such payment, Emmerson-Brantingham Company may repossess itself and take away said goods."

The contracts further provided that the notes given thereunder "are not accepted as payment, but as evidence of indebtedness only."

The evidence further shows that the goods sold were delivered by the defendant to the bankrupt and that the bankrupt gave the defendant his notes in settlement therefor as provided in the contract. It is admitted that the contracts of sale in question were never recorded or filed for record. It further appears from the evidence that on November 14, 1911, the defendant held four notes which had been given it by the bankrupt for goods purchased under the contracts before mentioned, aggregating in amount \$675.10, and that the bankrupt then had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

in his possession goods purchased by him under said contracts, aggregating in value \$400, and that on that day the bankrupt delivered the goods on hand to the defendant under the terms of the contracts in full payment of the notes held by the defendant.

The evidence further shows that in December, 1911, an involuntary petition in bankruptcy was filed against the bankrupt, and that thereafter, on January 18, 1912, he was adjudged a bankrupt, and that the plaintiff was afterwards elected, and has duly qualified as his trustee in bankruptcy.

The evidence as to the financial condition of the bankrupt on the date of the transfer complained of is not very clear or satisfactory, but, taken as a whole, the evidence satisfies me that the bankrupt was then insolvent and that defendant's agent, at the time he took the goods here in question, had knowledge of the bankrupt's insolvent condition.

It would seem to admit of no doubt that the contracts for the sale of the goods here in question were, as between the bankrupt and the defendant, valid contracts of conditional sale, and that, as between the parties, the contracts reserved to the defendant title to such goods sold under the contracts as remained in the possession of the bankrupt. *Columbus Buggy Company v. Hord*, 65 Mo. App. 41; *Oester v. Sitlington*, 115 Mo. 247, loc. cit. 255, 21 S. W. 820. It is also clear that independently of the bankrupt law the defendant would have been entitled to reclaim the goods from the bankrupt, and that the defendant's title to the property would have been good, except as against subsequent purchasers or creditors of the bankrupt armed with judicial process. *R. S. Mo. 1909, § 2887*; *Thompson v. Massey*, 76 Mo. App. 197, loc. cit. 204. The authorities also make it plain that prior to the amendments of June 25, 1910, the defendant's title would have been good under the bankrupt law, and that it would have been entitled to reclaim the goods from the trustee in bankruptcy even if they had remained in the possession of the bankrupt up to the time of the adjudication of the bankruptcy. *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Bryant v. Swofford*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; *In re Great Western Manufacturing Co.*, 18 Am. Bankr. Rep. 259, 152 Fed. 123, 81 C. C. A. 341.

It is contended on behalf of the trustee that the defendant's title to the goods was rendered invalid by section 47, cl. 2, of the Bankrupt Act, as amended by the Act of June 25, 1910. The provision in question is as follows:

"Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest; and such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is conceded by the defendant that, if the goods in controversy had remained in the possession of the bankrupt up to the time of the ad-

judication of bankruptcy, the provision of the Bankrupt Act just quoted would have rendered its title invalid as against the trustee, for, in respect of "property in the custody or coming into the custody of the bankruptcy court," the amendment of 1910 confers upon the trustee "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." But, as the property here in question was turned over by the bankrupt to the defendant, before the commencement of the bankruptcy proceeding, and never came into the custody of the bankruptcy court," the provision of section 47, cl. 2, last referred to, is rendered inapplicable to the facts in the case. The trustee is thus constrained to rely on that portion of section 47, cl. 2, which provides that, as to "property not in the custody of the bankruptcy court," the trustee "shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied." It seems reasonably clear that the "rights, remedies and powers" with which the trustee is invested arise, by relation, as of the date of the commencement of the bankruptcy proceeding, or as of the date of the adjudication of bankruptcy, and not as of an earlier date.

We thus come to the ultimate question here presented, namely, has a judgment creditor of a conditional vendee any remedy or right of redress as against the conditional vendor, where such vendor has reclaimed his goods from the vendee pursuant to the terms of the contract of conditional sale, previous to the rendition of the creditor's judgment? While I can find no case decisive of this precise question, a resort to fundamental principles constrains me to conclude that under these circumstances a judgment creditor would be entitled to no redress as against the conditional vendor. In the case here presented, the conditional vendor reclaimed its goods under a title which was superior to that of its conditional vendee, and as, at the time of the transaction, the return of the property was a lawful and valid act as between the parties, and as the rights of no creditor had then attached, it would seem clear upon principle that the transaction cannot be successfully assailed by one who is subsequently vested with the rights of a judgment creditor. *Humphrey v. Tatman*, 14 Am. Bankr. Rep. 74, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; *Thompson v. Fairbanks*, 13 Am. Bankr. Rep. 437, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Johansen Bros. Shoe Co. v. Alles*, 28 Am. Bankr. Rep. 299, 197 Fed. 274, 116 C. C. A. 636; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514. The same considerations lead me to the conclusion that the return of the goods cannot properly be treated as a preferential transfer, for the defendant took back the property under the assertion of a paramount title, and did not take it as a creditor for application upon a debt. The case of *McFarlan Carriage Company v. Wells*, 99 Mo. App. 641, 74 S. W. 878, decided by the Kansas City Court of Appeals, and the case of *Studebaker Brothers Company v. Carriage Co.*, 152 Mo. App. 401, 133 S. W. 412, seem to proceed upon principles at variance with those above stated; but these cases appear to me to be based upon an erroneous construction of the bankrupt act and fail to give effect to controlling decisions construing the act, and hence I do not

feel at liberty to apply to this case the doctrine announced in those cases.

In addition to the reasons already indicated, there is another reason why the plaintiff in this case cannot recover. To entitle him to a judgment, it is incumbent on the plaintiff to both plead and prove that the effect of the transfer complained of was to enable the defendant to obtain a greater percentage of its debt than any other creditor of the bankrupt of the same class. *Swarts v. Fourth National Bank*, 8 Am. Bankr. Rep. 673, 117 Fed. 1, 54 C. C. A. 387; *Painter v. Napoleon Township* (D. C.) 19 Am. Bankr. Rep. 412, 156 Fed. 289. The plaintiff has properly pleaded this essential element of a voidable preference, but no evidence has been submitted to sustain the allegation. The evidence fails to show what assets came into the hands of the trustee, and what creditors are entitled to participate in the distribution, and hence it is impossible to determine whether the return of the defendant's goods has resulted in giving it a greater percentage of its debt than has, or will be, paid to other creditors.

For the reasons stated, I conclude that plaintiff is not entitled to recover. The finding will be against the plaintiff and in favor of the defendant, and judgment will be entered accordingly.

UNITED STATES v. ONE CASE CHEMICAL COMPOUND.

(District Court, S. D. New York. February 10, 1913.)

CUSTOMS DUTIES (§ 133*)—SEIZURE AND SALE OF PROPERTY THROUGH MISTAKE OF FACT—PROCEEDING FOR REVIEW—LACHES.

Where an imported article was seized, forfeited, and sold by the United States for undervaluation, under a mistake of fact which was not known for some years, a delay of five years thereafter is not such laches as should debar the importer from maintaining a libel of review to reclaim the net proceeds of the property, which still remain in the registry of the court, the government having suffered no loss because of the delay.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316-331; Dec. Dig. § 133.*]

At Law. Proceeding by the United States against One Case Chemical Compound imported by George Leuders & Co. March 7, 1899. On libel of review. Decree for claimant.

Hans v. Briesen, of New York City, for George Leuders & Co.
Henry A. Wise, U. S. Atty., of New York City.

RAY, District Judge. March 7, 1899, George Leuders & Co. imported a case of chemical compound. This merchandise was appraised and claimed by the appraisers to have been undervalued. Pursuant to section 7, Act June 10, 1890, c. 407, 26 Stat. 134, as amended by section 32, Act July 24, 1897, c. 11, 30 Stat. 211 (U. S. Comp. St. 1901, p. 1892), the collector of customs of the port of New York seized such merchandise, and proceedings were instituted to forfeit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

same. The importers entered no appearance notwithstanding a monition duly published, etc., and such merchandise was condemned by decree of forfeiture entered June 6, 1899, and sold by the United States marshal July 19, 1899, and the proceeds of such sale, \$117, less expenses, were deposited in the registry of the United States District Court to await distribution, and same remain on deposit. The said merchandise was imported under the name "Citroline," and the increased valuation claimed was based on the allegation that such merchandise was in fact "Ionone," a patented product under letters patent No. 556,943, then owned by Haarmann & Reimer, and which product mainly, if not entirely, by reason of such patent, commanded a much higher price in the market than "Citroline" or other similar products. In 1902 the United States attorney applied for an order of distribution of such money which was opposed by Haarmann & Reimer, and such order was not made, nor does it appear that the application was denied. At that time a suit in equity was pending in the Circuit Court of the United States wherein Haarmann & Reimer were complainants, and said George Leuders & Co. were defendants, for alleged infringement of said letters patent in making, importing, and selling, or importing and selling, the said Citroline, claiming that in fact it was Ionone. This suit came to final hearing, and Citroline was held not to be Ionone, nor an infringement. *Haarmann-De Laire-Schaffer Co. v. Leuders* (C. C.) 145 Fed. 357. Decree was entered in 1906, dismissing the bill for infringement. On this final hearing the United States concedes that "Citroline" is not "Ionone," and, in effect, that the charge of undervaluation was in fact not justified, and therefore that, in fact, the seizure and sale ought not to have been made. The said George Leuders & Co. has since incorporated under the laws of the state of New York, and is now a corporation, and has succeeded to all the rights of said firm of George Leuders & Co. When the government seized the said importation of merchandise, it caused a sample to be taken and an analysis made. The said George Leuders & Co. claim, and it appears, that they were denied access to or an examination of such sample, and it is also alleged:

"That prior to final hearing (in such infringement case) said (government) expert made a further analysis of said sample in order to show that it was the patented 'Ionone,' and in making said analysis the entire quantity of 'Citroline' was consumed, wherefore, the members of the firm of George Leuders & Co. did not know, prior to the decision in the patent case, in 1906, whether as a fact the said importation and shipment was or was not the patented article."

This is not denied or was admitted on the final hearing. It follows that in justice and equity as between George Leuders & Co. and the United States the money, proceeds of such sale, belongs to the former, the importer, and not to the United States.

There has been no concealment of the fact that the balance of the proceeds of such sale made in July, 1899, has remained on deposit in court. If such proceeds had been paid into the treasury of the United States, the said George Leuders & Co. could have applied to the Treasurer of the United States for a refund thereof based on the decisions in such equity (patent) case, but no application was made there. As

there has been no concealment of the fact that the money remained in the Registry of the United States court, this fact could have been ascertained on inquiry by George Leuders & Co. at any time since 1906, the date of the decision in the patent suit. No excuse for not making inquiry is offered, except that it was presumed and assumed the money had been paid over to the Treasury Department of the United States, and mingled with the other moneys of the United States. But the remedy in such case was not availed of, showing a purpose not to apply to the treasury of the United States for a refund. It is quite probable that such an application would have involved expense much in excess of the money involved, \$117.

The United States claims that there has been such laches in the matter, since 1906, especially, that the relief now prayed for, by opening and examining into the matter, ought to be denied, not particularly on account of the sum involved, which is of little account, but as a matter of precedent. As the money still remains with the register of this court, and is in the possession of the court, I have no doubt of the power of the court to grant the relief prayed. Again, the said application to the court to distribute the money has never been passed upon.

However, should the relief asked be granted? Notice of motion for leave to file this bill or libel of review was served September 8, 1911, and leave was granted September 8, 1911, by Judge Hough, and the bill was filed October 16, 1911.

I do not think Judge Hough necessarily adjudged that the delay since 1906 is not an equitable defense, but still his allowance of the bill or libel of review indicates that in his opinion the merits should be inquired into. The United States has neither lost any right by reason of the delay, nor has it in any respect changed its position. The government at any time since 1906 might have moved for an order of distribution or renewed the old motion, but failed to do so until 1911. But on this branch of the case it may be said that the United States had the money and held it properly under the decree and sale of 1899, and that it was incumbent on George Leuders & Co., if it would claim the money and seek to open that decree, to move and move promptly. Laches is always a good defense, and may be invoked as a bar when the party invoking it cannot be put in the same position he would have occupied but for such laches, has changed his position, or lost evidence, etc. Here the parties, so far as appears, are in the same situation they were in 1906, and the alleged laches has prejudiced no one unless it be George Leuders & Co., which corporation has lost the use of the money.

"Strictly speaking, laches implies something more than lapse of time; it requires some actual or presumable change of circumstances rendering it inequitable to grant relief." 16 Cyc. L. & P. 152; *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640; *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. 354, 46 L. Ed. 636. In the *Merrill Case*, *supra*, the court said:

"Less than two years having elapsed from the payment of the first dividend to the filing of this bill, and the other creditors of the bank not having been

harmed by the delay, no presumption of laches is raised, nor can an estoppel properly be held to have arisen."

In *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 59, 30 C. C. A. 520, 528, the Circuit Court of Appeals in this circuit, Wallace, Lacombe, and Shipman, held:

"The defense of laches is not a mere matter of time, like limitation, but is a question of the inequity of enforcing the claim"—citing *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738.

The same rule is declared in *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794.

Here the money, the residue of the proceeds of the property seized and sold by the United States for its own benefit and in the enforcement of its own laws, has not changed hands. No right of third persons has intervened, and no wrong can be done to any one by turning over such proceeds of such sale to the *George Leuders & Co.* The United States suffers nothing. The sale is not interfered with. The purchaser retains his property, and the expenses of the seizure and sale were long since paid from the proceeds, and all the importer asks is that the remainder of such proceeds be turned over to it and not retained by the government as the seizure and sale were made under a mistake of fact, viz., that "Citroline" was the same as "Ionone," and therefore undervalued, when in fact it was not. I am of the opinion that no dangerous or troublesome precedent will be established by granting the relief prayed for. In this case no fraud was practiced by any one but the decree of 1899, which authorized the seizure and sale, proceeded on a mistake of fact, which it was impossible or impracticable for the importer to show at that time, and I do not think relief should now be denied for the reason the importer, *George Leuders & Co.*, did not then go to the great expense of showing that that particular "Citroline" was not "Ionone," which would have involved the taking of testimony abroad, and an analysis of this particular shipment which it was impossible for *George Leuders & Co.* to make, as the government had seized and retained the entire importation. A similar state of facts will rarely arise. I think, therefore, that there should be a decree in so far vacating and setting aside the decree of June 6, 1899, as to permit the insertion therein of a provision directing the clerk of the United States District Court of the Southern District of New York to pay over to *George Leuders & Co.* the proceeds of the sale referred to now remaining on deposit in this court, less lawful commissions.

There will be a decree accordingly.

In re ROSETT et al.

(District Court, S. D. New York. February 6, 1913.)

BANKS AND BANKING (§ 15*)—PRIVATE BANKER—SECURITIES—DEPOSIT—PERSONS ENTITLED TO BENEFIT.

New York General Business Law (Laws 1911, c. 393), § 25, declares that, except as provided in section 29d, no individual or partnership shall receive deposits for safe-keeping or transmission without first having obtained a license from the Comptroller, and that such license shall not authorize transaction of business at any place other than that described in the certificate except with the written approval of the Comptroller. Section 29d provides that the foregoing provisions shall not apply to any individual or partnership who would otherwise be required to file a bond in the sum of \$100,000 with the Comptroller, where the business is conducted in a city having a population of one million or over, etc. *Held*, that where the bankrupt transacted business of a private banker at its principal office in New York City, and maintained branch banks in New Jersey, Pennsylvania, and Ohio, the branches were each subject to the laws of the particular state in which they were located and not to the laws of New York, and hence only New York depositors were solely entitled to the \$100,000 deposited with the Comptroller in New York.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 12-17; Dec. Dig. § 15.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Morris Rosett and Max Rosett individually and composing the firm of M. Rosett. On review of referee's order providing for distribution of a fund deposited by the bankrupts with the Comptroller of the state of New York and denying a motion for declaration of a dividend. Reversed.

Samuel Hoffman, of New York City (Archibald Palmer and Alexander I. Hahn, both of New York City, of counsel), for petitioners.

Thomas Carmody, Atty. Gen., of the State of New York, John J. Dwyer, Deputy Atty. Gen., and Olcott, Gruber, Bonyng & McManus, of New York City (Irving L. Ernst, of New York City, of counsel), for trustee.

HOLT, District Judge. This is a petition to review an order of a referee in bankruptcy, holding that all the creditors of the bankrupts who had deposited money with them for safe-keeping or transmission to others were entitled to share in a fund of \$100,000 deposited by the bankrupts with the Comptroller of the state of New York, and denying a motion that a dividend be declared.

The bankrupts were private bankers, doing business under the style of M. Rosett. Their principal business office was at 197 Stanton street, New York. They also had offices or so-called branch banks at Perth Amboy and Jersey City, N. J., Wilkes-Barre, Pennsylvania, and Youngstown, Ohio. They also had an office at 114 Liberty street, New York, where a set of books was kept. At the end of each day a statement of the day's business at each branch office was sent to the office at 114 Liberty street, New York, and complete accounts kept

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there of the entire business. At each office outside of New York, as often as the money on hand exceeded \$1,500, the surplus was sent to the firm at New York. If any amount was demanded by depositors at such outside offices in excess of the amount on hand, it was sent there from New York.

On September 16, 1910, the bankrupts deposited with the Comptroller of the state of New York New York city bonds of the value of \$100,000, pursuant to the provisions of the General Business Law of New York in relation to private banking. By section 25 of that act (Laws 1911, c. 393) it is provided that, except as provided in section 29d, no individual or partnership shall engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another without first having obtained from the Comptroller a license to engage in such business. The same section provides that such license shall not authorize the transaction of business at any place other than that described in the license certificate, except with the written approval of the Comptroller. The licensee is required to cause such license certificate to be posted and conspicuously displayed in the place of business for which it is issued, and makes it unlawful to post it upon other premises. The same section further provides for depositing a bond varying in amount according to the amount of business done from \$5,000 to \$50,000, or equivalent money or securities with the Comptroller, and that:

"The money and securities deposited with the Comptroller as herein provided and the money which in case of default shall be paid on the aforesaid bond by any applicant or the surety thereof, shall constitute a trust fund for the benefit of the depositors of the licensee and of such persons as shall deliver money to such licensee for transmission to another, and such beneficiaries shall be entitled to an absolute preference as to such money or securities over all general creditors of the licensee."

Section 29d provides as follows:

"The foregoing provisions shall not apply * * * to any individual or partnership who would otherwise be required to comply with section twenty-five of this article who shall file with the Comptroller a bond in the sum of one hundred thousand dollars, approved by the Comptroller as to form and sufficiency, for the purpose and conditioned as in said section prescribed, where the business is conducted in a city having a population of one million or over and if conducted elsewhere in the state such bond shall be in the sum of fifty thousand dollars; or in lieu thereof money or securities approved by the Comptroller of the same amount. The provisions of section twenty-nine *a* shall be applicable to such bond, or deposit of money or securities."

Under this last provision the bankrupts deposited \$100,000 in bonds with the Comptroller. The Comptroller has turned the bonds over to the trustee in bankruptcy, who holds their proceeds for distribution. Certain New York creditors claim that the fund should be distributed among those persons who deposited money for safe-keeping or transmission in New York, and that the creditors who deposited moneys for such purpose in New Jersey, Pennsylvania, and Ohio are not entitled to share in such fund. The Attorney General of New York has appeared and filed a brief in support of this claim. The referee held that the fund should be distributed ratably among all

such creditors without regard to the question whether their deposits were made in New York or in New Jersey, Pennsylvania, and Ohio.

The question involved is not free from difficulty. The fact that most of the deposits made at the branch banks were immediately sent to the bankrupts at New York seems, at first view, to create a strong equity in favor of the depositors in the branch banks. It is claimed that the \$100,000 deposited with the Comptroller was derived in whole or in part from such remittances, but in my opinion the evidence on that question is not sufficient to determine what the fact is in that respect. The depositors in the branch banks generally knew that they were branches of the New York house. The bankrupts advertised in a Jewish almanac, which was circulated to some extent in the places where the branch banks were located, that they had deposited \$100,000 with the Comptroller of New York to secure their depositors, and it seems probable that some at least of the depositors in the branch banks knew of the \$100,000 deposited with the Comptroller, and that that fact influenced them in depositing in the branch banks.

On the other hand, these so-called branch banks were, as to the public at least, separate businesses. The bankrupts simply did business as private bankers in five places. Each of those businesses was governed by the law of the state in which it was carried on. A license was required by the law of New Jersey and was taken out there. No bond or security was required there. The law of New Jersey required that the bank examiner should be satisfied that a private banker's assets exceeded his liabilities by \$20,000. The examiner, after an investigation, became satisfied that the bankrupts were worth \$20,000 over their liabilities, and issued a license to them. In Pennsylvania no law required any license or security from a person engaging in the business of a private banker. In Ohio the law required a bond for \$5,000. That bond was given, and an Ohio license obtained by the bankrupts. They were thereupon authorized to do business in New Jersey, Pennsylvania, and Ohio by the laws of those states, respectively. They had no authority to do business in those states by the law of New York. If the state of New York had undertaken to grant them authority to do business in those states, such grant would have been nugatory. In fact, the entire law of New York concerning private bankers seems to me to indicate only a purpose to protect persons living or doing business in this state, over whom alone it could rightfully exercise jurisdiction. The law requires a license; that the license certificate state the place of business; that no private banking business shall be transacted in any other place; that the license is to be conspicuously posted in such place of business and nowhere else; and that the money or securities deposited or collected under the bond given shall be a trust fund for the depositors of the licensee. If the bankrupts had applied to have inserted in the license as their place of business Jersey City, or Wilkes-Barre, or Youngstown, the Comptroller would have refused, of course, to do so. If they had posted their license from New York in one of their branch offices in another state, they would have violated the law under which it was issued.

The depositors of the licensee for whose benefit the money deposited is a trust fund are those depositors whom it was the duty of the state which issued the license to protect, and not depositors in other states whom it had no authority to protect. So the provision of section 29d, exempting bankers who deposit \$100,000 from the other provisions of the act, point only to a business done in the state of New York. The bond is to be \$100,000, "where the business is conducted in a city having a population of one million or over, and if conducted elsewhere in the state such bond shall be in the sum of fifty thousand dollars, or in lieu thereof money or securities approved by the Comptroller." It is impossible, in my opinion, that these provisions can apply to a business done in any city of less than 1,000,000 population outside of the state.

Aside from any close verbal scrutiny of the statute, it seems to me that on general principles the result is the same. Each state exercises authority over and owes a duty of protection to those within its jurisdiction. It can exercise no such authority, and it owes no such duty to those without its jurisdiction. Those persons who did business with the bankrupts in New Jersey, Pennsylvania, and Ohio must look to the law of those states for their protection. In my opinion the New York creditors are not protected by the \$5,000 bond given in Ohio, at least as long as there are creditors in Ohio; and the Ohio creditors are not protected by the money deposited with the New York Comptroller, so long as there are creditors in New York.

The question whether a dividend to all general creditors should be now declared depends on the provisions of section 65 of the Bankruptcy Act. The \$100,000 fund should be distributed to the New York depositors without further delay. If no dividend has been declared, and there is a large enough amount on hand to pay a dividend of 5 per cent., or if there has been a dividend and there is enough to pay a dividend of 10 per cent., it should be declared without waiting for a sale of the real estate.

My conclusion is that the \$100,000 fund should be distributed among the New York depositors, and that a dividend should be paid at once if there are sufficient funds to do so in conformity with section 65 of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]).

BROWN et al. v. FLETCHER.

(District Court, S. D. New York. December 20, 1912.)

1. JUDGMENT (§ 656*)—DEFENSES PREVIOUSLY DETERMINED—DECISION ON DEMURRER.

Defenses pleaded in an answer which were in substance determined adversely to defendant on a demurrer to the bill will not be again considered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1167; Dec. Dig. § 656.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. JUDGMENT (§ 683*)—JUDGMENT AS BAR—PERSONS BOUND.

A judgment adjudging an assignment of a claim to be void is not binding on a second assignee, whose assignment was prior to the judgment, but who was not made a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. § 683.*]

3. APPEARANCE (§ 19*)—GENERAL APPEARANCE—JURISDICTION OF PERSON ACQUIRED.

In a proceeding in a Surrogate's Court in New York by a testamentary trustee for a decree determining whether he should pay a legacy to the legatee named or to assignees of the same, where the assignees, who were nonresidents of the state, were made parties and appeared generally and attempted unsuccessfully to obtain a removal of the cause, such appearance gave the court jurisdiction over their persons, rendering its decree binding on them.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-82, 84-90; Dec. Dig. § 19.*]

In Equity. Suit by John A. S. Brown and Frank E. Schermerhorn, as trustee under the will of Thomas Cunningham, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the will of Conrad Braker, Jr., deceased. Decree for defendant.

Frederic W. Frost, of New York City (Charles H. Burr, of Philadelphia, Pa., of counsel), for complainants.

William P. S. Melvin, of New York City, for defendant.

HOLT, District Judge. [1] This is a suit in equity to recover \$10,000 held by the defendant as testamentary trustee under a trust which directed the payment of that amount to Conrad Morris Braker upon his attaining a certain age, which he has already reached. The complainants allege in the bill that they are entitled to receive such legacy by virtue of certain assignments, one by Braker to Rabe, another by Rabe to the New York Finance Company, and another by the New York Finance Company to the complainants. The defendant originally demurred to the bill upon a number of grounds. The demurrer was heard before Judge Hand, who overruled it. In my opinion the defenses pleaded in the answer, which were passed upon in the decision of the demurrer, should be held to have been determined by that decision. The evidence taken upon final hearing does not present any different questions in regard to such grounds of defense from those which appeared on the face of the bill, and under those circumstances the presentation of those questions to be litigated again upon the final hearing simply amounts to trying the same question over before another judge.

[2] The answer pleads as a defense a judgment recovered in an action brought in the New York Supreme Court by Conrad Morris Braker against the New York Finance Company, Rabe, and the defendant, holding that the assignments from Braker to Rabe and from Rabe to the New York Finance Company were usurious and void. The pendency of such action was one of the grounds of demurrer, but at the time the demurrer was interposed no judgment had been ren-

dered. The effect of that judgment therefore was not passed upon in the decision upon the demurrer. I think that that judgment in the New York Supreme Court is immaterial in this case because the complainants Brown and Schermerhorn were not made parties to that action, and are not bound by the judgment rendered in it.

[3] The principal defense relied on is the claim that a decree of the surrogate of New York county that the defendant pay the money in his hands to Braker, rendered in a proceeding brought by the defendant in that court for an accounting in respect to his liability for the said \$10,000, is a bar to the complainant's recovery in this case. After this suit was brought, the defendant instituted the proceeding in the Surrogate's Court for an accounting, and in his petition joined as parties the complainants in this suit, among others. The pendency of a suit in a federal court is not a bar to a suit brought in a state court between the same parties involving the same issues. But if two suits are pending, one in a federal court and one in a state court, between the same parties, and involving the same issues, and a judgment is recovered in one of them, such a judgment is *res adjudicata* upon the issues raised in the other suit. In this case, therefore, the judgment in the Surrogate's Court, to the effect that the fund in question should be paid by the trustee to Braker, is a bar to the claim in this suit that the fund in question should be paid to the complainants Brown and Schermerhorn, if the Surrogate had jurisdiction to render the decree in the Surrogate's Court. The complainants claim that he had no such jurisdiction. The complainants are nonresidents of this state, and could not be served personally within this county. The cause of action in the proceedings in the Surrogate's Court related to a fund situated in this county, and was an action in *rem*. Substituted service on nonresidents of New York was therefore authorized by the New York Code of Procedure. Section 2524 of that Code provides that service of a citation by publication shall be made by publication of the citation in two newspapers, or at the option of the petitioner, by delivering a copy of the citation without the state to each person named in it in person, and that the order must also contain a direction that on or before the date of the first publication the petitioner deposit in a specified post office a copy of the citation, and of the order, contained in a securely closed postpaid wrapper, directed to the person to be served, at a place specified in the order. Such an order was made. The proof shows that, after the order of publication for substituted service was made, the citation was personally served upon Brown and Schermerhorn outside the state, but there is no proof that copies of the citations were sent to them by mail; and it is claimed, therefore, that the Surrogate's Court obtained no jurisdiction. This objection is highly technical, and is, in my opinion, of doubtful validity under the New York authorities (*Kennedy v. Arthur* [Sup.] 11 N. Y. Supp. 661; *Matter of Field*, 131 N. Y. 184, 30 N. E. 48; *Sabin v. Kendrick*, 2 App. Div. 96, 37 N. Y. Supp. 524), although undoubtedly the general rule is that the provisions of a statute authorizing service by publication must be strictly complied with in all essential respects. But whether jurisdiction over Brown and Schermerhorn was originally

obtained by service of the citation seems immaterial. They subsequently appeared in the Surrogate's Court, served a general notice of appearance, and filed a petition to remove the controversy, as between the complainants and the defendant, to this court. Such removal was ordered, but subsequently, on motion, this court remanded the case to the Surrogate's Court. In my opinion the general appearance of the complainants in the Surrogate's Court, although it may have been entered solely for the purpose of obtaining the removal of the case to the federal court, conferred jurisdiction upon the Surrogate's Court over the complainants, and authorized it, after the proceedings were remanded, to proceed to a decree which would bind them.

The complainants further claim that the Surrogate's Court had no jurisdiction to render a decree on the ground that it was represented to that court that the complainants had not appeared in that court, and that the surrogate entered the decree in reliance on that representation. Whatever the fact may be in that respect, such a representation, if made, in my opinion, did not destroy the jurisdiction of the Surrogate's Court. After the complainants had appeared generally in that court, that court had jurisdiction both of the subject-matter and of the persons of the complainants. If there is any ground on which that decree should be vacated and the complainants given a hearing, an application should be made to the Surrogate's Court for that purpose; but that court having rendered a decree, after it had obtained jurisdiction of the person and the subject-matter, I think that its decree is conclusive upon the complainants until set aside by that court, or reversed upon appeal. The claim that the decree entered is not final because a motion to open it has been made seems to me untenable. The decree has been entered, and has not yet been vacated. Even if it should be vacated, I think that the Surrogate's Court, having once entered its decree, will continue thereafter in sole control of the litigation.

My conclusion therefore is that the bill in this suit should be dismissed, with costs.

THE YANKEE.

THE HUGL.

(District Court, D. Rhode Island. February 19, 1913.)

Admiralty, No. 286.

COLLISION (§ 105*)—MOTOR AND SAILING BOATS MEETING—NEGLIGENT NAVIGATION.

A collision in the bay at Fall River at the time of a yacht race between the motor launch *Yankee* and the small sloop *Hugl*, approaching on converging courses, *held*, on conflicting evidence, due solely to the fault of the *Yankee*, which was going at much higher speed, and failed to keep out of the way of the sailing vessel as she might have done with proper attention, while the *Hugl* kept her course and speed until in extremis.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit for collision by Arthur P. Brayton, owner of the sloop Hugi, against the launch Yankee, Robert F. Chambers, claimant, and cross-libel. Decree against the Yankee.

Green, Hinckley & Allen, of Providence, R. I., for libelant.
Blodgett, Jones & Burnham, of Boston, Mass, for claimant.

BROWN, District Judge. These are cross-libels for a collision between the gasoline launch Yankee, 33 feet over all, 50 horse power, and the sloop Hugi, an 18-foot knockabout, in Mt. Hope Bay near Fall River, on the afternoon of August 22, 1912, when there was a yacht race in the bay.

The launch struck bow on about the middle of the port side of the sloop, breaking her planks, so that she sank in a few minutes in about 40 feet of water.

The sworn cross-libel of the owner of the launch Yankee alleges that her owner was navigating the said launch Yankee at a moderate speed across the harbor at Fall River, Mass., toward the yacht club float at the Enterprise Dock, so called, with a clear course ahead, and saw the sloop Hugi sailing close-hauled on the port tack about 100 yards distant, and approaching on a line nearly parallel to and about 50 feet to the northward of the course of the launch. When about 100 from the launch, the Hugi changed her course to port, and the claimant, in order to keep out of her way, immediately changed his course so as to pass under her stern. Almost immediately thereafter the Hugi suddenly changed her course to starboard, and thereupon the claimant immediately threw out his clutch and reversed his engine; but was unable to prevent his boat from striking said yacht Hugi at about amidships on the port side, well under the bilge.

Among other particulars the Hugi is charged with fault "in not holding her course and speed, as required by law." At the trial, however, the owner of the Yankee gave evidence materially different from the sworn statements of the libel, and to the effect that he had been out to a stake boat, and was returning in a circle and then in a straight line toward the clubhouse; that he changed his course to port while the Hugi was on her starboard tack; that the Hugi came about some 50 feet, or a length and a half away, too late for him to avoid her; that he immediately put his helm over to starboard; that his helm and boat went the same way; that his reverse was on, and his propeller slack just before the Hugi bore away. He also stated that he was going 8 miles an hour, and at that speed could stop in 100 feet; that the best speed of the Yankee was $22\frac{1}{2}$ miles.

Upon the brief for the Yankee it is insisted that the Hugi changed her course, in violation of article 21 of the Inland Rules, misleading the Yankee. It is also contended that the Yankee was not at fault for holding her speed until the Hugi came about on the port tack just prior to the collision.

The inconsistency between the testimony that the Hugi came about on the port tack when but 50 feet away and the statement of the libel that she was seen close-hauled on the port tack about 100 yards distant is apparent, and is unexplained.

The witnesses for the Yankee differ very materially. Fulford, who was on the Bat, a sloop of the same class as the Hugi, states that he saw the Hugi on the starboard tack and saw her change to go upon the port tack, but did not see her fill away so that she was on the port tack.

Chase, who was on the Idler, saw the Hugi on the starboard tack, saw her come about, and says that as she came about Wood, who was sailing her, stooped to look under the boom, looked across in the opposite direction from the Yankee, and was looking there at the time of collision; that the Hugi had sailed possibly 100 feet on the port tack before the collision; that the Hugi's sails filled, but she did not change her course until she bore away just before the collision. He thinks the witness Fulford was mistaken. He says the Yankee swung to starboard, and had retarded speed before the collision. He also stated that the Yankee went across the Idler's bow, and that the Idler's boom overhung the Yankee.

Charlton, who was on a power boat at the dock, says that the Hugi came about directly in the path of the Yankee; that the Hugi was 10 or 12 seconds on the port tack; that she did not change her course; that the wind knocked her down; that her sail was on her port side, and that the Yankee swung to port while the Hugi was on the starboard tack.

Gagnon, who was on the wharf, thinks that the Hugi was struck just as she came about.

The evidence for the Hugi is much more consistent, and it seems to me much more reliable, especially as it is in substantial agreement with the allegation of the cross-libel that the Hugi was close-hauled on the port tack when the launch was still about 100 yards distant. Wood, who was sailing her, testifies that she was on the port tack for 350 to 400 feet, and did not change her course until at the last instant he bore away to save the boat; that he paid particular attention to the Yankee which was coming at the rate of 12 to 15 miles while the Hugi was going at the rate of 4 or 5 miles.

Brayton, owner of the Hugi, says that she was one or two minutes on the port tack before the collision, did not change her course or speed, did not come into the wind, and bore away to save the boat.

Zuill, who was tending main sheet on the Hugi, says that she was on the port tack for at least 375 feet, and that the Yankee did not take a shoot into the wind.

Webster says that the Hugi was a minute on the port tack before collision, and had sailed 400 feet more or less, and did not change course or speed until she bore away two or three seconds before the collision. He testifies that Wood noticed the Yankee, and said, "I wonder what that fellow is going to do;" that the Yankee was 100 feet away when Wood made his remark; that the Hugi did not make a hitch before bearing away; and that when he saw the Yankee she was a little on the port bow, and the courses were converging. He estimates the speed of the Hugi at 4 or 5 miles, and that of the Yankee at 12 to 15 miles.

Rich, who was on the veranda of the clubhouse, saw the Hugi come about, and says that she was on the port tack and sailed 50 or 75 feet before the Yankee came into his view. She then sailed 150 feet; that the Yankee was about 50 feet away when the Hugi bore away; that he then remarked, "There is going to be a collision, and nothing can stop it;" that the Hugi did not change her course, but her sails remained filled.

Weaver, who was on Nimbus III, of the same class as the Hugi, and was following the Hugi on the starboard tack, says that the Hugi came about on the port tack, and that her sails did not afterwards shake. He estimates that she sailed 200 or more feet on this tack before the collision.

Upon the whole evidence, I find that the Hugi was close-hauled on the port tack, and had established her course when the launch was about 100 yards away, and did not change her course until she bore away in extremis, which was not a fault; that the Yankee might have avoided her by promptly keeping off to starboard, but that she held on too long without making a proper effort to give the Hugi a safe margin. According to the statements of her libel, nothing was done to reduce speed or to keep out of the way until after the Hugi was within 100 feet.

There is also evidence that the Yankee was close-shaving in the testimony that she ran across the bow of the Idler so close that she passed under her boom.

The contention that the Hugi was negligent in coming about so close under the Yankee's bow that she could not be avoided is not established by the evidence, and such a charge is not made in the cross-libel.

I find the Yankee alone at fault for the collision.

The libelant proves expenditures on repairs, etc., to the Hugi to the amount of \$158.14, and damages to personal effects which I estimate at \$30. There is also opinion evidence of depreciation of value due to replacing of her original planking, though it is admitted that her speed is not affected. Though such damage is proved by several witnesses, the extent of it is largely conjectural, but will probably not exceed \$50, which amount is allowed.

A draft decree may be presented for the libelant for \$238.14 damages, and costs to be taxed.

A draft decree may also be presented dismissing the cross-libel.

THE LEWIS LUCKENBACH.

(District Court, S. D. New York. August 23, 1912.)

INDEMNITY (§ 13*)—JOINT WRONGDOERS—DEFENSES—CONDITIONS PRECEDENT.

Libelant chartered a steamship from respondent, which was to deliver the vessel completely fitted for service, and pay and provision the officers and crew, while libelant was to load and discharge. One of the stevedores employed by libelant in loading was injured by the giving way of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a strongback crossing a hatch by reason of a defective fastening. He brought an action in a state court against both charterer and owner which libellant settled for \$5,000, receiving a general release, while respondent settled for \$1,000, receiving a similar release. *Held* that, conceding the right of libellant to recover contribution from respondent in a proper case, it could not do so without having given respondent notice before settlement and an opportunity to contest libellant's liability in the original action.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

In Admiralty. Suit by the American-Hawaiian Steamship Company against the steamship Lewis Luckenbach. Decree for respondent.

Burlingham, Montgomery & Beecher, of New York City (Everett Masten, of New York City, of counsel), for libellant.

Peter S. Carter, of New York City, for claimants.

HOLT, District Judge. This suit was brought by the charterer of the steamship Lewis Luckenbach to recover from the steamship an amount paid by the libellant in settlement of a suit. Under the charter party, the owners were to deliver the vessel completely fitted for service with a full complement of officers and crew. The owners were to pay wages, and furnish provisions for officers and crew. The charterer took charge of loading and discharging the vessel, and employed the stevedores for that purpose. The work of taking off and putting on the hatches, as required from time to time in loading and discharging, properly fell upon the stevedores employed by the charterer. On February 26, 1908, Erdman Borst, one of the stevedores employed by the libellant, while seated upon one of the strongbacks crossing the hatch, for the purpose of assisting in removing the fore and after pieces passing from the strongback to the side of the hatch, was injured by reason of the strongback upon which he was sitting falling into the hold. The evidence satisfies me that the strongback fell because one of the sockets or recesses on the side of the hatch which supported it had become badly rusted, and out of order, and that the weight of Borst upon the strongback while engaged in the work caused the strongback to slip down through the socket which should have held it. I think the evidence also shows that this condition had lasted for a considerable time, and should have been discovered by proper inspection. The result is claimed to be that not only the owners of the ship, who were bound to keep the socket upon which the strongback rested in proper order, and also the charterer, which was bound to furnish Borst, its employé, a safe place to work, and which it is asserted neglected by adequate inspection to discover and cause to be removed the defect in the support of the strongback, were jointly guilty of negligence which caused the injury. The fall of Borst broke his leg in several places, and ultimately made necessary the amputation of one of his legs above the knee. He brought a suit in the New York Supreme Court against both the libellant, the American-Hawaiian Steamship Company, and the owners of the Luckenbach. The libellant suggested to the owners of the Luckenbach to make a joint settlement,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each contributing, which the owners of the Luckenbach refused to do. Thereafter the libelant paid to Borst \$5,000 in settlement of its liability, and received from Borst a general release. About the same time the owners of the steamer paid to Borst \$1,000 in settlement of their liability, and received from Borst a general release. This suit is now brought by the charterer against the steamer. The claim in the libel is to recover the \$5,000 paid by the libelant, on the theory that the accident was due entirely to respondent's negligence.

I cannot see on what legal theory, if the accident was due solely to the respondent's negligence, the libelant can claim to recover from the respondent the amount which the libelant paid in settlement of an unfounded claim against the libelant. The counsel for the libelant now claims, however, that both the charterer and the owners of the steamer were negligent, and that this suit may be treated as a suit for contribution, citing *The Ira M. Hedges*, 218 U. S. 264, 31 Sup. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas 1235. In that case a collision occurred between a car float, towed by the tug Slatington, and a scow towed by the tug *Ira M. Hedges*. The court held that both the tugs were in fault for the collision. The owner of the scow brought an action at common law in the state court against the owners of the Slatington, without joining the owner of the *Ira M. Hedges*, and recovered a judgment against the owner of the Slatington. This judgment was paid, and thereupon the owner of the Slatington filed a libel against the *Ira M. Hedges* to recover the amount paid on the judgment. An exception to the jurisdiction of the court was filed, which was sustained by the district judge on the ground that a court of admiralty had no jurisdiction in such a case; the original judgment having been recovered and collected in the state court at common law, under which there is no contribution between wrongdoers. The Supreme Court held that the suit could be treated as a suit for contribution, and reversed the decision of the District Court, holding that the action might be maintained on the theory of a suit for contribution in admiralty under the law by which contribution is permitted between tort-feasors in admiralty. In that case, as in the case at bar, there was nothing in the libel to indicate that it was a suit for contribution. The demand in both cases was to recover the entire amount paid, but, as the Supreme Court held in the *Hedges* Case that the suit could be treated as one for contribution, I think this case may be treated in the same way. The decision, however, in the *Hedges* Case was simply a decision upon pleadings, and simply held that a cause of action was stated, and the Supreme Court states in the opinion:

"No doubt it would have been a prudent course for the appellant to give notice to the owner of the *Ira M. Hedges* to take part in the defense, with a view to its possible ultimate liability. Whether a failure to do so would affect its rights is not before us to decide."

Upon principle, I cannot see how the libelant in this case can hold the respondent for any part of the amount which the libelant paid, without having given the respondent notice that it proposed to settle, and offering to the respondent an opportunity to come in and contest the liability of the libelant to Borst in the state suit. The libelant paid

\$5,000 to Borst, and obtained a full release from him. The respondent paid \$1,000 to Borst, and obtained a full release from him. If the libellant proposed to hold the respondent for any part of the \$5,000 which it paid in settlement, on the theory of contribution, it seems to me that it should have given the respondent an opportunity to contest the liability of the libellant to pay that or any other sum. In the first place, the liability of the libellant at all is in my opinion not beyond controversy. The primary duty to keep the steamer in good condition was by the terms of the charter on the owners. Moreover, the question arises whether, if the libellant and respondent are to be regarded as joint tort-feasors, a greater liability might not justly have been imposed upon the owners of the steamer for the accident which occurred than upon the charterer, who presumably had nothing to do with keeping the ship in order. Moreover, the defendant urges that Borst was negligent in being upon the strongback at all, and that his fall was caused by the negligence of his fellow servants who were engaged in taking out the fore and after pieces. All these questions the respondent had a right to litigate in the state court if it saw fit. It had a right to assume, upon payment of \$1,000 and obtaining a general release from Borst, that its liability was at an end, and under all the circumstances of the case I do not think that the libellant has established a right to compel the respondent to reimburse it for a large payment voluntarily made in settlement without notice to the respondent or an opportunity afforded the respondent to litigate the necessity of such payment.

The libel is dismissed, with costs.

In re ZITRON.

(District Court, E. D. Wisconsin. February 8, 1913.)

1. INSURANCE (§ 580*)—RIGHT TO PROCEEDS—MORTGAGEE.

A contract by a mortgagor or purchaser under a conditional sale contract to provide insurance as additional security, although he has violated it by taking the insurance in his own name, will be given effect in equity through a lien against the proceeds of the insurance after a loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1439-1443; Dec. Dig. § 580.*]

2. BANKRUPTCY (§ 143*)—PROPERTY PASSING TO TRUSTEE—PROCEEDS OF INSURANCE—CONDITIONAL SALE CONTRACT.

Where a contract of conditional sale, which, although not filed as required by statute, was valid between the parties, required the purchaser to insure the property for the benefit of the seller, but he insured it in his own name, and it was destroyed by fire within four months prior to his bankruptcy, not having been paid for, the seller became at once equitably entitled to the insurance proceeds, and his right thereto was not affected by the subsequent bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

3. BANKRUPTCY (§ 188*)—LIEN—WAIVER.

The filing of an ordinary claim against the estate of a bankrupt by one who sold him property by a contract of conditional sale was not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inconsistent with the assertion of a lien on the insurance proceeds of the property, and not a waiver of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-295; Dec. Dig. § 188.*]

In Bankruptcy. In the matter of William Zitron, bankrupt. On review of order of referee. Affirmed.

The matter comes before the court upon the petition to review the determination of the referee of the right of the intervener, United Refrigerator Ice Machine Company, arising under the following facts:

On February 4, 1911, the Racine Refrigerator & Ice Machine Company made a contract with Zitron Mercantile Company to furnish and install for the latter certain refrigerator machinery and equipment described in the contract for the sum of \$4,000. The terms of payment were to be \$250 in cash, balance upon notes, with interest at 6 per cent. as specified. Such contract contains the following provision: "All property rights in this plant shall remain in us until all money payable hereunder shall have been paid in full to us (vendor) in cash, but you (vendee) shall keep said property insured for our benefit while on your premises and hold us harmless from loss by fire or otherwise." This contract was not filed for record as required under section 2317 of the Statutes of Wisconsin relating to conditional contracts, until April 5, 1912, after the institution of bankruptcy proceedings. The Refrigerator Company fulfilled the contract, receiving the cash payment of \$250, but the notes for deferred payments were never executed, nor were any further payments ever made.

In March, 1911, the vendee, the Zitron Mercantile Company, dissolved, and Zitron, the bankrupt, succeeded to its rights and assumed the liabilities of the above-mentioned contract. In May, 1911, the vendor Racine Refrigerator & Ice Machine Company was succeeded in interest under such contract by the herein intervener and petitioner, United Refrigerator Ice Machine Company. Zitron, the bankrupt, carried insurance in his own name upon the stock and fixtures, including the refrigerator plant installed as mentioned, to the amount of \$16,000, but no part of the insurance was by its terms payable to the vendor or to the herein intervener, assignee.

On January 12, 1912, all the property was destroyed by fire, and on February 3, 1912, Zitron made a voluntary assignment for the benefit of his creditors, which was followed April 3, 1912, by a voluntary petition in bankruptcy, upon which adjudication was had April 16, 1912, the trustee herein being elected May 10, 1912.

On June 11, 1912, the intervener filed two separate claims upon the contract mentioned for a balance of \$3,830.52, and also \$363.29 for a motor and additional equipment, and claimed an equitable lien, as hereafter stated. The total insurance carried by the bankrupt on his furniture and fixtures, including the specified refrigerator plant, was \$7,000, and the total loss claimed thereon was \$7,581.13, on which the loss on the refrigerator plant complete, together with the motor and connections, was claimed to be \$4,202.20. This insurance was adjusted at 85 cents on the dollar, and the trustee received from the insurers \$13,600 upon the policies of \$16,000 covering the entire stock, fixtures, refrigerating plant, etc.

On July 15, 1912, and after the trustee had received these insurance monies, the claimant, United Refrigerator Ice Machine Company, filed its intervening petition to establish an equitable lien upon \$4,202.20 of such fund. The petition was answered by the trustee, and, after a trial, the referee awarded to the intervener a lien against said funds in the sum of \$3,928.22, after deducting therefrom \$766.10, the amount of a dividend theretofore received, and the trustee was adjudged to pay to the intervener such balance, to wit, \$2,805.77.

The trustee asks for a review of such determination.

B. F. Saltzstein, of Milwaukee, Wis., for trustee.

Glicksman, Gold & Corrigan, of Milwaukee, Wis., for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GEIGER, District Judge (after stating the facts as above). The question is whether the intervener can claim an equitable lien upon the insurance fund now in the hands of the trustee. Treating the bankrupt and the intervener as original parties, the facts are briefly these: The intervener, as vendor, agreed to manufacture for and sell to the bankrupt, as vendee, a certain equipment, the title to which was to remain in the vendor until the purchase price was paid. The vendee agreed to insure the property for the benefit of the vendor. The contract of conditional sale was not filed. The property is destroyed by fire, and the vendee is then adjudicated a bankrupt.

[1] What were the rights of the parties at the time when the fire occurred? Clearly, bankruptcy not having intervened, the contract of conditional sale was valid between the parties. The contract for insurance was equally valid, though it had not been in form executed for the benefit of the vendor. The latter, the fire having occurred, could then, as against the vendee, have asserted its right to a lien against the insurance proceeds; and the vendee, having breached his obligation, could not urge that such proceeds belonged to him freed from such lien. *Wilder v. Watts* (D. C.) 138 Fed. 426; *Hanson v. Blake* (D. C.) 155 Fed. 342; *Re Little River Lumber Co.* (D. C.) 92 Fed. 585; *Re West Norfolk Lumber Co.* (D. C.) 112 Fed. 759; *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; *Miller v. Aldrich*, 31 Mich. 408; *Re Sands Brewing Co.*, 3 Biss. 175, Fed. Cas. No. 12,307. These cases and many others treat as elementary the doctrine that, where a covenant has been entered into to provide insurance as additional security, such covenant, though the mortgagor or vendee breaches it by taking the insurance in his own name, will nevertheless be given effect in equity through a lien against the proceeds after a loss has occurred.

[2] It is equally clear that the matter is not to be considered as an effort by the intervener to follow property previously covered by a conditional contract of sale. The proceeds are not to be deemed as the equivalent of the property, but, on the contrary, the mortgagee or vendor is awarded the benefit of the covenant, giving to him that which, had such covenant been performed, would have come directly from the insurer as of the time when the loss occurred. Viewing it in this light, it is clear that, immediately upon the occurrence of the fire and before bankruptcy had intervened, the equitable lien against the fund arose, and could have been enforced by appropriate action. So, too, if the bankrupt, instead of being obliged to go through the form of preparing and submitting proofs, could have instantly received the insurance proceeds, he could have forthwith paid the proper proportion to the intervener in satisfaction of its lien. In neither event could the trustee contend that a preference was sought or allowed. The situation, in my judgment, is different from that disclosed in *Brown City Savings Bank v. Windsor* (C. C. A.) 198 Fed. 28, where it was held that insurance proceeds arising from a loss on property covered by a preferential mortgage should be deemed the equivalent of the property, and therefore subject to be reclaimed by the trustee. It was there observed that, the mortgage having been given

within four months and therefore preferential, the insurance covenant was likewise infirm. But, in the matter at bar, the contract, though not filed, was at the time of the fire valid between the parties, and, when bankruptcy intervened, the property was no longer in existence. The insurance fund at once became impressed with the lien arising under a covenant valid against the trustee, regardless of filing or record. The contention of the trustee may be fairly tested by considering whether creditors who had attached the insurance fund could claim a right superior to that of the intervener. They clearly would not be regarded as purchasers of the fund without notice; but, on the contrary, would attach merely the vendee's interest. The trustee, under the bankruptcy act, as amended by act of June 25, 1910, is in no better position.

[3] The filing of an ordinary claim by the intervener was consistent with his assertion of the lien, and cannot be considered as an election to waive it. Neither can the failure to file the conditional sale contract be urged as laches. The petition to intervene was filed soon after the funds came to the hands of the trustee, and it does not appear that the delay, if any, was prejudicial.

Upon argument, reference was made to an erroneous calculation of the proportion of the insurance fund to be subjected to the lien. The matter may be held open for correction by the referee of such error.

The order of the referee, except as last noted, is affirmed.

IRVINE v. ELLIOTT.

(District Court, D. Delaware. February 24, 1913.)

1. CORPORATIONS (§ 251*)—INSOLVENCY—STOCKHOLDERS—STATUTORY LIABILITY—CONSTITUTIONAL PROVISIONS.

Where a stockholder of an insolvent Ohio railroad company acquired his stock prior to the adoption of a constitutional amendment November 3, 1903, relieving stockholders from the double liability imposed by Ohio Const. 1851, art. 13, § 3, the stockholder's liability was not affected by the amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1013-1015; Dec. Dig. § 251.*]

2. CONSTITUTIONAL LAW (§ 34*)—SELF-EXECUTING PROVISIONS—STOCKHOLDERS—DOUBLE LIABILITY.

Ohio Const. 1851, art. 13, § 3, imposing on stockholders a double liability to creditors, was not self-executing, but contemplated legislative action to effect its purpose, which was provided by Ohio Act May 1, 1852 (50 Ohio Laws, p. 296, § 78), as amended by Act April 17, 1854 (52 Ohio Laws, p. 44, § 1), providing that all stockholders of specified corporations and joint-stock companies should be liable to an amount equal to their stock subscribed in addition to the stock to secure creditors of the company.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34; Dec. Dig. § 34.*]

3. CORPORATIONS (§ 244*)—INSOLVENCY—STOCKHOLDERS' LIABILITY—STATUTES.

Where, at the time defendant acquired stock in an insolvent Ohio railroad company, and when suit was brought by creditors to enforce the

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same, Ohio Rev. St. 1880, § 3258, was in force, providing that the stockholders of a corporation should be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the corporation's debts and liabilities, defendant assumed and became subject to double liability under such section.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. § 244.*]

4. CORPORATIONS (§ 259*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY—NATURE AND ENFORCEMENT.

Double liability of an insolvent Ohio railroad company imposed by Ohio Rev. St. 1880, § 3258, for the enforcement of which provision is made by section 3260, involves equitable procedure, since such liability does not constitute the primary fund for the payment of corporate indebtedness, but is a mere collateral security for the exclusive benefit of creditors, not to be availed of while other means of compelling payment remain open, whether through the collection of unpaid stock subscriptions or the seizure of other corporate assets, nor until ascertainment through an accounting of a basis of assessment against all stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052-1067, 2272; Dec. Dig. § 259.*]

5. CORPORATIONS (§ 563*)—STOCKHOLDERS—DOUBLE LIABILITY—ENFORCEMENT—RECEIVERS.

The statutory double liability of stockholders imposed by Ohio Rev. St. 1880, §§ 3258, 3260, being equitable in its nature, was properly enforceable by a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2280, 2280½; Dec. Dig. § 563.*]

6. CONSTITUTIONAL LAW (§ 156*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY—SUBSEQUENT LEGISLATION.

Double liability of stockholders of an insolvent Ohio railroad company, resident and nonresident, imposed by Ohio Rev. St. 1880, § 3258, in connection with the constitutional provision of 1851, providing for the imposition of such liability, could not be destroyed, lessened, or impaired as to stockholders to whom it had attached by subsequent legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 429-436; Dec. Dig. § 156.*]

7. CONSTITUTIONAL LAW (§ 169*)—IMPAIRMENT OF CONTRACT—STOCKHOLDERS—DOUBLE LIABILITY—ENFORCEMENT.

The double liability of stockholders of an insolvent Ohio railroad company imposed by Ohio Rev. St. § 3258, having attached as to resident as well as nonresident stockholders, it was not material that at that time the Legislature had failed to provide an adequate remedy for its enforcement; the Legislature being entitled to remedy that defect by subsequent legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 474, 476, 478-481, 502, 511-514, 522; Dec. Dig. § 169.*]

8. CONSTITUTIONAL LAW (§ 191*) — REMEDIAL LEGISLATION — RETROACTIVE LAWS—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Ohio Act April 16, 1900 (94 Ohio Laws, p. 359), amending Ohio Rev. St. 1880, § 3260, and section 3258, imposing a double liability on stockholders of certain corporations, in so far as it provided for the enforcement of such liability already accrued against nonresident stockholders, was purely a remedial act, and not in violation of the constitutional provision forbidding the passage of retroactive laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 534; Dec. Dig. § 191.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

9. CORPORATIONS (§§ 263, 265*)—INSOLVENCY—STOCKHOLDERS' DOUBLE LIABILITY—ENFORCEMENT—ACTION.

An action to enforce double liability of stockholders of an insolvent Ohio railroad company, imposed by Ohio Rev. St. 1880, §§ 3258, 3260, can only be prosecuted in Ohio, and all stockholders, resident as well as nonresident, must be made parties thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 831, 1065, 1101-1125, 2275; Dec. Dig. §§ 263, 265.*]

10. JUDGMENT (§ 17*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY—ASSESSMENT—DECREE—NONRESIDENTS.

While an assessment to enforce the double liability of stockholders of an insolvent Ohio railroad company, imposed by Ohio Rev. St. 1880, §§ 3258, 3260, must necessarily include both resident and nonresident stockholders, no judgment or decree in personam can be rendered in the domiciliary proceedings against nonresident stockholders not served with process, or voluntarily appearing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.*]

11. CORPORATIONS (§ 268*)—STOCKHOLDERS—DOUBLE LIABILITY—PLEADING—"OTHER THAN."

An averment in a receiver's suit to recover double liability of stockholders of an insolvent Ohio railroad company that the railroad company was without any property "other than" the double liability of its stockholders constituted a sufficient averment that there were no unpaid stock subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129, 1131, 1133-1147; Dec. Dig. § 268.*]

For other definitions, see Words and Phrases, vol. 6, p. 5104.]

12. CORPORATIONS (§ 261*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY—ENFORCEMENT—CONDITIONS PRECEDENT—RECOVERY OF JUDGMENT.

Where an insolvent Ohio railroad company had no assets out of which existing debts might be paid, unpaid creditors were not required to reduce their claims to judgment and have an execution returned unsatisfied, or even to obtain judgment before bringing suit against the corporation and its stockholders to enforce the stockholder's double liability imposed by Ohio Rev. St. 1880, §§ 3258, 3260.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023, 1068-1075, 2268-2271; Dec. Dig. § 261.*]

13. PROCESS (§ 86*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY—ENFORCEMENT—DOMICILIARY SUIT.

A domiciliary suit to enforce the statutory liability of stockholders of an insolvent Ohio railroad company imposed by Ohio Rev. St. 1880, §§ 3258, 3260, in so far as it related to the making of the assessment against nonresident stockholders not actually served with process, nor appearing, was in the nature of a proceeding in rem where service by publication is sufficient, and, such stockholders being represented by the corporation, the decree was conclusive on them, so far as it adjudicated the amount of the indebtedness of the corporation and the necessity of making an assessment on the stock to the extent and in the amount set forth in the decree.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

14. CORPORATIONS (§ 262*)—INSOLVENCY—DOUBLE LIABILITY—ENFORCEMENT—NONRESIDENT STOCKHOLDERS—DEFENSES.

Where a decree enforcing double liability of stockholders of an insolvent Ohio railroad company was rendered in a domiciliary action, nonresident stockholders not appearing nor served with process in such proceeding when sued in the state of their residence to enforce the judg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment were entitled to defend on the ground that they were not stockholders or holders of stock in the amount alleged, or that they had claims against the corporation which they were entitled to set off against their assessment, or that they had other defenses personal to themselves.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076-1083, 2273; Dec. Dig. § 262.*]

15. CORPORATIONS (§ 563*)—INSOLVENCY—STOCKHOLDERS' DOUBLE LIABILITY—NONRESIDENTS—RECEIVERS—AUTHORITY TO SUE.

A receiver appointed by an Ohio state court to enforce statutory double liability of stockholders of an insolvent Ohio railroad company and authorized by statute to sue for and recover assessments levied both within and without the state was not a mere chancery receiver, but had authority to sue a resident of Delaware in the courts of that state to recover the assessment levied on him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2280, 2280½; Dec. Dig. § 563.*]

16. CORPORATIONS (§ 247*)—INSOLVENCY—STOCKHOLDERS—DOUBLE LIABILITY.

The double liability of stockholders of an insolvent Ohio railroad company, imposed by Ohio Rev. St. 1880, §§ 3258, 3260, is not a corporate asset, but a liability not to the corporation, but to creditors to secure payment of their claims against the corporation, and cannot therefore be released or assigned by the corporation even for the general benefit of its creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983-997; Dec. Dig. § 247.*]

17. LIMITATION OF ACTIONS (§ 18*)—ACTION OF "DEBT"—STOCKHOLDERS—DOUBLE LIABILITY.

A suit by a foreign receiver of an insolvent Ohio railroad company to enforce a double statutory liability against a stockholder imposed by Ohio Rev. St. 1880, §§ 3258, 3260, in the courts of Delaware, was an action of debt within the three-year statute of limitations, contained in Delaware Rev. Code 1852, amended to 1893, p. 888, c. 123, § 6.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 70-72; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

18. LIMITATION OF ACTIONS (§ 6*)—APPLICATION—PENDING PROCEEDINGS.

Ohio Act April 29, 1902 (95 Ohio Laws, p. 312), limiting actions to enforce double liability of stockholders of insolvent Ohio corporations to 18 months after the debt or obligation shall become enforceable, if applicable to a domiciliary suit for the enforcement of such liability, could not apply to a suit pending at the time the statute was enacted.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.*]

19. CONSTITUTIONAL LAW (§ 171*)—OBLIGATION OF CONTRACT—SHORT STATUTE OF LIMITATIONS.

Contractual liability of stockholders of an insolvent Ohio railroad company having been incurred pursuant to Ohio Rev. St. 1880, § 3258, providing that stockholders shall be liable for an equal amount in addition to their stock liability, it was not within the power of the Legislature wholly to deprive the creditors of all remedy for the enforcement of such liability by reducing the period of limitation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 506; Dec. Dig. § 171.*]

20. LIMITATION OF ACTIONS (§ 2*)—WHAT LAW GOVERNS—LEX FORI.

An action in a court sitting in Delaware by an Ohio receiver to enforce a double liability of a Delaware stockholder of an insolvent Ohio

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railroad company could not be affected by an Ohio statute of pure limitations affecting the remedy only; the action being governed as to such limitations by the *lex fori*.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

21. COURTS (§ 375*)—CONSTRUCTION OF STATE STATUTES—LIMITATIONS.

On any question touching the construction or operation of a statute of limitations of Delaware, a decision of the Supreme Court of that state is conclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. § 375.*]

22. EVIDENCE (§§ 35, 43*)—JUDICIAL NOTICE—LAW AND PRACTICE.

While a federal court sitting in Delaware will take judicial notice of the laws of Ohio, it will not take notice of what may have been done in the course of the practice and procedure of the courts of that state under its statutes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51, 62-65; Dec. Dig. §§ 35, 43.*]

At Law. Action by Ellsworth C. Irvine, receiver for the benefit of creditors, appointed in an action of F. M. Marriott, Consolidated, against the Columbus, Sandusky & Hocking Railroad Company and others, against Alfred S. Elliott. On demurrer to declaration. Overruled.

Willard Saulsbury and Hugh M. Morris, both of Wilmington, Del., for plaintiff.

Herbert H. Ward, of Wilmington, Del., for defendant.

BRADFORD, District Judge. This is an action of debt brought for the recovery from Alfred S. Elliott of \$8,125, being the amount assessed against him by the court of common pleas of Franklin County, Ohio, hereinafter called the court of common pleas, under his alleged statutory double liability as a stockholder of The Columbus, Sandusky and Hocking Railroad Company, hereinafter referred to as the railroad company, an insolvent Ohio corporation, with interest thereon. The case is before the court on a demurrer to the declaration. By stipulation of counsel a paper marked "A" containing a copy of certain decrees in the proceedings in Ohio has been filed, to to have the same force and effect as if set forth in the declaration as originally filed. The declaration in connection with paper "A" so far as material to the consideration of the demurrer alleges in substance that the railroad company was duly incorporated in Ohio in 1895; that on and prior to January 14, 1899, it was indebted to F. M. Marriott in the sum of \$1,000 with interest, and to The E. A. Kinsey Company in the sum of \$12,860.53, with interest; that the railroad company was on the last named day, and for some time theretofore had been, and now is wholly insolvent and without any property which could be applied to the satisfaction of the above mentioned two debts, other than the liability of its stockholders as hereinafter set forth; that on or about January 14, 1899, Marriott filed in the court of common pleas, a court of competent jurisdiction, a petition in his own behalf as well as in behalf of all the creditors of the rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

road company, setting forth that he had on or about October 3, 1898, obtained in that court judgment against the railroad company on his above mentioned claim, which was in full force and unsatisfied, stating the authorized amount of the capital stock of the railroad company, the number and par value of the shares, all of which had been subscribed for and taken, further setting forth that the railroad company October 3, 1898, was and for two years prior thereto had been wholly insolvent, its property and all property rights "then being in the hands of receiver," and the railroad company "at said time did not have, and since the recovery of said judgment had not had, any property from which said judgment could be satisfied"; that Marriott in his petition prayed that the railroad company be compelled to disclose the names of the persons who were then or had been its stockholders, and to set forth the amounts due from them, if any, on their stock, and that they when discovered be made defendants in that cause, and further that the names of the creditors of the railroad company be ascertained "together with the amounts due each, in such manner as the court might direct, and that all stockholders in arrears for subscription for said stock be required to pay the balance due from them, and that each stockholder be required to pay his ratable proportion of any deficit remaining after the application of the said assets to said debts"; that on the filing of the above petition process issued and was served on the railroad company which duly appeared by its authorized attorney; that thereafter, December 22, 1899, The E. A. Kinsey Company filed in the same court against the railroad company and its stockholders a petition, hereinafter called the Kinsey petition, in behalf of itself and all other creditors of the railroad company, (the Marriott and the Kinsey petitions having the same general purpose), alleging, among other things, that on or about June 2, 1897, in a suit in the circuit court of the United States for the southern district of Ohio between The Mercantile Trust Company of New York, as trustee, and the railroad company, a receiver was appointed of all the assets and property of the latter company, and further alleging that the railroad company "had ceased to do business and had no property of any kind with which to do business," and "it was necessary for the payment of the creditors of said company that the stockholders thereof should be assessed under the laws of the State of Ohio the full amount of their statutory liability," and praying for an ascertainment of the total debts and liabilities of the railroad company, the amount of each and when contracted, and of the "number of shares of stock held by each of said stockholders and the time during which each of said stockholders respectively owned and held said stock," and of the "amount of the assessment necessary and proper to be made to satisfy the said debts of said railroad company," and praying further that "after such ascertainment of said debts and liabilities, stockholders and assessments a receiver should be appointed to collect the said assessments and to distribute the same among the creditors of said company as the same should be entitled thereto," and that the petitioner should have "all other and further relief as the circumstances of the case might require," etc.; that the

railroad company was served with process and duly appeared by its authorized attorney; that the court of common pleas March 31, 1902, found and determined that the two proceedings instituted by the Marriott and Kinsey petitions had the same object, and ordered and adjudged that the same be consolidated and thereafter conducted under the name of "Case No. 39,457, F. M. Marriott, Consolidated, Plaintiff, vs. The Columbus, Sandusky & Hocking Railroad Company, et al., Defendants"; that the above order and judgment was not appealed from and remains in full force; that in the consolidated cause the defendant herein and all the other stockholders of the railroad company were made parties defendant, and all the defendants residing in Ohio were duly served with summons and all defendants not residing in Ohio, including Elliott, were duly served by publication in accordance with the statute of Ohio in such case made and provided; that on or about June 14, 1902, the court of common pleas referred the consolidated cause to one of the master commissioners of that court and ordered him "to proceed according to law to determine what persons, firms and corporations, (other than those already parties thereto) should be made parties therein, to ascertain the address and residence of each of such stockholders in the defendant corporation, The Columbus, Sandusky & Hocking Railroad Company, to determine what transfers of stock had been made, and the dates of each, to determine the solvency or insolvency of the various stockholders, the amount of stock held by each, the indebtedness of said corporation, the names and addresses of its creditors, in such manner as is provided by law, and to do all other things necessary, proper and lawful to enforce the liabilities of the stockholders of said defendant corporation, and to report to said court his findings of fact and his conclusions of law thereon"; that in obedience to the said order and judgment of the court of common pleas the said master commissioner proceeded to carry out all the directions of said court, and thereafter, March 17, 1905, duly filed his report containing his conclusions of law and findings of fact in accordance with the said order and decree; that thereafter the consolidated cause came on to be heard by the court of common pleas upon the report of the master commissioner and the exceptions thereto and a motion to confirm the same, and thereafter, July 17, 1905, that court by a proper and final order, judgment and decree confirmed the said report and decreed, among other things, that the shares of stock of the railroad company were of the par value of \$100 each, and further, that it at the time of filing the Marriott and Kinsey petitions in the court of common pleas and on July 17, 1905, was insolvent and had no assets of any kind with which to pay its debts, and further, that the unpaid valid and subsisting debts of the railroad company as found in the report of the master commissioner amounted with interest until March 1, 1905, to \$706,251.55, and by reason of the amount of that indebtedness, the costs of the consolidated cause and the insolvency of the railroad company, it was necessary to make an assessment against each of its stockholders amounting to 25% of the par value of the shares held and owned by each such stockholder; that the court of

common pleas did in and by the order and decree of July 17, 1905, find and adjudge that Elliott was then the owner of 325 shares of the said stock and there was then due from him as such stockholder to the creditors \$8,125; that at the time of filing the Marriott and Kinsey petitions Elliott was a stockholder in the railroad company and was the owner and holder of the number of shares above mentioned; that the court of common pleas by its said decree appointed Ellsworth C. Irvine, plaintiff herein, receiver in the consolidated cause under the statute of Ohio in such case made and provided, and authorized, directed and empowered him to collect and enforce by suit or by such action brought in his own name as receiver as might be necessary or otherwise "in any jurisdiction and before any court of competent jurisdiction" all assessments ordered and made or amounts due or found due by the said decree from such stockholders, including the amount found due from Elliott, and make proper distribution of the amount so recovered under the further orders of the court; that the said decree of July 17, 1905, is in full force and effect and no appeal therefrom is pending; that within the proper time as allowed by the laws of Ohio an appeal was taken in the consolidated cause from that decree to the circuit court for Franklin county and was dismissed by that court; that the appellants "within the proper time" allowed by the laws of Ohio prosecuted the said proceedings further in error to the Supreme Court of Ohio which, April 30, 1907, affirmed the judgment of the circuit court dismissing the appeal; that on or about December 22, 1906, the court of common pleas made a further final order and decree in the consolidated cause supplemental to the decree of July 17, 1905, by which supplemental order and decree Irvine, the receiver, was vested with the title to all the goods, chattels, property and assets, real and personal, of the railroad company, wherever situated or held, and was thereby given the right and power, among other things, to collect by suit or otherwise, in his own name as such receiver, any debts due to it, and to recover any property belonging to it, and to do any and all acts which it could do or could have done to recover any debts due to it or property belonging to it; and was thereby further authorized, directed and empowered to proceed to collect and enforce by suit, or by such action brought in his own name as such receiver, as might be necessary, in any other jurisdiction and in any court of competent jurisdiction "all assessments and judgments ordered and made, or amounts due or found due herein, against each and all persons, estates, personal representatives, firms, or corporations who have been made parties defendant herein and served by publication or otherwise, or who are parties defendant, or who have been found by the court to be stockholders in said The Columbus, Sandusky & Hocking Railroad Company and liable to such assessment or judgment, all according to the statute in such case made and provided"; that the decree of July 17, 1905, and the supplemental decree of December 22, 1906, are final and unversed and no appeal therefrom is pending; that the plaintiff in the consolidated cause within the time allowed by the laws of Ohio duly took and perfected an appeal from the supplemental decree of De-

ember 22, 1906, to the circuit court for Franklin county, which refused, on motion made for that purpose, to dismiss such appeal, but by an order or decree made December 7, 1907, in effect reversed the decree appealed from, and assessed against all of the defendant's stockholders including Elliott 50% of the par value of the capital stock of the railroad company held by them; that some of the defendants in the consolidated cause thereupon duly prosecuted a proceeding in error to the Supreme Court of Ohio, giving a supersedeas bond under the laws of that state; that the Supreme Court May 11, 1909, reversed the decree of the circuit court of December 7, 1907, and sustained and affirmed the decrees of the court of common pleas of July 17, 1905, and December 22, 1906, respectively, and found and adjudged that the judgments, decrees and assessments and each of them made and entered in the consolidated cause in the court of common pleas July 17, 1905, and December 22, 1906, respectively, were final and conclusive, and that they and each of them "now stand unreversed and unmodified and are in full force and virtue in law"; that all the above mentioned appeals and proceedings upon writs of error were taken in due time as required by law, and upon proper bonds being filed as required by law, and as hereinabove referred to; that the effect of said appeals and proceedings on writs of error under and by virtue of the laws of Ohio was to suspend the operation and effect of the said decrees of the court of common pleas; that by reason of said appeals and proceedings by writ of error there was no time during which Irvine could lawfully proceed as such receiver, under and by virtue of the decrees of the court of common pleas, to enforce the collection of the amounts so assessed against the stockholders of said company, defendants in the consolidated cause, until the making of the order and decree of the Supreme Court May 11, 1909; that the court of common pleas made a further order and decree May 28, 1909, that Irvine as receiver be invested with the title and ownership in trust for the creditors of the railroad company of and to all and singular its property and assets and the rights of its creditors against its stockholders wherever situated or held, including the right to the sum of money found due from and assessed against Elliott as above mentioned, and empowering, authorizing and directing Irvine, receiver as aforesaid, to institute and prosecute in his own name in pursuance of the statute in such case made and provided, such action, actions or other proceedings against the defendants in the consolidated cause and the stockholders of the railroad company, or any of them, in any court of competent jurisdiction in Ohio or elsewhere as he might deem necessary or proper for the recovery of the amount due from such defendant or defendants and from the stockholders of the railroad company as thereinbefore or thereafter found and adjudged by the court of common pleas, and further authorizing and empowering him to commence and prosecute such action or actions against such defendants and stockholders, or any of them, whether residing in Ohio or elsewhere, and whether served with process in such proceedings in the court of common pleas by publication or otherwise, and to commence and prosecute such action or actions

against any such defendants or stockholders who were during the pendency of the action in the court of common pleas non-residents of Ohio whether personally served with process or not in such action; that the decree of May 28, 1909, is final and unreversed and in full force and effect and no appeal therefrom is pending; that by virtue of the constitution and statutes of Ohio and the decrees of the court of common pleas and Supreme Court of Ohio above mentioned, the plaintiff Irvine, receiver, became invested with the title and ownership in trust for the creditors of the railroad company of all its assets and the rights of its creditors against its stockholders, wherever situated or held, including the several sums found by the court of common pleas to be due from the stockholders of the railroad company, and among them the sum adjudged and decreed to be due from Elliott as above mentioned, and was authorized, empowered and directed to collect the same by suit in any court of competent jurisdiction whether in Ohio or elsewhere, in his name as such receiver or otherwise; that Irvine duly qualified and entered upon the discharge of his duties as receiver and is duly qualified as receiver for the purposes aforesaid; that at and prior to the time of the incorporation of the railroad company and when Elliott became a stockholder thereof and when the Marriott and Kinsey suits were commenced in the court of common pleas and thereafter, the constitution of Ohio provided that "dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock"; that during all of said time the statutes provided that "the stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation"; that under the above mentioned constitutional and legislative provisions and the judgments and decrees of the court of common pleas the statutory liability of the defendant here passed to and is now vested in the plaintiff as the representative of the creditors of the railroad company, and the plaintiff now holds title thereto as a trust fund for their benefit; that at and prior to the time of the filing of the Marriott and Kinsey petitions in the court of common pleas Elliott was and has ever since continued to be the owner and holder of the said 325 shares of the capital stock of the railroad company; that the court of common pleas duly found, adjudged and decreed in the consolidated cause that he was duly served with process in such cause by publication, pursuant to the laws of Ohio in such case made and provided, being section 3260 of the revised statutes of Ohio, as amended April 16, 1900 (94 Ohio Laws, p. 359); that the plaintiff by virtue of the constitution and laws of Ohio and his appointment and qualification as receiver in the consolidated cause became and now is the representative of the creditors of the railroad

company and is "vested with the title to all and singular the rights of action possessed by said railroad company and its creditors, including the right of action to recover the indebtedness of said stockholders and the indebtedness of this defendant to the creditors of said company, as hereinabove alleged, and is duly authorized to maintain this action in this court against the defendant herein to recover the sum aforesaid due from and assessed against this defendant" as above mentioned; and that the plaintiff has demanded and been refused payment by the defendant, etc.

The demurrer assigns nine grounds, as follows:

"1. That said declaration is uncertain and insufficient in that it does not aver on the twelfth page of the said declaration at what date an appeal was taken in said cause in the said declaration mentioned, from said decree dated July 17th, 1905, or when said appeal was dismissed by said circuit court for Franklin County, State of Ohio, nor by whom said appeal was so taken and prosecuted.

2. That said declaration is uncertain and insufficient in that it is not stated therein on pages 12 and 13 of said declaration at what date said plaintiff in the cause mentioned in said declaration did take an appeal from said decree dated December 22nd, 1906, to the circuit court for Franklin County and State of Ohio, or when said plaintiff filed an appeal bond as required by the laws of the State of Ohio.

3. That said declaration is uncertain and insufficient in that it is not stated therein on page 13 of said declaration what defendants in said consolidated cause mentioned in said declaration did prosecute said mentioned proceeding on writ of error to said Supreme Court of said State of Ohio, upon which the said mentioned order of the Supreme Court of the State of Ohio of May 11th, 1909, was entered.

4. That it appears by said declaration and by the record in said cause that said plaintiff is barred by the statute of limitations of the State of Ohio against the maintaining of this action, in that suit against said defendant was not brought within eighteen months from the accrual of the cause of action mentioned in said declaration.

5. That it appears by said declaration and the record in said cause that said plaintiff is barred from the maintaining of this action by the statute of limitations of the State of Ohio, in that this suit was not brought within six years from the accrual of the supposed liability or cause of action against this defendant.

6. That it appears by said declaration and the record in said cause that said plaintiff is barred from maintaining this suit by the statute of limitations of the State of Delaware, in that this action was not brought within three years from the accrual of the cause of action against this defendant.

7. That it appears by said declaration and the record in said cause that the statutory procedure of the State of Ohio upon which this action is based was not complied with, and that thereby no cause of action exists against this defendant.

8. That said plaintiff hath no right as a receiver appointed by the courts of Ohio to maintain this action in the circuit court of the United States for the District of Delaware.

9. That the statutory procedure of Ohio is void and legally ineffective as to stockholders who were not personally served with process."

The counsel for the defendant in open court at the hearing and also in his brief of argument said that:

"Of the grounds specially set up by said demurrer, the fifth, seventh and ninth are not insisted upon and no judgment of the court is asked thereon, the same being abandoned so far as this demurrer is concerned."

The defendant thus practically, though impliedly, admits for the purpose of disposing of the demurrer, first, that the Ohio six year limitation is not applicable to this case; second, that the statutory procedure of Ohio upon which this action is based was complied with; and, third, that such statutory procedure is valid and legally effective as to stockholders not personally served with process. Of the remaining causes of demurrer five, namely, Nos. 1, 2, 3, 4 and 6, directly or indirectly involve questions touching the effect upon this action of statutes of limitation or lapse of time, and number 8 challenges the right of the plaintiff as a receiver appointed in Ohio to maintain an action in Delaware to enforce the statutory or double liability of a stockholder of an Ohio corporation. This last cause of demurrer may conveniently be considered first.

[1] Section 3 of article 13 of the Ohio constitution of 1851 provided:

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, and to a further sum, at least equal in amount to such stock."

This provision continued in force until after the defendant acquired his shares of the capital stock of the railroad company and after the consolidation of the Marriott and Kinsey petitions as above mentioned. This constitutional provision was amended November 3, 1903, so as to read:

"Sec. 3. Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

[2] It is unnecessary, however, in this immediate connection to dwell upon the latter constitutional provision, for the plaintiff's right to maintain this action, if it exists, must rest upon the constitutional provision of 1851 and the legislation enacted thereunder. That provision contemplates legislative action to effect its purpose, and under it the legislature of Ohio by act of May 1, 1852 (50 Ohio Laws, p. 296, § 78), amended April 17, 1854 (52 Ohio Laws, p. 44, § 1), provided, among other things:

"All stockholders of any railroad, turnpike, or plank-road, magnetic telegraph, or bridge company, or any joint stock company, organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock for the purpose of securing the creditors of such company," etc.

Of this legislative provision the Supreme Court of Ohio in *Wright v. McCormack*, 17 Ohio St. 87, said:

"The statute adopts the minimum liability allowable by the Constitution, and was intended to make the constitutional provision effective."

[3] And later, section 3258 of the revised statutes of Ohio, in force from 1880 to April 29, 1902, provided:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock

by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

This section was in force at the time of and prior to and after the incorporation of the railroad company and the acquisition by the defendant of his stock therein and the commencement of the Marriott and Kinsey suits, and consequently the defendant, upon the acquisition of his stock, assumed and became subject to the statutory double liability. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. It was a liability imposed upon all the stockholders.

Section 3260 of the revised statutes, dealing with the subject of remedial procedure for the enforcement of the double liability, was as follows:

"Sec. 3260. A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable."

This section remained in force from 1880 until March 22, 1894 (91 Ohio Laws, p. 88), when it was amended by the addition of a proviso, which, so far as may be pertinent to this case, was as follows:

"Provided, that in any such action the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholder or such legal representatives of a stockholder, and remitting from the claim of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the state, and judgment shall be rendered against the stockholders who have been served with summons, for the pro rata amount for which they would be liable if all solvent stockholders resident of the state were served with summons," etc.

[4] The court of common pleas of Ohio is vested with common law and chancery jurisdiction. Under the foregoing legislation the enforcement there of the statutory double liability of stockholders of a corporation of that state involved equitable procedure. This resulted from the essential nature of such liability. It did not constitute a primary fund or resource for the payment of the corporate indebtedness, but was only a collateral security for the exclusive benefit of the creditors and not to be availed of while other means of compelling payment remained open, whether through the collection of unpaid stock subscriptions or the seizure and sale of other corporate assets, nor until after the ascertainment, through an account, of a proper and equitable basis for an assessment against all the stockholders respectively. In *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250, the court, referring to the procedure under section 3260 before its amendment to enforce the double liability said:

"We think there is abundant authority in the statutes for the appointment of a receiver in an action to collect the statutory liability of stockholders,

and that such is the usual and better practice. But the judgment against the several stockholders must be rendered in the original action brought by a creditor or stockholder as provided in section 3260 revised statutes. Such an action is equitable in its nature, and the statutory liability of the stockholders is a trust fund inuring to the equal benefit of all the creditors of the corporation, and this fund is made up from different amounts of money, to be collected from many different stockholders, and to be distributed among many creditors, and no one creditor is more interested in the collection than another. As no preference can be obtained by diligence, no one would be specially interested in prosecuting suits for the equal benefit of himself and others; and in such cases, it is the usages of equity to appoint a receiver to collect and distribute the fund under the order of the court, for the equal benefit of all the creditors. The fact that the right of action is given by statute makes it none the less an equitable action, and being an equitable action, in its nature, requiring the service of a receiver, it is one of those in which receivers have heretofore been appointed by the usages of equity as provided in section 5587 of the revised statutes."

In *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234, the court said:

"The action is an equitable one, in which all the creditors and stockholders must be parties, and the court may withhold final judgment until the exact amount each stockholder should pay can be ascertained, or so mould its decree as to require the several stockholders to pay their proper proportion of the liabilities remaining after the application of all the assets of the corporation toward their satisfaction, and retain control over the cause and the parties until their ultimate rights shall be determined and adjusted."

In *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611, the court said:

"Our method of enforcing the liability of stockholders is by a proceeding in the nature of a suit in equity which contemplates the bringing in of the corporation, of all the creditors, and of all the stockholders, and a decree which will adjust and finally settle the rights and liabilities of the parties."

[5-7] The foregoing cases suffice to show the equitable nature of the procedure to enforce the stockholders' statutory double liability prior to the filing of the *Marriott* and *Kinsey* petitions, and that it was proper and usual to appoint receivers to collect the amount due under such liability. Unless under very exceptional circumstances, not disclosed here, the insolvent corporation was made a party defendant with the stockholders. *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250, was decided before section 3260 was amended by the addition of the above quoted proviso; and in that case the court declared that in the procedure under that section "the judgment against the several stockholders must be rendered in the original action brought by a creditor or stockholder" as therein provided. And that section as amended March 22, 1894, did not authorize or contemplate the enforcement of the double liability against stockholders of insolvent corporations who from non-residence or other cause could not be served with process unless voluntarily appearing. It did not authorize, nor was there any other legislative act then in force authorizing, the appointment of a receiver to bring suit outside of Ohio for the collection of any assessment made against non-resident stockholders of Ohio corporations under their statutory or double liability. Nor did either the *Marriott* petition or the *Kinsey* petition pray for the appointment of such a

receiver. The former petition did not allude to a receiver. The Kinsey petition, indeed, prayed that after the "ascertainment of said debts and liabilities, stockholders and assessments a receiver should be appointed to collect the said assessments and to distribute the same." But in view of the provisions of section 3260 as amended and of the practice to appoint receivers to collect such assessments only within the limits of Ohio, it is to be presumed that the petitioner did not contemplate the appointment of a receiver with less restricted power. A peculiar condition of things existed at and before the time of the acquisition by the defendant of his stock, the filing of the Marriott and Kinsey petitions, and thereafter and until section 3260 was further amended and supplemented April 16, 1900. The constitutional provision of 1851 was still in force declaring that dues from corporations "shall be secured by such individual liability of the stockholders" but "in all cases, each stockholder shall be liable," etc. And section 3258 of the revised statutes was still in force providing generally and without exception that "the stockholders of a corporation * * * shall be deemed and held liable," etc. Neither the constitutional provision nor the legislation enacted thereunder for the creation of the double liability discriminated between resident and non-resident stockholders. And this is accentuated by the fact that section 3260, both before and after its amendment March 22, 1894, required an "action jointly against all the holders or owners of stock." The double liability of all the stockholders, non-resident as well as resident, clearly was established by section 3258 of the revised statutes in connection with the constitutional provision of 1851, and was not and could not under the constitution of the United States be destroyed, lessened or impaired in the case of Elliott and others who, by their acquisition of stock, contractually assumed and became subject to the double liability for the benefit of all creditors of the railroad company. The legislature failed to provide at any time prior to April 16, 1900, an adequate remedy for its enforcement against those stockholders who were non-residents. That such a remedy could be provided by the legislature for the enforcement of the existing double liability of non-resident stockholders who had acquired their stock before the creation of such remedy but while the constitutional and statutory provisions creating the double liability were in force is established by the cases. In *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, the court had under consideration a statute of Minnesota amending a former act relative to the double liability of stockholders of corporations of that state, and providing a remedy for its enforcement in other states, which could not be effected before the passage of the amendatory act. The court speaking with reference to the contract growing out of the purchase of stock said:

"The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder

would fall within the prohibition of the constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. * * * The liability arising under the constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent law-making body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. Under it stockholders in another State, who could not be reached by personal service, were immune from liability and the entire burden was cast upon local stockholders. There was no provision for a receiver or assignee beginning action outside the State, and it was held by this court in *Hale v. Allinson*, supra [188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380], that a chancery receiver was powerless to enforce the rights of creditors beyond the borders of the State. In this condition of affairs the State of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the extent of the indebtedness of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the constitution of the State, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement. It operates equally upon all stockholders at home and abroad and assesses all by a uniform rule. * * * By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the State might lawfully make to render the liability effectual."

The above doctrine was approved and enforced in *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749. The Supreme Court of Ohio has decided that a retrospective statute of a purely remedial nature is not repugnant to the provision of the Ohio constitution forbidding the passage of retroactive laws. *Gager v. Prout*, 48 Ohio St. 89, 26 N. E. 1013.

[8] Largely for the purpose of affording an adequate remedy for the enforcement of the stockholders' double liability under the constitution of 1851 and section 3258, section 3260 was further amended and supplemented April 16, 1900, so as to read as follows:

"Sec. 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

Sec. 3260a. The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporations, and may appoint one or more receivers.

Sec. 3260b. If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders and enforce the same by its judgment, as in other cases.

Sec. 3260c. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockhold-

ers as provided in sections 5048, 5049, 5050, 5051 or 5052 of the revised statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

Sec. 3260d. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

Sec. 3260e. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

Sec. 3260f. Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors."

The above amendatory and supplemental act provided that "this act shall apply to pending actions, and shall take effect and be enforced from and after its passage." While it is possible that the hypercritical may object to some of the phraseology in this act, the meaning of its provisions when read in the light of the earlier statutes in *pari materia* is plain and unmistakable. It did not undertake to create any new liability or to change the general nature of the suit for the enforcement of the double liability, but to provide an efficient remedy for its enforcement against non-resident stockholders. Section 3260 provides for a proceeding by a creditor in the court of common pleas to enforce the statutory liability. Section 3260a directs the court, when necessary, to cause an account to be taken of the corporate assets and liabilities and authorizes the appointment of a receiver. As has appeared the Supreme Court of Ohio had already recognized the power of the court of common pleas to appoint receivers for the enforcement within that state of the double liability. Section 3260b provides in effect that where on the coming in of the answer of the corporation or upon the taking of such account it appears that the corporation is insolvent, and has not sufficient property to satisfy the claims of creditors on behalf of whom the plaintiff creditor sues, the court may ascertain the respective liabilities of the stockholders and enforce the same by its judgment or decree. Section 3260c provides in effect that in all cases in which the stockholders are made parties to an action for the enforcement of the double liability, where a judgment or decree is rendered against the corporation, if its property is not sufficient to discharge its debts, the court shall give notice to non-resident stockholders pursuant to the sections of the revised statutes therein specified, and shall "first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is

necessary to satisfy the debts of the company." And section 3260d provides in effect that if, notwithstanding the payment by or collection from the stockholders of the amount remaining unpaid on their stock, the corporate debts still continue unsatisfied, the court shall ascertain and adjust the amount due under the statutory double liability of the respective stockholders, adjudge the amount payable by each, and enforce the judgment or decree; and to that end may "authorize and direct the receiver" to prosecute an action in his own name as receiver, as may be necessary, in any other state to collect the amount found due from a stockholder therein.

[9, 10] In an action for the assessment against stockholders of an Ohio corporation of the amounts due from them under their double liability and for the enforcement of such liability, not only must all the stockholders be made parties, but further, the proceedings must be prosecuted in Ohio. *Middletown Bank v. Railway Company*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803. While, however, an assessment made in such action necessarily includes both non-resident and resident stockholders, no valid and binding judgment or decree in personam can be rendered in the domiciliary proceedings against non-resident stockholders not served with process nor voluntarily appearing; for it is elementary law that service by publication will not alone support such a judgment or decree. A decree in the domiciliary suit in Ohio finally ascertaining the amount necessary to be raised from the stockholders for the satisfaction of the corporate indebtedness through the enforcement of their double liability, and assessing against them severally the amount appearing to be due from them respectively under such liability, while it can be enforced by judgments and executions in the domiciliary proceedings against stockholders over whom jurisdiction in personam has been obtained, cannot authorize or support a final judgment or decree in personam in the domiciliary suit, to be enforced by execution or attachment against non-resident stockholders, not served with process nor appearing in the domiciliary proceedings. *Irvine v. Bankard* (C. C.) 181 Fed. 206. Affirmed 184 Fed. 986, 106 C. C. A. 664. The proceedings on the Marriott and Kinsey petitions both before and after their consolidation appear from the facts admitted by the demurrer to have conformed in their several stages to the law and practice existing at the time in Ohio as declared by the Supreme Court of that state.

[11, 12] The Marriott claim against the railroad company had been reduced to judgment before the filing of the Marriott petition for the enforcement of the double liability. The Kinsey claim, however, had not been reduced to judgment before the filing of the Kinsey petition for the same purpose. But the railroad company at the time of the filing of each of these petitions was wholly insolvent and without property of any kind applicable to the above claims or either of them, and had been so insolvent and without assets for a period antedating the recovery of judgment by Marriott on his claim October 3, 1898. It also appears that at the last named date the property and all property rights of the railroad company were in the hands of a receiver. It does not appear, however, what the nature and scope

of the receivership were, or that it continued until the filing of either of the above petitions. The averment to the effect that the railroad company was without any property "other than" the double liability of its stockholders amounts to an assertion that there were no unpaid stock subscriptions. For such unpaid subscriptions constitute corporate assets. Further, it appears from paper "A," made part of the declaration, that it was found by the court in the consolidated suit that "prior to the commencement of this action, and prior to the insolvency of The Columbus, Sandusky & Hocking Railroad Company, all of the stock of the said railroad company had been fully paid up and that there is now nothing due and remaining unpaid to said company on the shares of stock held by any of the stockholders of said company on account of subscriptions to the capital stock thereof." Under these circumstances the Supreme Court of Ohio has decided that it is not necessary that the creditor of a corporation should reduce his claim to judgment and have an execution returned unsatisfied, or even obtain judgment, before bringing suit against the corporation and its stockholders for the enforcement of their double liability. *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558; *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798. In the last named case it was said, "the law does not require the doing of a vain thing." But, as before stated, it does not appear from the facts admitted on demurrer that the railroad company had any property in the hands of a receiver at the time of filing the Marriott or the Kinsey petition or that it then had any property or was represented by a receiver. The proceedings in the consolidated cause on which the decree of July 17, 1905, was based conformed generally to the provisions of the constitution and statutes of Ohio applicable to the case and to the procedure and practice of the courts of that state, as appears from the declaration in connection with paper "A." The Marriott and Kinsey petitions having been consolidated in March, 1902, all the defendant stockholders residing in Ohio were duly served with process, and all the defendant stockholders not residing there, including Elliott, were served by publication pursuant to the statute in that behalf. The consolidated cause was referred in June, 1902, to a master commissioner who pursuant to the order of reference proceeded to carry out all the directions contained therein, including the ascertainment of the names and addresses of the stockholders of the railroad company, other than those already parties to the case, who should be made defendants therein, what transfers of stock had been made and when, the solvency or insolvency of the various stockholders, the amount of stock held by each, the indebtedness of the railroad company, with the names and addresses of its creditors, and all other things necessary to enforce the liability of the stockholders. The master commissioner filed his report March 17, 1905, which was confirmed by the court of common pleas July 17, 1905. In that confirmatory decree the court from the evidence and report of the commissioner found it necessary to make and did make an assessment of 25% of the par value of the stock held by each and all of the defendant stockholders

in the consolidated cause; and ordered, adjudged and decreed that the stockholders within the jurisdiction of the court and served with process or who had appeared in that cause were severally liable for such assessment upon the stock owned by them respectively, and that the plaintiff in his own behalf and in behalf of all other creditors of the railroad company recover from each and every of such defendant stockholders the amount of the assessment made against such stockholder, and directed that in default of payment of the assessment by August 20, 1905, execution should issue. Here subject to reversal or modification on appeal in the domiciliary proceedings was a final binding judgment or decree in personam. But in the case of stockholders who were non-residents of Ohio and only served by publication, (Elliott being one of them) this decree did not direct the entry of judgment for the recovery of the amount of the assessment; but made the assessment and authorized and empowered, as far as it could, Irvine as receiver to sue for and collect the same, in the following words:

"And said receiver is hereby further authorized, directed and empowered to proceed to collect and enforce by suit or by such action filed in his own name as receiver as may be necessary or otherwise in any jurisdiction and before any court of competent jurisdiction all assessments ordered and made or amounts due or found due herein against each and all persons, estates, personal representatives, firms or corporations who have been made parties defendant herein and served by publication or otherwise, or who are parties defendant, or who have been found by the court to be stockholders in said The Columbus, Sandusky & Hocking Railroad Company and liable to such assessment, all according to the statute in such case made and provided."

[13] That the assessment made as above stated against stockholders of the railroad company, whether non-resident or resident in Ohio was valid hardly can be questioned. It appears to have been based upon a lawful and proper ascertainment of the facts necessary to authorize and support it. And as before stated, counsel for the defendant through his abandonment of the seventh ground of demurrer virtually admitted that the statutory procedure in Ohio upon which the present action was based was duly complied with. But what is of controlling importance the Supreme Court of Ohio in the decree in the domiciliary suit made May 11, 1909, found and adjudged that the decree of the court of common pleas of July 17, 1905, and the supplemental decree of the same court made December 22, 1906, respectively, "are final and conclusive in said case and that from said judgments, decrees and assessments no valid or lawful appeal or proceeding in error was ever prosecuted, and that said judgments, decrees and assessments and each of them, now stand unreversed and unmodified and are in full force and virtue in law." The railroad company was made a defendant and served with process and it duly appeared in the domiciliary proceedings. The non-resident stockholders including Elliott were joined as defendants with the railroad company and resident stockholders and constructively served by publication pursuant to the laws of Ohio. The domiciliary suit, so far as it related to the making of the assessment against non-resident stockholders not actually served with process nor appearing, was in the nature of a

proceeding in rem, where service by publication is sufficient. *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104. And in that suit such non-resident stockholders were represented by the company; and the decree ordering the assessment, while not binding them as a judgment or decree in personam rendered after personal service of process, was conclusive upon them as to the amount of the indebtedness or liability of the company and the necessity of making an assessment upon the stock to the extent and in the amount set forth in such order and decree. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619; *Francis v. Hazlett*, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230; *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Irvine v. Putnam* (C. C.) 167 Fed. 174; *Irvine v. Putnam* (C. C.) 190 Fed. 321.

The Minnesota statute considered in *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, declared in section 5:

"Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided."

[14] But the above section of the Minnesota statute is unimportant so far as the determination of the force and applicability of *Converse v. Hamilton* to this case as an authority on the point just discussed is concerned. In the first place, no stress was laid upon it by the court in the decision of the case. Secondly, the court recognized the principle enunciated in *Howarth v. Lombard* and *Bernheimer v. Converse* that, as declared in the latter case, the "members of the corporation should be sufficiently represented by the presence of the corporation itself" in the "liquidation of the affairs of the corporation in a proceeding in the State of its origin." And thirdly, section 5 above quoted was only declarative of existing law as stated by the authorities. But non-resident stockholders, not appearing nor served with process in the domiciliary proceedings, would not be precluded from showing in proceedings elsewhere brought against them to enforce payment of the assessment, that they were not stockholders, or not holders of stock in the amount alleged, or that they had claims against the company which at law or in equity they were entitled to set off as against the assessment upon their stock, or that they had any other defence or defences personal to themselves. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

Section 3 of article 13 of the constitution of Ohio relating to double liability of stockholders was amended November 3, 1903, so as to read as follows:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

This amendment was not adopted until after the Marriott and Kinsey petitions had been consolidated. It had for its object, not any mere change or substitution of remedy for the enforcement of the statutory double liability, but the abolition of the liability itself, and could not defeat or affect the consolidated cause. The Supreme Court of Ohio has decided this point not only in the consolidated cause but elsewhere. In *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11, where the action to enforce double liability was brought against a corporation and divers alleged stockholders before the amendment was adopted, the court said:

"To avoid possible misunderstanding it may be added that this controversy, having arisen before the recent amendment to the constitution of the state, which abolishes the double liability of stockholders, is not affected by that amendment."

This statement strictly accords with the doctrine of *Ochiltree v. Railroad Co.*, 88 U. S. (21 Wall.) 249, 22 L. Ed. 546.

That the plaintiff has sufficient title to maintain this action, although in Delaware, whatever may be its final outcome, I think there can be little or no doubt on the authorities. The defendant on this point principally relies on *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380. But that case is wholly inapplicable to the facts here disclosed. The Minnesota statute of 1894 there considered neither vested title in the receiver nor expressly or impliedly authorized the appointment of a receiver to sue in other states for the enforcement of the stockholders' double liability. The receiver, though appointed pursuant to the statute, was a chancery receiver with no other power than resulted from his appointment by the court in the exercise of its general jurisdiction in equity. The court said:

"We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that State do not provide for the appointment of a receiver to recover as such the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability, (certainly not as to non-resident stockholders,) nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders. We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title, and the question is whether, in these circumstances, a receiver can maintain this suit in equity in a foreign State by virtue of his appointment and the direction to sue contained in the decree in the case in which he was appointed a receiver?"

[15, 16] And it was held that he could not. Whatever significance *Hale v. Allinson* may have in the consideration of the present case is due to the marked contrast between the nature and functions of

the receiver there and the receiver here; clearly serving to distinguish the two cases from each other in principle. If Irvine were a mere chancery receiver of the railroad company, appointed by the court of common pleas in the exercise of its general jurisdiction in equity, he could not solely in that capacity under any circumstances enforce the double liability of the defendant as a stockholder of that company. But he was more than a mere chancery receiver so appointed. The legislature authorized his appointment by the court as a receiver to sue for and recover both beyond and within the limits of Ohio the amounts due under the double liability of the stockholders, and the court pursuant to such legislative authorization appointed him for that purpose. He possessed the same authority and power as if directly named and appointed by the legislature. But the double liability of the stockholders, unlike unpaid subscriptions for stock and other pecuniary demands of the corporation, is not included among the corporate assets. It is a liability, not to the corporation, but to its creditors, to secure payment of their claims against the corporation. It could not be controlled, released or assigned by the corporation even for the general and equal benefit of its creditors. It runs directly to the creditors and cannot be enforced by the corporation, but only by the creditors or some one representing them. *Wright v. McCormack*, 17 Ohio St. 87; *Umsted v. Buskirk*, 17 Ohio St. 114; *Hawkins v. Furnace Co.*, 40 Ohio St. 507; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. In *Wright v. McCormack*, where it was held that an attempted assignment of the double liability by a corporation, though for the equal benefit of all its creditors, was void, the court said:

"The liability thus imposed on stockholders is not a primary resource or fund for the payment of the debts of the corporation. It is collateral and conditional to the principal obligation which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it by the ordinary process. It is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities can have no control."

In *Umsted v. Buskirk* the court said of the double liability:

"If the corporation has the right to enforce this liability by assessments, it can exhaust it to discharge a present indebtedness, and continue its business with no other security to its future creditors than its corporate liability. This would neither be in accordance with the design of the constitutional provision nor of the statute."

In *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402, the circuit court of appeals for the fifth circuit decided that the double liability was a "trust fund for the benefit of all creditors of the corporation." And the Supreme Court of Ohio has made a similar decision, authoritative in this case. *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.

By constitutional sanction section 3260 as amended and supplemented up to and including April 16, 1900, expressly empowered the court of common pleas to authorize and direct a receiver, appointed by it, to prosecute actions in his own name as receiver for the enforcement in other jurisdictions of the double liability, and that court pursuant to the power conferred upon it authorized and directed the plain-

tiff so to sue beyond as well as within the limits of Ohio as might be necessary. It is to be assumed that it was the purpose of the legislature and of the court of common pleas to provide an effectual remedy for the enforcement of the double liability in other states and fully to authorize and empower the receiver to accomplish the object contemplated and intended by the constitution and the act passed to give it practical operation and effect, and further, that Elliott through his subscription to the capital stock of the railroad company agreed that the receiver appointed to enforce the double liability against him as a stockholder should have right and title so to do. The double liability constituting a special quasi-trust fund, not for the corporation nor included among its assets, but exclusively for its creditors, a receiver under the legislatively authorized direction of the court for the enforcement of such double liability, whether in Delaware or any other state, acts, not as a naked chancery receiver, but as a representative of the creditors or a quasi-assignee or trustee, and in such capacity has a right or title to sue which must be respected, not only in Ohio, but in any other state. *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Francis v. Hazlett*, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402; *Irvine v. Bankard* (C. C.) 181 Fed. 206; *Bankard v. Irvine*, 184 Fed. 986, 106 C. C. A. 664; *Irvine v. Putnam* (C. C.) 190 Fed. 321; *Irvine v. Putnam* (C. C.) 167 Fed. 174; *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104.

In *Bernheimer v. Converse*, supra, it was held that a receiver appointed in Minnesota to enforce the double liability of stockholders of a corporation of that state could maintain an action in New York against stockholders based upon an assessment made against them in the proceedings in Minnesota, although not served with process in that proceeding nor appearing therein. The Minnesota statute of 1899 (Laws 1899, c. 272) under which *Bernheimer v. Converse* was decided, was, as has been said, essentially different from the statute of 1894 (Gen. St. 1894, c. 76) with which the court dealt in *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, but quoad the right of the receiver to sue in other states for the enforcement of the double liability essentially the same as section 3260 of the revised statutes of Ohio, as amended and supplemented on and before April 16, 1900. The Minnesota statute of 1899 directed, among other things, that on the petition of an assignee of a corporation of that state for the benefit of its creditors under its insolvency laws, or of a receiver of the corporation duly appointed under the general equity powers and practice of the court, or pursuant to any statute, or of any creditor who had filed his claim in assignment or receivership proceedings, action might be taken for making an assessment upon the stockholders for the enforcement of their double liability; that the court should "direct the payment of the amount so assessed" to the assignee or receiver within the time specified in its order; that the order should direct the assignee or receiver in default of payment of such assessment to

"prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this state or elsewhere"; and that actions for the amount assessed might be maintained against each stockholder severally in Minnesota or "in any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found." This legislative enactment contained a proviso having no pertinency to the point now under consideration. The Minnesota statute of 1899 did not expressly vest in the assignee in insolvency or the receiver any right or title to the stockholders' double liability nor did it mention the vesting of title in him; and it cannot be assumed, in view of the fact that the double liability runs, not to the corporation, but exclusively to its creditors, that property in it passed to its assignee or receiver as trustee, quasi-assignee or in any other capacity, save in so far as the authority and duty conferred and imposed upon him to collect the quasi-trust fund, consisting of the double liability, constituted him a representative of the creditors as the cestuis que trustent or a quasi-assignee for their benefit. Whatever right or title he possessed to recover the amount of the assessment in other states arose, therefore, not from any express conference of title upon the receiver, but solely from the fact that he was legislatively authorized to recover the quasi-trust fund as the representative of the creditors of the corporation, and precisely this authority was conferred upon Irvine, although in fewer words, under section 3260 as amended and supplemented, by the court of common pleas in the decree of July 17, 1905. The court in *Bernheimer v. Converse* said:

"It is objected that the receiver cannot bring this action, and *Booth v. Clark*, 17 How. 322 [15 L. Ed. 164], *Hale v. Allinson*, 188 U. S. 56 [23 Sup. Ct. 244, 47 L. Ed. 380], and *Great Western Mining Co. v. Harris*, 198 U. S. 561 [25 Sup. Ct. 770, 49 L. Ed. 1163], are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a quasi assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction."

In *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, the court had under consideration the Minnesota statute of 1899 above referred to and said:

"Under this statute, as interpreted by the Supreme Court of the State, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent jurisdiction in the State or elsewhere. * * * It is true that an ordinary chancery receiver is a mere arm of the court appointing him, invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. * * * But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi-assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that State

and elsewhere. So, when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce for the benefit of his cestuis que trustent, a right of action, transitory in character, against one who was liable contractually and severally, if at all."

In *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, approved by the Supreme Court of the United States, as already stated, the court said with reference to the enforcement of the double liability:

"It has been held that an ordinary appointment as receiver, made in another state will not enable the appointee to sue in this Commonwealth in his own name. * * * In the present case the receiver is called by the court in Washington a quasi assignee for creditors. He is charged with the administration of a trust fund which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name."

No importance is attached to the fact that in the decree of the circuit court of Franklin county of December 7, 1907, which subsequently was reversed, it was ordered and adjudged that the plaintiff "be, and he hereby is, invested with the title and ownership in trust for the creditors of said railroad company * * * of the rights of the creditors of said railroad company, against the stockholders * * * including the several sums hereinbefore found due from the stockholders," or to the fact that the decree of the court of common pleas of May 28, 1909, contained a similar provision. Whatever motive may have prompted the making of such a provision it was wholly unnecessary and neither enlarged nor impaired the authority and right of the receiver to maintain suit in other states to enforce the double liability. For the receiver could not act in excess of the power conferred by the legislature upon the court to authorize and direct him "to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder." For the foregoing reasons the demurrer cannot be sustained on the eighth ground, challenging the right of the plaintiff to maintain suit in Delaware to enforce payment of the assessment made against the defendant under his double liability.

[17] The fourth ground of demurrer is to the effect that this action is barred by the Ohio "statute of limitations," because not brought against the defendant "within eighteen months from the accrual of the cause of action mentioned in said declaration"; and the sixth ground is to the effect that the action is barred by the Delaware statute of limitations because "not brought within three years from the accrual of the cause of action against this defendant." But little need be said of the Delaware statute. If under the laws of this state there be any limitation applicable to this action it is to be found in section 6 of chapter 123 of the revised code, providing:

"No action of trespass, no action of replevin, no action of detinue, no action of debt not found upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case shall be brought after the expiration of three years from the accruing of the cause of such action; subject, however," etc.

The omitted qualification has no pertinency here. This is an action of debt, and the above section includes all actions of debt "not found upon a record or specialty." If the action be "found upon a record or specialty" there is no limitation applicable to it; and lapse of time less than a period of twenty years from the accruing of the cause of action, necessary to give rise to a presumption of payment, cannot of itself render the action defeasible. If, on the other hand, the action is not "found upon a record or specialty," but upon an implied contract resulting from the acquisition by Elliott of stock in the railroad company and the double liability he thereby incurred and assumed, the three year limitation is applicable as a pure limitation and nothing else, and under the settled law of this state cannot be taken advantage of by demurrer, but must be pleaded. *Parker v. Whitaker*, 4 Har. (Del.) 527.

It is claimed in the fourth ground of demurrer that this action is barred because not brought within eighteen months from the accrual of the cause, not of this action, but of the "action mentioned in said declaration." That action was the domiciliary suit in Ohio commenced by the filing of the Marriott and Kinsey petitions in 1899.

Section 3258 of the revised statutes of Ohio which had been in force from 1880 was amended April 29, 1902 (95 Ohio Laws, p. 312) and again April 24, 1904 (97 Ohio Laws, p. 390). By the former amendment the following provision was added:

"Sec. 3258a. An action upon the liability of stockholders can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders."

And by the later amendment, passed to adapt the legislation on the subject of the double liability to the changed condition of things produced by the constitutional amendment of November 3, 1903, abolishing such liability, a provision to precisely the same effect was added. There has been much contrariety of judicial opinion on the point whether the eighteen months limitation begins to run from the insolvency of an Ohio corporation, barring any domiciliary suit for the enforcement of the double liability not commenced within that period, or, on the other hand, is applicable only to an action brought against a stockholder who has not been served with process nor appeared in the domiciliary suit, barring such action if not brought within eighteen months after the completion of the final assessment against him and the appointment of a receiver. On principle it would seem that the eighteen months should not begin to run until after the making of the final assessment and such appointment. Before section 3260 was so amended and supplemented as to permit the enforcement, by a receiver appointed in the domiciliary proceedings, of such liability against stockholders in other states, the local or domiciliary action was brought by one or more creditors of the insolvent corporation on behalf of

themselves, and all other creditors thereof, against it and all its stockholders, non-resident as well as resident. The period of limitation applicable to the action was six years from and after the insolvency of the corporation. An assessment under the double liability could be made only in the domiciliary suit, and no judgment or decree to enforce the payment of such assessment against any stockholder could be rendered or made save in that suit. There was no means by which non-resident stockholders of an Ohio corporation could be reached by process beyond the limits of that state, and unless served with process while temporarily there or voluntarily appearing in the domiciliary proceedings no judgment or decree could pass against them for the amount assessed against them in such proceedings. Under these circumstances there could be no reason to cut down the period of limitation for the commencement of the domiciliary action from six years to eighteen months unless on general principles the latter period was deemed preferable to the former.

But after the passage of the amendatory and supplemental act of April 16, 1900, providing means for the enforcement beyond the limits of Ohio of the double liability of the stockholders of Ohio corporations through actions brought by receivers appointed in the domiciliary proceedings, there was the strongest reason for limiting the bringing of such actions to a comparatively short period, to the end that the double liability fund should be promptly realized and distributed equitably and justly among the creditors. Further, it is a significant fact, that if the eighteen months limitation was intended to apply to the domiciliary suit there would have been no period of limitation applicable to a suit for the enforcement of the double liability against non-resident stockholders over whom jurisdiction in personam had not been acquired in the domiciliary proceedings, save the varying periods of limitation provided by the *lex fori* in the various states in which such suit should be brought. It seems inherently improbable that the legislature of Ohio, in view of the desirability of making prompt distribution among the creditors of the double liability fund, could have intended such a result. Hence, it seems most natural that section 3258a which limits the bringing of an action upon the double liability to the period of eighteen months after the debt or obligation "shall become enforceable against stockholders" should have been intended to apply only to suits brought against stockholders not served with process nor appearing in the domiciliary proceedings.

[18, 19] If, however, the eighteen months limitation was intended to apply only to a domiciliary suit for the enforcement of the double liability, it could have no application to this case; for the domiciliary suit in question was commenced before the enactment of the statute creating the eighteen months limitation, and at the time of such enactment more than eighteen months had elapsed after the insolvency of the railroad company. The contractual liability of Elliott and other stockholders of the railroad company to its creditors through their acquisition of stock had been created and was in full force, and it was not within the power of the legislature of Ohio, under the constitution of the United States, wholly to deprive the creditors of all

remedy for the enforcement of their valid and binding contract with the stockholders. From the fact that the Supreme Court of Ohio expressly declared the validity of the assessment made in the domiciliary suit, it is to be assumed, in the absence of explanation, that it did not regard the eighteen months limitation as applicable to or as barring the proceedings in such suit. And this accords with some of the cases. *Irvine v. Putnam* (C. C.) 167 Fed. 174. *Irvine v. Putnam* (C. C.) 190 Fed. 321. If, then, the eighteen months limitation can apply only to a suit or action brought by the receiver against a stockholder not served with process nor appearing in the domiciliary suit, how does the matter stand? It seems clear that on that assumption time cannot begin to run under the eighteen months limitation in favor of a non-resident stockholder, not served with process nor appearing in the domiciliary proceedings, with respect to the commencement of an action brought against him in a state other than Ohio for the collection for what may be due under his double liability, until after a final ascertainment and establishment of the rate of the assessment and the amount apportioned thereunder against him in the domiciliary proceedings and the appointment of a receiver to bring such action. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Irvine v. Bankard* (C. C.) 181 Fed. 206; *Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Francis v. Hazlett*, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230; *Irvine v. Putnam* (C. C.) 167 Fed. 174; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Irvine v. Putnam* (C. C.) 190 Fed. 321. Until that time there is no one entitled to maintain such action. The corporation cannot do so, for the double liability does not run to it, nor can such action be maintained by any one or more of the creditors of the corporation, for such statutory liability is a fund for the equal and pro rata benefit of all the creditors and the remedy for its enforcement is conferred upon the receiver exclusively. Nor can it appear before the final establishment in the domiciliary proceedings of the rate of assessment and the amount apportioned thereunder against such stockholder what sum is due and collectible from him under his double liability. Hence, as no action can be maintained in a foreign jurisdiction to enforce an assessment until its rate is established and an apportionment made nor until there is some one entitled to sue for such enforcement, time will not begin to run in favor of the stockholder before such final establishment of rate, such apportionment and a receivership.

[20] The fourth ground of demurrer refers to the provision in question as an Ohio statute of limitations. If it were a limitation solely affecting the remedy it could have no operation in a suit in Delaware even were it set up by plea; for pure limitations are part of the *lex fori*, and this state has no such limitation. Assuming, however, without deciding the point, that the eighteen months limitation is not confined to the remedy, but qualifies, limits, or conditionally destroys the right, and as such must be recognized by the courts in every state where an action may be brought to enforce the right, it is not perceived how such assumption can enure to the benefit of the de-

fendant here. On the above assumption two questions are presented; the first, relating to the point or stage in the domiciliary proceedings when such statutory period began to run, and the other, to the alleged suspension or interruption of the running of time within that period by reason of exceptions, appeals, etc., delaying the completion of the final assessment.

The first question will briefly be considered at this point. While the Ohio six year limitation was applicable to the bringing of the domiciliary suit, there was no statutory limitation of the duration of the proceedings therein. And from the nature of the proceedings in such a suit there could not be. The time required for making a just and lawful assessment upon the stockholders severally for their respective shares of the amount of the double liability necessary to be collected for the satisfaction of the debts of the corporation is obviously of uncertain duration, involving, as it does, among other things, the ascertainment of the stockholders liable, the number of shares held by them respectively, the amount and validity of the corporate indebtedness, the establishment of the rate of assessment, the hearing and determination of exceptions and appeals, and corrections of erroneous assessments made against individual stockholders. The court in the domiciliary proceedings may and should as far as possible ascertain the exact amount each stockholder should pay and so mould its judgment or decree as to do justice to all parties. *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234. The court of common pleas in the decree of July 17, 1905, recognized that the original assessment or rate of assessment made thereby was not necessarily the final assessment or rate, for it declared:

"All questions and issues which have been or may be raised herein as to who are or may be liable herein as stockholders * * * and which have not been heretofore decided in this case, and all questions as to ownership of stock and liability of stockholders * * * not herein or heretofore in this cause determined by this court, be and they hereby are reserved by this court for its further order, judgment and decree."

And the decree of July 17, 1905, recites many notices of intention to appeal therefrom, contains orders fixing the amount of appeal bonds and particularly states notices from a number of stockholders of intention to appeal from the "finding and judgment of the court fixing the amount to be assessed against each stockholder of said defendant company at 25 per cent. of the par value of the stock held by each of them." And in fact it appears from the admissions of the demurrer that such appeals were taken, perfected and prosecuted, and that certain other appeals in the domiciliary suit touching the rate of assessment, among other things, were not finally disposed of before the decree of the Supreme Court of Ohio of May 11, 1909, which was less than eighteen months before the bringing of this action, October 27, 1910. Until the former date no final and conclusive rate of assessment under the double liability had been made. The assessment was *in fieri* and had not become "enforceable against stockholders" within the meaning of section 3258a, nor did it become so enforceable until its rate was finally established May 11, 1909. It was not only not incumbent on the plaintiff to bring suit against the

defendant while the assessment was imperfect and in fieri, its rate not having been finally established, but it would have been the height of folly to do so before the Supreme Court of Ohio made its decree of May 11, 1909, after which date no appeals could lawfully be taken from the rate of assessment thereby approved. The unwisdom of prematurely instituting suit against non-resident stockholders for the collection of assessments under the double liability has received practical illustration in an action in this court between these parties for the recovery of the 50% assessment ordered by the circuit court of Franklin county in the decree of December 7, 1907. The action was brought after this decree and before its reversal as to the 50% clause by the Supreme Court of Ohio, resulting in its abandonment and the bringing of this suit. If section 3258a be regarded, not as a pure statutory limitation affecting only the remedy for the enforcement of a right, but as qualifying, restricting, or making conditional the right itself, and forming an essential part of it, it cannot be recognized as a valid enactment when tested by the constitution of the United States; for, after the act of April 16, 1900, the creditors of the railroad company had a vested right to sue in other states through the instrumentality of a receiver for the enforcement of the stockholders' double liability and to maintain such suit, subject only to the limitation provided by the *lex fori*. Such being the case the legislature of Ohio could not, in my opinion, through the section in question, lawfully deprive the creditors of the benefit of that right.

[21] It is urged on the part of the plaintiff that the taking and prosecution of appeals in the domiciliary suit, whereby he was prevented from prosecuting this action, until after May 11, 1909, suspended the running of the eighteen months period of limitation or the period of limitation under the Delaware statute, whichever may be applicable to the case. This contention, I think, cannot be sustained for while there is weighty authority in support of it (*Braun v. Sauerwein*, 77 U. S. 218, 19 L. Ed. 895; *Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953), the Supreme Court of Delaware in *Lewis v. Pawnee Bill's, etc., Co.*, 6 Pennewill (Del.) 316, 66 Atl. 471, 16 Ann. Cas. 903, has declared that, where the legislature has made no exception to the positive terms of a statute of limitations the presumption is that it intended to make none, and it is not within the province of a court to do so, following the declaration of Chief Justice Marshall in *McIver v. Ragan*, 2 Wheat. 25, 4 L. Ed. 175, that courts cannot "insert in the statute of limitations an exception which the statute does not contain." On any question touching the construction or operation of a statute of limitations of the State of Delaware, a decision by the Supreme Court of that state is conclusive. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. And with respect to the eighteen months period of limitation prescribed by the Ohio statute the contention is equally unavailing.

The vital question is not whether the running of time under the Ohio limitation of eighteen months or the Delaware statute of limitations was suspended by reason of the inability of the plaintiff owing to appeals, etc., in the domiciliary suit to maintain a suit against

Elliott, but whether it was incumbent upon the plaintiff to sue until after the decree of May 11, 1909, by the Supreme Court of Ohio. Until that date no assessment or rate of assessment had been finally and irreversibly established. As the assessment under the statutes of Ohio must be uniform as to all stockholders it is obvious that appeals by an individual stockholder or stockholders, or by a receiver, representing the creditors, may or may not result in increasing or diminishing the rate of assessment necessary under the double liability, thus affecting all the creditors and all the stockholders; and it is wholly unimportant whether an appeal is taken by the receiver, on the one hand, or, on the other, by Elliott or any other stockholder. Until exceptions and appeals and other attacks upon the rate of the initial assessment are finally disposed of, an assessment which will support an action by a receiver against a stockholder in another state is only in fieri and incomplete. The demurrer admits the following allegation in the declaration:

"That all the said appeals and proceedings upon writs of error were taken in due time as required by law, and upon proper bonds being filed as required by law, and as hereinabove referred to; that the effect of said appeals and proceedings on writs of error under and by virtue of the laws of the State of Ohio was to suspend the operation and effect of the said decrees of said court of common pleas; and that under and by virtue of said appeals and proceedings by writ of error as aforesaid, there was no time during which the said Ellsworth C. Irvine could lawfully proceed as such receiver under and by virtue of the decrees of said court of common pleas, to enforce the collection of the amount so assessed against the various stockholders of said company, defendants in said consolidated case, until the passage of said order of said Supreme Court on said date, to wit, May 11, 1909."

[22] While this court takes judicial cognizance of the laws of Ohio it does not take judicial cognizance of what may have been done in the course of the practice and procedure of the courts of that state under its statutes, and consequently the above averments in the declaration are admitted by the demurrer to be true. From these admissions it appears that the assessment against the stockholders under their double liability was not fully completed and established so as to enable the plaintiff to maintain suit thereon against them in other states before May 11, 1909, which date was not only within the Delaware three year period of limitation, but also the Ohio eighteen months limitation. More than eighteen months had expired after the decree of July 17, 1905, and before the decree by the Supreme Court of Ohio May 11, 1909; and if it had been deemed to bar a suit by the receiver against a stockholder in another state brought after the above decree of May 11, 1909, it is somewhat remarkable that the court of common pleas should not have so declared. On the contrary, after the appeals had been disposed of May 11, 1909, the court of common pleas in a further decree May 28, 1909, expressly authorized the receiver to bring suit in other states against stockholders subject to the double liability including Elliott. It cannot reasonably be assumed that it was intended by the legislature of Ohio that the receiver should have a right to sue a stockholder in another state while absolutely prevented from so doing by the practice and procedure

of the courts of Ohio under the statutes in question. Nothing that has here been stated is intended to convey the idea that before action can be maintained by the receiver against a stockholder resident in another state not served with process nor appearing voluntarily in the domiciliary suit, the assessment against such non-resident stockholder should be conclusive in all respects; for, as has appeared, it is settled doctrine that such non-resident stockholder is not precluded in such action from setting up that he is not a stockholder, or not a stockholder in the amount alleged, or that he has claims against the insolvent corporation which at law or in equity he is entitled to set off against the assessment upon his stock, or that he has any other defence or defences personal to himself. But the final establishment of the rate of assessment is an indispensable condition to the maintenance of such a suit. For without it there is nothing on which suit can be based. From the foregoing considerations it seems to result as a corollary that the cause of action against Elliott did not fully mature before the final establishment of the rate of assessment by the decree of May 11, 1909. Hence the plaintiff is not barred by any statute of limitations from maintaining this action.

In view of the conclusions reached it is not necessary to discuss the first three grounds of demurrer; as the plaintiff is under no obligation to set out in his declaration matters of evidence, on the one hand, or, on the other, to anticipate a supposed defence that possibly may hereafter be presented by plea. It may be added that the right of the plaintiff to maintain this action cannot be affected by any mere non-jurisdictional irregularities or defects in the domiciliary suit. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. Such imperfections, if there be any, could be rectified only in the domiciliary suit and cannot collaterally be taken advantage of in this action. On the whole I am satisfied that the demurrer should be overruled and the defendant required to plead.

FAULKNER v. KAPLON et ux.

(District Court, E. D. North Carolina. March 3, 1913.)

No. 347.

1. BANKRUPTCY (§ 178*)—FRAUDULENT CONVEYANCES—SALE BY ASSIGNEE—FRAUD—EVIDENCE.

In a suit by bankrupt's trustee to recover goods sold by the bankrupt's assignees to the bankrupt's daughter and his wife's nephew for fifty per cent. of the inventoried cost, evidence *held* to require a finding that the sales were fraudulent and for the benefit of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. § 178.*]

2. BANKRUPTCY (§ 279*)—FRAUDULENT TRANSFERS—ACTIONS—ESTOPPEL.

Where a sale of bankrupt's stocks of goods by his assignees for the benefit of creditors was claimed to be fraudulent and void by the bankrupt's trustee, and the assignees were directed to pay the proceeds of the sale into the bankruptcy court to await the final decree in bank-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy proceedings, the only effect of such order was to place the money in custodia legis to be disposed of as should be decreed on the final disposition of the case, and did not estop the trustee from suing to set aside the sales as fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

In Bankruptcy. Suit by C. J. Faulkner, as trustee in bankruptcy of Moses Kaplon, against Saul Kaplon and wife. Decree for complainant.

John W. Hinsdale, of Raleigh, N. C., J. G. Mills, of Wake Forest, N. C., and Faulkner & Faulkner, of Boydton, Va., for plaintiff.

N. Y. Gulley, of Wake Forest, N. C., and James H. Pou, of Raleigh, N. C., for defendants.

CONNOR, District Judge. [1] The plaintiff alleges: That Moses Kaplon, trading under the firm name of Moses Kaplon & Co., was duly adjudged a bankrupt by the District Court of the United States for the Eastern District of Virginia, and that he was elected and duly qualified as trustee of said bankrupt. That defendant Saul Kaplon and his wife, Bessy, were at the time of said adjudication, and are now, residents of the town of Wake Forest, in the Eastern District of North Carolina. That prior to his adjudication in bankruptcy the said Moses Kaplon was engaged in the mercantile business in the said town of Wake Forest and in Chase City, in the state of Virginia, having in each of said places a stock of goods, wares, and merchandise. That on December 26, 1911, said bankrupt executed to D. Gulley, Esq., an assignment, whereby he transferred and assigned to him his entire stock of goods, and all his other assets in Wake Forest, N. C., for the benefit of his creditors, and on December 27, 1911, he executed to T. D. Jeffries, Esq., an assignment whereby he assigned and transferred to him his entire stock of goods, etc., in Chase City, Va., for the benefit of his creditors. The said deeds of assignment were duly recorded, and the assignees took said property into their possession and made inventories thereof. That the assignee, T. D. Jeffries, on January 4, 1912, sold the stock of goods assigned to him to one Adolph Aarons of New York at the price of 50 cents on the dollar of the inventoried cost thereof. That said assignee gave no notice of his purpose to sell said stock of goods, although there were several other parties who were desirous of purchasing at a price in advance of that received from Aarons. Plaintiff, upon information and belief, charges that, while said purchase was pretended to be made by Adolph Aarons, it was in truth and fact made by Moses Kaplon the bankrupt, and paid for by money belonging to said bankrupt, which should have been surrendered by him as a part of his assets. That said Kaplon has continued in possession of said goods, exercising ownership over them, etc. That D. Gulley, Esq., the assignee of the stock of goods at Wake Forest on January 8, 1912, immediately upon the expiration of 10 days, being the time fixed by the North Carolina statute, before which an assignee is not permitted to sell the property assigned, without giving any notice of his intention to make sale, sold the entire stock as-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed to him by Moses Kaplon to defendant Bessy Kaplon, wife of defendant Saul Kaplon, the son of said Moses Kaplon, for 50 cents on the dollar of the inventoried price of said goods. That said goods are worth much more than the price for which they were sold. Plaintiff alleges upon information and belief that, while said purchase was pretended to be made by said Bessy Kaplon, it was in truth made by said bankrupt or by said Bessy Kaplon with money belonging to said bankrupt. That said Saul and Bessy Kaplon had been in the sole management and control of said store, stock, and business at Wake Forest, purchasing and selling goods as they saw fit, rendering to said Moses Kaplon no account of their transactions. Plaintiff charges that the money with which defendant Bessy Kaplon paid the assignee for said stock of goods was derived from the proceeds of the business conducted by her husband and herself prior to the adjudication of said Moses Kaplon. Plaintiff further charges, upon information and belief, that the alleged purchase of the stocks of goods by Adolph Aarons and Bessy Kaplon at Chase City and Wake Forest, respectively, was the result and consummation of a conspiracy entered into before the execution of the said deeds of assignment by Moses Kaplon by and between the said Moses Kaplon, his brother and assistant Max Kaplon at Chase City, Saul Kaplon, his son, and wife, Bessy Kaplon, Adolph Aarons, the nephew of the wife of said Moses and Joseph L. Balkind, another kinsman of his wife, and Louis Applefield, by which it was planned and determined that said Moses Kaplon should make said deeds of assignment, have the goods sold privately without any competition, purchase the same for the said Moses Kaplon, but in the name of some other person, at less than one-half of the value thereof, pay for the same with the money theretofore derived from the sale of said goods in the regular course of business, which money should have gone to the creditors of Moses Kaplon in payment of debts due them for said goods, etc. Plaintiff made further charges respecting the manner in which defendants were at the date of filing the bill disposing of the goods, etc., as the basis for injunctive relief pending the hearing, etc. This suit is prosecuted only against defendant Saul Kaplon and his wife Bessy, residents of this district, wherein the property in controversy is situate. The bill concludes with prayer for process and appropriate relief. Defendants filed their joint answer, admitting that Moses Kaplon was adjudged a bankrupt, and that plaintiff was his trustee—the execution of the deeds of assignment—the manner of conducting the business at Wake Forest, N. C., and the purchase of the stock by defendant Bessy Kaplon from the assignee. They deny that the goods were sold without notice to others, and allege that the assignee made several efforts to obtain a higher price for said goods; that the best price offered him was 30 cents on the dollar; that a portion of the goods in said stock was old, etc. They allege that the price paid by defendant Bessy Kaplon for said goods was more than their real value. She expressed her readiness to surrender such part of said goods as were on hand at the time of filing the bill and an accounting for the balance if the amount paid by her is refunded. She avers that no part of the money paid by her for said goods belonged to Moses Kaplon, but that all of said money belonged to her, the

said Bessy Kaplon; that of the amount \$3,723.29, paid for said goods, she borrowed \$2,100 from one Louis Applefield, and the balance thereof was a part of the sum of \$6,000 given to her by her father, S. W. Levine, of Chicago, Ill., as her "marriage portion." She states that a portion of said sum was deposited in the Kennaway Trust & Savings Bank of Chicago, a part in the Illinois Trust & Savings Bank, and a part kept by her in cash. The defendants expressly deny any and all allegations charging a conspiracy between Moses Kaplon and themselves. They deny having any knowledge in respect to the transaction at Chase City, etc. The defendants deny that they were attempting to dispose of said goods otherwise than in the usual and ordinary way, admitting that during the dull season they were advertising sales, that they intended removing from Wake Forest to some larger town in the eastern section of the state, where trade conditions were better. Defendants further allege that plaintiff trustee, having received the amount paid by her to D. Gulley, Esq., assignee, as the purchase money for said goods, is estopped from attacking the purchase thereof by her, etc. They expressly and explicitly deny any and all manner of fraud, combination, or conspiracy on their part in regard to the entire transaction. Plaintiff filed a general replication, etc. It appears that, after the appointment of plaintiff as trustee in bankruptcy of Moses Kaplon, he obtained from the court, without objection, an order directing the assignee to pay the amount received by him from the sale of the stock of goods into the registry of the District Court for the Eastern District of Virginia, which was done. Plaintiff proceeded to take the depositions in support of his bill, and upon the completion thereof the cause was set down for hearing. Defendants took no testimony. The testimony is found in a large mass of examinations had before a commissioner appointed by Judge Waddill, depositions taken under commissions from this court, and many exhibits.

It appears that Moses Kaplon at and prior to the execution of the deeds of assignment to Mr. Gulley and Mr. Jeffries resided at Chase City, Va. His son, Saul Kaplon, and his wife, Bessy Kaplon, resided at Wake Forest, N. C. Bessy Kaplon is the daughter of S. L. Levine of Chicago, Ill. Saul Kaplon married her in Chicago, August, 1907, and during the month of March, 1910, they went to Wake Forest, taking charge of the business, then opened, for Moses Kaplon, under the name of M. Kaplon & Co. The larger part of the stock of goods with which the business was begun was shipped from Chase City, Va. Saul Kaplon and his wife had absolute control of the business, bought and sold goods, received and paid out money, executed notes, deposited money in bank, checking it out as they saw fit. They did not at any time render to Moses Kaplon any account of the money received and paid out, or the manner in which they conducted said business; nor did they keep any books of account except their bank book and invoices when paid. They paid but small sums of money received from said business to Moses Kaplon, and of these they kept no account. They were to receive for their services, in conducting said business, \$100 a month and all of their expenses, including house rent, groceries, traveling expenses, and "anything that was necessary to keep us up." On August 19, 1911, defendant Saul Kaplon made in his own hand-

writing, and signed, the name of M. Kaplon & Co. to a statement which he sent to R. G. Dun & Co. and Bradstreet & Co. "as a basis of credit," showing the financial condition of said M. Kaplon & Co. "from inventory of July 25, 1911," by which it appeared that he had "Merchandise on hand \$8,200. Bills Receivable and accounts \$155. Cash in Bank \$400. Other personal property consisting of Mdse. at Chase City, Va. From Inventory of July 20, 1911, \$11,750. Total available assets \$20,500. Liabilities for Merchandise not due \$1,094. For Merchandise past due \$327.50. Loans from bank \$300. Liability of Chase City Store \$2,750.00. Net worth \$16,033.50." Between September 1 and December 27, 1911, they bought goods for the Wake Forest Store amounting to \$11,135.85. The total amount of inventory, as taken by the assignee immediately after the execution of the assignment, was \$7,506.58. Plaintiff introduced a large number of telegrams to and from defendant Saul Kaplon, Bessy Kaplon, Adolph Aarons, Joseph L. Balkind of New York, Moses Kaplon and Max Kaplon, all of them sent either to or from Wake Forest, New York, or Rutherfordton, N. C. They bear date during the months of October, November, December, 1911, and January and February, 1912. While the language of many of them is obscure, it is manifest that the large majority of them relate to the business of Moses Kaplon & Co. at Wake Forest and some of them to his business at Chase City. It is not practicable to set out all of the telegrams in full, but a reference to them clearly indicates that they relate to negotiations between these parties in regard to the business of M. Kaplon & Co. and the disposition of the stock of goods at Wake Forest and Chase City. The parties to the telegrams are all related, either by blood or marriage. They indicate that several of the parties are moving about between Chase City, Wake Forest, and other points. Many of them are sent by defendant Bessy to Saul Kaplon, who it appears has removed portions of the goods to Hillsboro, Rutherfordton, and Zebulon. In these telegrams his wife and his father urge him to return to Wake Forest and to send the goods there. These bear date December 25th and 26th. A number of telegrams to and from G. W. Groves & Co., Buffalo, N. Y., indicate a purpose to have a "rush special sale" of the goods which, for some reason, was not successful. On December 11, 1911, Bessy Kaplon wires her husband at Rutherfordton, "Don't come until I tell you Father and Balkind are here." On the next day Balkind wires from Wake Forest to Aarons, N. Y.:

"Send Dorfman at once, very important, train leaves twelve thirty and two to-day. Wire answer. Will take two days here."

On same day, Moses Kaplon, from Wake Forest, wires Max Kaplon at Chase City:

"Cannot come home before Wednesday—look after business, get all help needed, get out circulars."

On December 12th Saul Kaplon, from Rutherfordton, wires Balkind at Wake Forest:

"Will be at Wake Forest to-night."

On same day Aarons, from New York, wires Balkind at Wake Forest:

"Dorfman leaves to-day on two o'clock train."

Dorfman was a cousin of Saul Kaplon. There is evidence that Balkind and Dorfman looked over, and took an inventory of, the stock of goods. On December 31st M. Kaplon, from Wake Forest, wires Balkind at Brooklyn, N. Y.:

"Come at once to Chase City. Stock for sale at Chase City. Will be home to-morrow."

On January 4th Balkind from New York wires Aarons at Wake Forest:

"You need not stay for sale. They can buy it themselves. Prefer your name not to be mentioned, apt to be complications. Will send Lemson if possible. Rosenthal and others are going to fight."

On same day Aarons, from Wake Forest, wires Balkind at New York:

"Must I come home. If I leave I am sure they will not get the stock. Can buy on some other name—answer if I should come home. Can leave to-night."

On January 6th Saul Kaplon, from Wake Forest, wires Aarons at New York:

"You or Mr. Balkind come at once. Stock to be sold Monday."

On January 7th Aarons wires Saul:

"Must postpone sale till Monday—impossible to come over. See Mr. Professor."

On January 8th Aarons from New York wires Prof. Gulley:

"Will give thirty cents on dollar for stock of Kaplon."

On same day he wires Saul:

"Must I come to-day. Answer immediately at home address."

On same day he wires Saul:

"Have wired Prof. G. per your letter; answer if sale postponed, then I will leave to-night, expect money from Applefield Tuesday in Wake Forest."

On same day defendant Bessy, from Wake Forest, wires M. Kaplon Chase City:

"Everything all right. I bought stock same price Chase City."

On same day M. Kaplon, from Wake Forest, wires Aarons, at Brooklyn, N. Y.:

"Not necessary for you to come. Bessy Kaplon bought stock same price as Chase City. Need one thousand. Send at once."

On same day, Bessy, from Wake Forest, wires her sister Mrs. E. H. Flowers, Chicago, Ill.:

"Have just bought stock under my name, paid 50 cents on dollar. Did not use check you sent; will bring it home. We may leave Sunday. It is snowing. Love to all—tell Pa and Ma."

On January 9th M. Kaplon from Wake Forest wires Aarons at New York:

"Don't send man until further notice. Bad weather."

It is in evidence that the assignee, both at Wake Forest and at Chase City, made the sales upon the advice of the counsel for Moses Kaplon. From the foregoing and other evidence, appearing in the examination of Saul and Bessy Kaplon, it is manifest that the business of Moses Kaplon & Co., at Wake Forest, was conducted exclusively by them and that, as between them, defendant Bessy was the controlling spirit. She spent a large part of her time in the active management of the business. Her husband was during the time intervening, between March, 1910, and December, 1911, traveling about, endeavoring to establish branch stores at Zebulon, Hillsboro, and Rutherfordton. This is shown by his own testimony, other witnesses examined and the telegrams. It appears that the statement made to Bradstreet was recalled. In his several examinations regarding these statements Saul makes many contradictory statements. It is impossible to draw any very satisfactory conclusions from his testimony in regard to the statements. It is apparent that they were made with either a purpose to deceive and obtain a very much larger line of credit than he was entitled to, or with a reckless disregard of the truth. If he had a stock of goods, inventoried on July 25, 1911, at \$8,200, as he stated, it is impossible to understand what became of them between that date and the date of the inventory taken by the assignee about January 4, 1912. It is conceded that they purchased during the fall season of 1911 goods amounting to \$11,135.85. This amount added to \$8,200 makes \$19,355.85. The amount deposited in bank during the same period representing, they say, the amount of cash sales, is \$5,284.80. They sold nothing on credit. Assuming that the goods were sold at cost, although they say that they were sold for a profit, there should have been on hand December 26, 1911, approximately, goods of the value of \$14,071. No cash or balance in bank nor accounts payable were delivered to the assignee. The inventory shows goods of but \$7,506 value, thus showing a shortage of \$6,565. Mr. D. Gulley, who is an attorney, says that he has no special knowledge of the prices of goods. He also says that Saul Kaplon alone assisted him in taking the inventory, calling out the prices—that it was taken "in a very general way." Plaintiff insists that the real value of the goods was very much in excess of the inventory. I think it very probable that the statement made by Saul Kaplon in regard to the value of the goods on hand August 19, 1911, is false, but to what extent it is impossible to even conjecture. His testimony indicates either a reckless disregard of the truth or a disordered mind. Whether true or not that the statement made to commercial agencies had the effect of giving to them a large credit is evidenced by the amount of debts proven against Moses Kaplon & Co. in bankruptcy for goods purchased subsequent to the statement. Of the amount deposited in bank only \$2,435 was paid on account of debts. Saul and his wife were to receive \$100 per month and ex-

penses for their services. Their family consisted of themselves and one infant. Without undertaking to unravel this tangled thread or explain this very peculiar manner of conducting a mercantile business of the size and character disclosed by the testimony, it is manifest that Saul and Bessy Kaplon, and their father, Moses Kaplon, are the only persons who are capable of explaining very much which in the light of results calls for explanation. There was either gross misrepresentation of the condition of the business on August 19, 1911, or a very large shortage in available assets at the time the property went into the possession of the assignee or a large sale of goods for cash which went into the possession of Saul Kaplon and his wife, unaccounted for by them. It seems that they did not receive the amount to be paid them for services. Saul proves a claim of \$1,000 against his father for balance due on account of services. The telegrams put in evidence tend strongly to show that during the latter part of November, 1911, Moses Kaplon & Co., or Saul and his wife, conceived the purpose of having a "rush or special sale" and sought the services of a firm in Buffalo, N. Y., for that purpose. It is not clear to what extent this purpose was executed. The man sent out to conduct the sales appears not to have given satisfaction. The last telegram, relating to this phase of the transaction, bears date December 8, 1911. "Don't send man; yot've fooled too many times." This was evidently sent by Bessy Kaplon, because on the 9th December she wires M. Kaplon at Chase City: "Be sure to come to-morrow—Sunday. Bessy." And on the 11th December to her husband at Rutherfordton not to come "until I tell you Father and Balkind here." It is not clear, because of the absence of any punctuation, whether this wire should be understood as a statement that her father and Balkind are then at Wake Forest, or as a direction to her husband not to come until she tells him that they are there. The next telegram, December 11th, from Balkind to Aarons, shows that the former was at Wake Forest on that day, and that Moses Kaplon was there on the 12th December. From that day until the business is brought to a conclusion by the execution of the deeds of assignment, the sale of the stock to Adolph Aarons at Chase City and to Bessy Kaplon at Wake Forest, the telegrams show that Balkind, Aarons, and Moses Kaplon are in constant communication in regard in disposing of both stocks of goods. Without attributing to the assignees any complicity with, or knowledge of, the purpose on the part of Moses Kaplon to bring about sales of these stocks to the persons selected by himself, it is manifest that there was undue haste in making the sales. They both state they were made under the advice of the counsel for Moses Kaplon. Keeping in mind the relationship of these parties, the significant language of the telegrams, the manner in which the business at Wake Forest was conducted, the statement made by Saul on August 19, 1911, his absolute indifference to or disregard of its truth, the margin between the value of the goods stated to be on hand in August, 1911, those purchased between that date, and December 27th of that year, and those found in the store at the date of the assignment, the failure on the part of Saul Kaplon and his wife to render any account of the

business, their contradictory statements made upon their several examinations, and many other facts and circumstances found in the conduct of the parties concerned, call upon the defendants to explain the transactions which, in four months, resulted in converting a business, which Saul Kaplon stated was not only amply solvent, but carried a large amount of "net available assets" into insolvency, and a series of transactions thereafter resulting in putting into the possession of Bessy Kaplon the stocks of goods representing purchases in four months of some \$12,000, inventoried at \$7,500, for \$3,750. The series of transactions disclosed, with these results, call for a frank, full, and corroborated explanation to overcome the presumptions which arise from the facts and circumstances recited.

To meet the case thus made by plaintiff, defendants rely upon the testimony of Bessy Kaplon, introduced by plaintiff, insisting that it shows the sources from which she obtained the money with which she paid for the Wake Forest stock of goods, and explains the entire transaction consistently with honesty and good faith. Bessy Kaplon was examined before a commissioner. She says that her father gave her, as her "marriage portion," \$6,000, a part of which she had deposited in certain banks, named by her, in Chicago, and a part was left with him, the balance she kept in her trunk. She further says that her sister, Mrs. E. H. Flowers, residing in Chicago, sent her on January 6, 1912, \$1,547. In this statement she is corroborated by a telegram from her sister of that date. Her telegram of January 6th says: "Just mailed \$1547—some hustling to-day." Bessy Kaplon says that this amount was sent in three checks, one for \$1,000, which she sent back to her sister in a few days, that she returned the \$1,000 check, depositing \$547. The bank book shows a deposit by Bessy Kaplon January 9th of \$1,615; that, when she wrote her sister for it, she did not tell her for what purpose she wanted it; that she did not want it to buy the stock. Her sister was examined in Chicago, and says that she sent to Bessy Kaplon a draft for \$1,547; that she got it from a bank in Chicago, the name of which she cannot remember. She says that she had the money in a vault of the Citizens' Savings & Trust Company, Chicago, that she had "saved it up," that Bessy did not return any part of it to her—owes it all now. Her testimony in regard to the source from which this money came and the correspondence with Bessy in regard to it is very unsatisfactory. She says that she had a letter telling her to send the money, but destroyed it. She admits that her testimony, taken at another time, in regard to the amount of money which she had, was untrue. The cashier of the Citizens' Trust & Savings Bank was examined, and stated that Esther Flower rented a box in its vault November 4, 1911. The transaction is involved in mystery and doubt. Where the money came from, in what form it was sent, whether in one check or draft as testified by Mrs. Flower, or in three, as Bessy Kaplon swears, at what bank in Chicago the check or checks were issued, are uncertain. Mrs. Flower says that she does not know; that although she has resided in Chicago a long time, had a box in the vault of the bank, she is unable to tell where, or in what form, she got the exchange, etc. The deposition of the clerk in the First National Bank of Chicago was taken. He says no such check was issued by that bank

on that or any other day. Bessy Kaplon says that she did not write to her sister for money to buy the goods, that she did not need it for that purpose, that at the time she wrote she did not intend to buy the goods; that she had at the time about \$3,000 in her trunk; that her father owed her about \$2,000, and she had money on deposit in banks in Chicago as much as \$3,000. She says that, when she was married, her father gave her \$6,000 as her "portion." "Mostly all bills, there was some little gold." She left a part of it with him, deposited some in bank, and always kept some in her trunk. She further says that she borrowed from one Louis Applefield \$2,100, which she used in paying for the goods. She loaned Adolph Aarons, to help him pay for the Chase City stock, \$1,434. Her testimony in regard to all of these matters is vague, uncertain, and frequently contradictory. Plaintiff took and read the deposition of her father, S. L. Levine. He says that he gave her some money at different times, that he has no memorandum or evidence of the dates or amounts of such gifts, that they may have amounted to \$5,000 or \$6,000. He denies that he had any money for her, or owed her any money. His testimony in regard to these matters is very indefinite and unsatisfactory, and in several material respects he contradicts his daughter. The testimony of the cashier of one of the banks, in which she says that she had money, was taken. He says that on July 11, 1911, she deposited in the bank \$100, and on January 18, 1912, drew it out with the accrued interest. The cashier of the Kenwood Trust & Savings Bank says that she deposited but a small amount in that bank during the years 1908-1911, not exceeding \$575. She drew out the balance \$345.65 January 6, 1912. No other bank account in her name is found in Chicago. Thus but two sources remain from which she could have received the money with which she paid for the goods. In regard to the alleged money in her trunk she is not corroborated by a single witness. Her husband, she says, knew nothing of her having money in her trunk, although she claims to have kept it there during the period of her married life. The cashier of the Citizens' Bank of Wake Forest says that about the time of the purchase she spoke to him about borrowing a large sum of money, but nothing came of it. The cashier of another bank at Wake Forest says that she brought small bills to him to be exchanged for larger ones. I find it difficult to believe that her father gave her \$6,000. There are many facts and circumstances in the record rendering it very improbable, nor can I find upon her uncorroborated testimony that she kept \$3,000, or any like sum, in her trunk during the years of her married life, as she says. It is so unreasonable, and she makes so many statements in which she contradicts herself, and so many in which she is contradicted by those who would, if possible, corroborate her, that it is impossible to safely adopt her testimony as true. The cashier of the Citizens' Bank of Wake Forest says that about the time of the transaction in controversy she brought him \$1,434 in currency, probably some in silver, which at her request he sent to the First National Bank at Chase City by express; that he did not send the same bills, but larger ones. Mr. Williams, president of that bank, says that this money was received and placed to the credit of Adolph Aarons and drawn out by him by check payable to Mr. Jeffries, assignee. The

check was drawn several days before the money arrived. The evidence shows that Aarons was relying on this money to use in part payment for the stock of goods there. The balance appears to have been paid from the proceeds of two notes of \$500 each given by Aarons to the bank, indorsed by Moses Kaplon, and secured by a deed of trust on the goods. Aarons who lives in New York, left the goods in the possession of Moses Kaplon, who continued to sell them, and deposit the proceeds to Aarons' account. The notes were paid by checks on the account of Aarons, drawn by Moses Kaplon, in Aarons' name. Bessy Kaplon says of this money sent to Aarons that it was "money that I have had here for a long time. It was a part of the money that I had that my father gave me, had it ever since he gave it to me. I don't know where I kept it, most any place, kept it home in my trunk ever since I was married—five years ago. Don't think my husband knew it; think my father did; did not want to deposit in bank." She says that Aarons has paid her a part of the \$1,434. She has no note or other evidence of the debt. He has promised to pay the balance in July. That Aarons, a merchant in New York, should come to Chase City for the purpose of buying a large stock of goods without having made any arrangement to pay for them, depending on borrowing the money from the daughter-in-law of the bankrupt debtor, and negotiating a loan for the balance at a local bank upon the indorsement of the debtor and a lien on the goods, excites suspicion that the entire transaction was for the "ease and benefit" of the insolvent debtor. This suspicion is vastly strengthened by all of the "facts and circumstances" surrounding the transaction.

Coming to the alleged loan by Louis Applefield of \$2,100, defendant produced notes executed by her to Applefield and checks showing their payment. The testimony in regard to this transaction comes from Bessy Kaplon, and in this respect is important. At her examination taken before a commissioner (In re M. Kaplon & Co.) May 16, 1912, she says:

"I borrowed \$2,100 from Louis Applefield of Baltimore. I don't know how long I had known him—about two or three years. He is a wholesale merchant. He was down here at the time. He just came down here. He travels all around, and he heard about the assignment being filed, and he said: 'If I were you, I would buy that stock of goods.' I said: 'I want to go to Chicago. I don't want to live here.' He said: 'I think you ought to buy it.' I said: 'Will you loan me the money?' He said: 'I will loan you all you want.' And he loaned me \$2,100. *The day I borrowed the money I went over and he gave it to Mr. Brewer.* He was there when I signed the note. I gave him notes. I have just got through paying the notes, four notes. Three amounted to \$500 and one \$600. I paid the last May 10th. Business is so dull here. I had to draw money from Chicago, a thousand dollars, and gave it to Mr. Brewer. I drew it on the First National Bank of Chicago. I wrote to the bank in Chicago, and told them to send me the thousand dollars. * * * I certainly had money in Chicago. I did not want to take my money. Wanted to save it to educate my child."

Mr. Brewer says that Bessy Kaplon and Louis Applefield came into his bank and asked him to fill up a couple of drafts on Applefield in Baltimore, and to take off the interest on two or three notes. The drafts were paid. The bank books show a deposit by Bessy Kaplon

January 10th of \$2,073.65. It will be observed that on January 8, 1912, Aarons wires from New York to Saul Kaplon at Wake Forest:

"Have wired Prof. G. per your letter, answer if sale postponed—then I will leave to-night. *Expect money from Applefield Tuesday in Wake Forest.*"

On the same day Bessy Kaplon buys the stock, and so wires Moses Kaplon at Chase City. Louis Applefield wires from Chase City to "Louis Applefield, Baltimore":

"Between January 2nd and 4th 1912. Have arranged everything satisfactory. Will leave for Durham to-morrow."

It is difficult to reconcile these facts. There is evidence tending to show that Applefield was about this time at Chase City, and that he and Aarons went together from there to Wake Forest. The telegram of January 8th, from Aarons to Saul Kaplon, indicates that he expected to get money from Applefield to buy the goods at Wake Forest. It is evident that Applefield did not reach Wake Forest until January 10, 1912. That is the date of the deposit by Bessy Kaplon of \$2,073.75, as shown by bank book. It is evident that the transaction between Bessy Kaplon and Applefield took place on one day. This must have been January 10th. She says that they went to the bank. Mr. Brewer says that they came to the bank in the afternoon. Mr. Gulley says:

"The goods were sold on the 8th of January. The payment of \$30 was made on the 8th and on the 10th. She paid the balance by check on the Citizens' Bank."

How is it possible to reconcile these indisputable facts with Bessy Kaplon's testimony in regard to the transaction between Applefield and herself? She had bought the goods two days before she saw Applefield at whose suggestion and upon whose offer to loan her the money she says she purchased them. Her statement as to the manner in which Applefield loaned her the money is unreasonable. That a business man should, almost accidentally, find himself in Wake Forest, find a stock of goods in the hands of an assignee, suggest to a young married woman, without consultation with her husband, as she says against the advice of her father-in-law, to buy a stock of goods for \$3,723.29, and propose to loan her, on her own notes, without security, or the signature of her husband, \$2,100, is a very remarkable transaction and calls for explanation, especially in view of the many and manifest contradictions found in the testimony of Bessy Kaplon in regard to the transaction. Applefield was with Aarons at Chase City, and in some way, and in regard to some matter, "arranged everything satisfactorily." It will be recalled that Aarons wires Saul Kaplon "expect to get money from Applefield," yet, when he buys at Chase City, he gets no money from Applefield, but borrows \$1,434 from Bessy Kaplon, who, in turn, accepts Applefield's unsolicited offer to loan \$2,100. Bessy Kaplon says that at that time she had \$3,000 in her trunk, \$1,200 in her father's hands, and \$3,000 on deposit in Chicago banks. Why were all of these mysterious methods resorted to when she had ample money of her own to pay for the goods? Why send Aarons \$1,434 and immediately borrow \$2,100 from Applefield? Why did she not write to her father, or draw on the Chicago banks, or open her trunk and use her own money?

These questions demand plain, straightforward answers. Her father denies that he had any money for her, and the testimony from the banks shows that she had none there. She says that she paid Applefield the notes, and the checks produced show that she did so. She says that the last note was paid by money drawn from the First National Bank of Chicago. Her account at the Wake Forest Bank shows a deposit, April 3, 1912, of \$1,000, but Mr. Givens of the Chicago bank says that she had no account there for the past five years. It is impossible to unravel the tangle into which the parties to these transactions have gotten it. It is equally impossible to escape the conviction that a fraud has been practiced upon the creditors of Moses Kaplon; that as to the Wake Forest stock the defendant Bessy Kaplon has either been an active participant or has been used by others who have profited by their fraudulent scheme. That Balkind, Aarons, and Applefield have not been called upon to explain their connection with these transactions, in which they are so closely connected, excites grave suspicion that they were active participants, if not the chief promoters of the conspiracy and its consummation. A very eminent judge has well said:

"Fraud rarely lurks in the written agreement of parties, entered into at the end of their negotiations with each other, but almost universally precedes it, and consisting, as it must necessarily do in such case, of acts and declarations merely, it can only be exposed by allowing the conduct of the parties, their words and deeds throughout the entire treaty, to be shown to the jury. To hold the law to be * * * that because the negotiations of the parties culminated in a written instrument all inquiry into their preceding conduct is excluded would be to say that fraud by its very success might be made secure, unless, as can seldom happen, it would be detected in the mere words of the instrument." Ruffin, J., in *Knight v. Houghtalling*, 85 N. C. 17.

Applying this language to the disclosures in this record, it is difficult to avoid the conclusion that the execution of the notes to Applefield by Bessy Kaplon was the final means resorted to for the purpose of covering up and concealing the truth, that Applefield was a party to the scheme or conspiracy which found its consummation in the execution of the notes to him for the purpose of putting the stock of goods into the possession of Bessy Kaplon by the use of money which justly belonged to the creditors of Moses Kaplon. It may be that we have not been able to accurately interpret all of the facts and circumstances surrounding and permeating this transaction from start to finish. I cannot find that Bessy Kaplon had on January 8, 1912, the money which she claims derived from the sources claimed by her. I entertain a strong conviction that she and her husband have either made away with goods which in equity and justice belonged to the creditors of Moses Kaplon, or have used the proceeds of goods purchased and not paid for to consummate a fraud upon them. In either event, she is not, as against them or their representative the plaintiff, entitled to hold these goods as her property.

[2] To the suggestion that the trustee is estopped to prosecute this suit because, upon his motion, the judge of the District Court for the Eastern District of Virginia directed the assignee to pay the proceeds

of the sale into the court to await the final decree in the bankruptcy proceeding, of which that court has original jurisdiction, it is sufficient to say that the only effect of such order was to hold the money in custodia legis, to be disposed of as upon the final disposition of the case should be decreed. No estoppel can arise against the plaintiff by reason of that order. It appears that prior to the filing of the bill in this cause defendant Bessy Kaplon bought other goods and put them in the store with the stock purchased from the assignee. By direction of this court an inventory was taken in which these goods were separated from those purchased of the assignee. This has been done, and is on file. An order was also made permitting the defendant to sell the goods in the usual course of business, and keep and deposit the proceeds thereof in the bank under the supervision of Mr. Brewer, who has filed monthly statements of such sales, etc. A decree will be drawn adjudging that the goods sold by Mr. Donald Gulley, assignee of Moses Kaplon to Bessy Kaplon, were paid for by the money of Moses Kaplon, and that so much of said stock of goods as may be on hand shall be sold and the proceeds paid over to plaintiff, trustee. To the end that it may be ascertained what portion of the goods now on hand were of said stock and the same separated from such goods as were brought by defendant since January 10, 1912, a referee will be appointed to make such separation, with direction to ascertain the amount of sales that have been made since the order in this cause. The referee will take immediate possession of the goods now in the store and hold the same until the separation is made, not to exceed five days from the date of the interlocutory decree herein. This decree will further provide for a report by said referee within 10 days from its date. The cause will be retained for such further decree as upon the coming in of the report may be proper in the premises.

THE PERE MARQUETTE 18.

(District Court, E. D. Wisconsin. February 18, 1913.)

1. SHIPPING (§ 209*)—PETITION FOR LIMITATION OF LIABILITY—RIGHT OF CLAIMANT TO ANSWER.

Under admiralty rule 56 (29 Sup. Ct. xlv), which provides that, in a proceeding by a shipowner for limitation of liability, any claimant of damages "who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition and contest the right of the owner or owners of said ship or vessel either to an exemption from liability or to a limitation of liability," a person who has not so presented a claim has no standing as a claimant to answer the petition.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

2. SHIPPING (§ 209*)—PROCEEDING FOR LIMITATION OF LIABILITY—ANSWER.

Where a petition for limitation of liability alleges the facts necessary to entitle the petitioner, under the statute, to the relief sought, the answer of a contesting damage claimant must be full, explicit, and distinct as to each separate article and separate allegation, as required by ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

miralty rule 27 (29 Sup. Ct. xlii), and, where a necessary statutory allegation of the petition is denied, the answer must state the facts on which the denial is based, and not merely bare denials or general conclusions of the pleader.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

3. SHIPPING (§ 209*)—PROCEEDING FOR LIMITATION OF LIABILITY—DEFENSES—RECOVERY OF INSURANCE.

That a shipowner recovered insurance on the loss of his vessel does not affect his right to a limitation of liability under the statute as against damage claimants.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

4. SHIPPING (§ 209*)—PROCEEDING FOR LIMITATION OF LIABILITY—SECURITY FOR COSTS.

Contesting damage claimants in a proceeding for limitation of liability must give security for costs, unless relieved therefrom on a proper showing of inability on account of poverty.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. In the matter of petition of the Pere Marquette Railroad Company, as owner of the car ferry steamer Pere Marquette 18, for limitation of liability. On exceptions to answers. Exceptions sustained.

The petitioner, Pere Marquette Railroad Company, has filed a libel and petition, alleging its ownership of a car ferry steamer Pere Marquette 18, a duly enrolled and licensed merchant vessel employed in navigation upon the Great Lakes. On September 9, 1910, while on a voyage between the ports of Ludington, Mich., and Milwaukee, Wis., she met with disaster, sank, and with her cargo became a total loss, out of which were subsequently recovered certain articles belonging to her, life preservers, life raft, etc., valued at approximately \$85.00. A description of the cars and their contents, constituting the cargo, and their respective owners, consignors, and consignees, the passenger list, names of officers and crew of the steamer at the time, also the names of passengers and members of crew killed or drowned in said disaster, are particularly set forth. It is also averred that because of the disaster no freight money was or could be earned on the voyage; such part, if any, as had been prepaid, being subject to refund. Suit has been brought by the representatives of one whose life was lost, claiming damages for such loss. Other actions will, unless restrained, be brought upon similar claims, which, if established, will greatly exceed the value of the steamer after such disaster, and of her pending freight.

In claiming the benefit of Revised Statutes, §§ 4283, 4284, 4285 (U. S. Comp. St. 1901, p. 2943), and asserting its desire in the proceedings thus instituted to contest its, and its steamer's, liability for any and all loss or damage resulting from said disaster, conformably to the general admiralty rule, the petitioner negatived in the language of the statutes the occurrence of the disaster and its consequent loss and damage through its or its managing officers' privity or knowledge, and upon information and belief gave the facts concerning the loss of the steamer as follows: "That its said steamer left the port of Ludington, Mich., on the evening of September 8, 1910, bound for the port of Milwaukee, Wis., with about 6 passengers on board, and laden with about 29 freight cars on its main deck in the usual and customary manner, and was then and at all times hereinafter mentioned stout, staunch, and strong, with her said cargo well and sufficiently stowed and secured, was well equipped, manned, and supplied, and in every respect fit for the sea and the voyage she was about to undertake; that while on Lake Michigan in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

course of said voyage she became waterlogged, and about 7:30 a. m. of September 9, 1910, the said steamer, being then about 20 miles off the port of Sheboygan, Wis., suddenly sank stern first in about 60 fathoms of water; that the cause of the sinking of said vessel has been carefully investigated by your petitioner, and your petitioner has been unable to ascertain, and does not know, the cause of said vessel taking in water and sinking as aforesaid, but your petitioner alleges that the sinking of said vessel was in no wise the fault or want of care on the part of your petitioner or those in charge of the navigation of said steamer."

The prayer is for a monition citing all claimants to appear before a commissioner and make due proof of their respective claims, to appear and answer the allegations of the petition, for an injunction restraining all other suits and proceedings except herein, for an adjudication of nonliability of the petitioner and its steamer for any loss, damage, or injury resulting in and from said disaster. And, if on final hearing liability be adjudged then that petitioner be permitted to surrender its right, title, and interest in the steamer and salvage therefrom and freight pending at the time of the disaster, and that liability be limited to the property so surrendered, and also, inasmuch as said voyage was not and cannot be completed, that no freight was pending or can be earned, and that all liability of the steamer and the petitioner otherwise existing be thereby and therethrough satisfied and limited, all in conformity with the general admiralty rules and the statutes in such case made and provided. Upon this petition a monition was issued, citing claimants to appear and make proof of their claims before the commissioner therein named; also to appear and answer the libel and petition. The order for the issuance of such monition restrained the prosecution of actions or proceedings to enforce claims, except in this proceeding.

Pursuant to the foregoing, claimants have appeared, some of them filing a separate claim before the commissioner, and also an answer to the libel and petition; others have filed answer seeking therein to contest the right to limit, and also to state grounds of liability. The petitioner has filed exceptions whose scope and purpose are particularly detailed in the opinion.

Van Dyke, Rosecrantz, Shaw & Van Dyke, of Milwaukee, Wis., for petitioner.

Glicksman, Gold & Corrigan, Harry N. Glicksman, Bloodgood, Kemper & Bloodgood, B. F. Saltzstein, and Chas. Friend, all of Milwaukee, Wis., for claimants.

GEIGER, District Judge (after stating the facts as above). [1] The first exception relates to the right of claimants to answer the petition without having filed a claim with the commissioner. Upon this, the fifty-sixth rule in admiralty (29 Sup. Ct. xlvii) seems decisive:

"In the proceeding aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and *who shall have presented his or their claim to the commissioner under oath*, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability or to a limitation of liability under the said act of Congress, or both."

This rule, in connection with rules 54 and 55 (29 Sup. Ct. xlv, xlvii), clearly contemplates that all claimants must, in obedience to the monition issued, present their claims to the commissioner in order to have

any standing or right of contest in the proceedings to limit liability. Such proceeding has for its object the bringing into the admiralty court all claimants, to the end that, if exemption is granted or liability limited, all will be bound. The right to contest is given to those who assert claims against which the proceeding to exempt or limit will, if successful, operate either as a bar or as the means of complete satisfaction. The petition for limitation calls for an answer which can, as hereinafter indicated, raise merely the limited issue respecting the owner's privity or knowledge in or to the causes of the disaster, and, probably, respecting the property offered to be surrendered—in any event to the necessary allegations required by statute to be set out as the foundation of the proceeding. Such issues, in the nature of things, must be first adjudicated. On the other hand, the claim for damages is treated as having the effect of a libel requiring allegations of fact which may have no relevancy to the exemption or limitation right. Thus, an owner may concede liability upon any ground except that of personal fault or privity, the absence of which alone entitles him to limitation. The issues, being thus distinct, must be set out in separate pleadings. *Re Davidson S. S. Co. (D. C.)* 133 Fed. 411. The jurisdiction of the admiralty court being comprehensive, all parties, if they come in at all, must be ready to recognize and submit to the accomplishment by the owner of both the primary and incidental purposes of the statute and the rules. *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585.

The exception to the sufficiency of the denials contained in the pleadings of several answering claimants will be next considered. It is unnecessary to notice the separate exceptions to each of the answers, but those filed to the answer of claimant *Schraufnagel* will suffice to indicate petitioner's contention. Such exceptions relate to denials: (a) That the steamer was stout, staunch, seaworthy, etc.; (b) that the steamer became a total loss; (c) that only the articles specified in the petition were lost; (d) that no freight or passage money was or could be earned or that refund was necessary, that the cargo was covered by insurance whereby petitioner was reimbursed; (e) denies that the damage arose "without the privity or knowledge of petitioner or its managing officer," or "without fault on the part of the petitioner"; (f) or that the steamer was stout, strong, with her cargo well and sufficiently stowed and secure, or that the steamer was well manned, etc.; (g) or that the sinking was in no wise due to want of care on petitioner's part.

The exceptions further challenge affirmative allegations upon information and belief which doubtless seek to charge liability for damages: (h) That the sinking of the steamer and claimant's loss "proceeded directly and proximately from the fault and want of care of the petitioner"; (i) that the loss was due directly "to causes within the privity and knowledge of the petitioner and its managing officers"; (j) that petitioner carelessly and negligently failed and neglected to provide "claimant's intestate with a safe, suitable, or proper boat, * * * in that the boat was insecure, unseaworthy, and unequal to meet the perils of navigation and unsafely constructed so that water was liable to get into the hold and fill the boat"; (k) that defendant's

officers and agents "carelessly failed to properly navigate the boat" and to inspect her; (1) and negligently permitted her and her engines, machinery, appliances, and equipment to be insufficient and defective.

[2] The several denials to which exception is thus taken disclose the same infirmities as were considered in *Re Davidson S. S. Co.*, *supra*, where Judge Seaman observed:

"The denial in each instance assumes knowledge or information on the part of the respondent that the facts and circumstances were not as alleged in the petition in certain of the essentials imposed by statute, but withholds disclosure of such information. Thus the denial to which the first exception is taken is the sole answer to the jurisdictional allegations that the *Sacramento* was at the time of the collision 'stout, staunch, strong and seaworthy, well and properly manned and equipped and had on board a full and complete complement of officers and crew,' etc. The answer must be full, explicit, and distinct (rule 27 [29 Sup. Ct. xlii]), and the requirement is not met by denial alone. The Commander in Chief, 1 Wall. '43, 17 L. Ed. 609. If the party answering is uninformed in the premises, he may so state, and thus raise the issue without denying; but a denial must be founded on information, and, possessing that, the pleader must state the facts accordingly upon information and belief."

In the case at bar, a denial, for example, that the disaster occurred without the fault or privity of the petitioner's managing officers, and the affirmative allegation that it occurred through their neglect, or was due to causes within their knowledge or to which they were privy, necessarily imply or assume knowledge or information on the part of the answering claimants, of some particular fault, cause, or act of neglect chargeable to them. The negation by the petitioner of privity or fault, likewise its recital of the manner of disaster's occurrence, are at the foundation of its right to exemption and limitation; and, as indicated in the *Davidson Case*, can be met in pleading only by alleging facts showing privity in fault, or by a disavowal of knowledge, which latter will put the petitioner to its proof. Under the principles of equity pleading, which afford a proper test in the admiralty court, the answers are clearly insufficient, as may be demonstrated by a brief consideration of analogous situations. If an administrator or trustee, seeking a settlement of his accounts and a discharge, should aver that he "had fully administered the trust estate," no one would contend that an express denial thereof would be sufficient to raise an issue; and in actions at law it is familiar doctrine that the denial of a negative averment creates no issue unless coupled with an affirmative averment of facts which of themselves disclose an inference putting the negative averment in issue.

As indicated, therefore, unless the answering claimants are content to put the petitioner to its proof by disavowal of knowledge respecting the truth of the averments of the petition, they cannot by denial alone meet its negative averment, and thereby charge that the loss or damage did occur through an act to which petitioner's managing officers were personally privy. The rule is of utmost importance to the petitioner, because the "privity of knowledge" which will defeat it means the personal fault of the owner or officers, and not that of agents or servants which, in other situations may be imputed so as to create liability. Hence, unless apprised of the act or acts of personal fault claimed to be chargeable to its officials, naming them, it can have no means of

preparing for trial or to meet its adversaries—unless it accurately conjectures and prepares to meet all possibilities. This, in effect, would require the trial to proceed without issues presented by the pleadings.

So, too, the affirmative allegations of the answers—and which seem to commingle matters going to defeat the right to limit liability with matters upon which a claim for damages may be founded—are properly subject to exception. As indicated in the Davidson Case, these claims are pleadings in the nature of libels, and as such must set out the “facts upon which the claimant relies in support of his suit in accordance with rule 23 [29 Sup. Ct. xli].” For example, allegations that petitioner “breached and violated its duties to” claimant’s intestate, which “proximately and directly caused the loss of life,” and that “the sinking of the said steamer as aforesaid and the loss of life * * * proceeded directly and proximately from the fault and want of care of the petitioner, * * * and was due directly to causes within the privity and knowledge of petitioner and its said managing officers,” all fail to meet that degree of fullness and particularity required, not only by the admiralty, but by other rules of pleading. They are not allegations of fact, but merely the ultimate conclusions of the pleader, predicated upon facts presumed to be in his possession, and of which his adversary can demand disclosure. The Commander in Chief, 1 Wall. 43, 17 L. Ed. 609; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Young v. Lynch, 66 Wis. 514, 29 N. W. 224.

Equally insufficient are the allegations that the steamer “was insecure and unseaworthy and unequal to meet the perils of navigation, and was unsafely constructed so that water was likely to fill the hold of the said boat and cause it to sink, * * * and that the officers, agents, and servants * * * carelessly and negligently failed to inspect the same and to repair”; “that the engines, appliances, machinery, and equipment” were so “defective and insufficient that the boat was caused to sink.” These are mere general conclusions, apprising petitioner of no fact showing negligent construction, unsafe condition, or a breach of duty upon which liability could be predicated.

[3] Nearly all the answering claimants allege petitioner’s recovery of insurance upon the lost steamer. The statute provides for a limitation of the owner’s liability, to his interest in the vessel and her freight. The insurance fund arises upon a collateral contract of indemnity for the loss of such interest; but neither the contract of insurance nor the fund is the equivalent nor in any sense takes the place of the interest of the owner in the vessel. The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. Hence the recovery of insurance cannot be relevant to the right to proceed or to obtain relief under the act.

[4] The petitioner insists that the answering claimants be compelled to furnish security for costs. In Rawson v. Lyon (D. C.) 15 Fed. 831, Judge Brown thus states the rule:

“There is no question that the ordinary practice in admiralty has long been to require a stipulation for costs from a respondent on entering his appearance and answering in an action in personam. Judge Betts, in his book on Admiralty Practice, says: ‘This stipulation must be filed when a defendant comes into defend, although the first process was a citation and not a warrant.’ Page 40. This is in accordance with the ancient practice. Clerke, Praxis, tits. 5, 11; Pharo v. Smith, 18 How. Prac. 47 [Fed. Cas. No. 11,062].

When suits were commenced by warrant, rule 17 of this court [17 Sup. Ct. xl] expressly required bail to be taken for \$100 above the sum claimed; and this was to cover costs. When warrants were abolished by Supreme Court rule 48 [29 Sup. Ct. xlv] as the ordinary process for commencing actions, rule 17 was no longer expressly applicable to ordinary suits in personam; but the ordinary practice in this court to give security has remained as before, although it appears to have been occasionally omitted.

In all other cases, libellants and defendants and interveners are by express rules required to give security for costs, except in the special cases of seamen, salvors, or persons suing in forma pauperis. Rules 17, 38, 44, 45 [29 Sup. Ct. xl, xliii, xlii]. There is no reason why the defendants in actions in personam should form an exception to the usual requirement to file security for costs, which, under the former process by warrant, was always obtainable."

It is contended by answering claimants that, in admiralty, security should not be required where inability to give it is shown. But the practice seems to be quite uniform in recognizing, as exceptional, only cases of seamen, salvors, or persons suing in forma pauperis; and admiralty rules 25, 26, 34 [29 Sup. Ct. xli, xlii], and 63 of this court seem to be in accord with the observations in the Raymond Case, *supra*.

In a proceeding for limitation of liability, Judge Lacombe expressed the following views respecting the subject:

"In view of the large number of these causes which seem to be pending in this court, the subject of requiring security for costs has been again considered. There is force in the contention of defendant that, inasmuch as the statutory limitation of liability (the steamer being a total loss) relieves it from all liability for faults of navigation, etc., the plaintiff's case is more than ordinarily speculative. Undoubtedly, the taking of testimony in support of and in opposition to the averments in the complaint will be an expensive matter; and the court is not unmindful of the fact that those averments are really not sworn to by any one, the usual verification being on information and belief. Nevertheless, individuals who may have a right to recover damages for the death of the next of kin should not be deprived of their day in court to show, if they can, that defendant's actionable negligence caused such death merely because they are too poor to file security. On the other hand, the defendant should not be harassed by repeated trials of the same question nor put to unusual and extraordinary expense in defending suits, the prosecution of which is left free to its adversaries. The following disposition of these and similar motions will be made: Where the affidavits clearly show that the persons interested in the recovery (i. e., the widow or next of kin) are all in such a condition pecuniarily that none of them is able to give security, the motion will be denied; otherwise it will be granted. The denials, however, are to be without prejudice to a renewal of the motion in the event of defendant prevailing on the trial of the first cause. If security be then exacted, defendant will thereafter be harassed only by litigants who deal with it on equal terms." *Raymond v. La Compagnie Generale, etc.* (C. C.) 90 Fed. 105.

It thus appears that the discretion, if any is to be exercised, is limited to those cases where the party is suing in forma pauperis, and in which, in the language of rule 63 relating to the issuance of process, it must be disclosed to the satisfaction of the court that "by reason of poverty, or other cause shown" the party "is unable to obtain a responsible surety to stipulate for costs." The proctor of claimants Schraufnagel, Trace, and Renner has filed his affidavit upon information averring, not inability to give security, but that "claimants

are persons of meager financial ability and unable without great hardship to furnish a stipulation or security for costs." The claimant Threehouse, as special administratrix claiming liability of the petitioner for loss of life of her intestate, has filed the affidavit of her proctor upon information and belief, averring that said intestate left no property and that claimant is dependent upon others for her support, and has no property, etc. These are manifestly not in compliance with the rules.

The conclusions are:

(1) That the specific exceptions to the answers of the claimants Schraufnagel, Rosecrans, Renner, Trace, Brown, and Threehouse challenging (a) the right to answer the petition for limitation without having first filed a claim with the commissioner, and (b) the right to combine in a single pleading, a claim for loss or damage, and an answer to such petition, are sustained.

(2) That exceptions numbered 2 to 5, inclusive, to the answer of Schraufnagel, 2 and 3 to the answer of Brown, 2, 3, and 4 to the answer of Trace, 2, 3, and 4 to the answer of Renner, 3, 4, and 5 to the answer of Rosecrans, 2, 3, and 4 to the answer of Threehouse, are all sustained.

(3) That the exceptions to the affidavits respecting the giving of security for costs are sustained; and all claimants are required to give such security unless relieved therefrom upon proper showing.

Consideration of exceptions to claims filed with the commissioner will be reserved until all claimants shall file their claims pursuant to the ruling herein made, should they elect to do so.

Orders may be entered accordingly.

FRANKLIN et al. v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. January 27, 1913.)

No. 1,650.

COMMERCE (§ 89*)—ACTIONS TO RECOVER EXCESSIVE CHARGES—INTERSTATE COMMERCE ACT—JURISDICTION OF COURTS.

A consignee of property shipped in interstate commerce cannot maintain an action against the carrier to recover because of excessive freight charges exacted on such shipments, except for the enforcement of an award of damages made by the Interstate Commerce Commission under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (U. S. Comp. St. Supp. 1911, p. 1301), in favor of plaintiff, and a court is not given primary jurisdiction of such an action by the fact that the Commission, on complaint of the shippers, to which proceeding plaintiff was not a party, has made a finding that the rate was excessive, and an award of damages to such shippers.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

Jurisdiction of federal courts of suits under Interstate Commerce Act, see note to *Bailey v. Mosher*, 11 C. C. A. 318.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1937 to date, & Rep'r Indexes

At Law. Action by Henry G. Franklin and others against the Philadelphia & Reading Railway Company. Answer to rule to plead. Rule discharged, and action dismissed.

Henry Baur, of Philadelphia Pa., for plaintiffs.

Wm. L. Kinter, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This is an action in trespass, in which the plaintiffs seek to recover from the defendant the excess of freight charges alleged to have been paid by the plaintiffs to the defendant upon ice shipped from Gouldsboro, Pa., and other points taking the same rate over various connecting interstate carriers to Philadelphia, Pa., during the period from April 18, 1907, to August 20, 1909. The rate charged by the defendant was \$1.40 per ton. The rates in question were held to be unreasonable by the Interstate Commerce Commission on November 14, 1910, in a proceeding brought by the Mountain Ice Company, which was the plaintiffs' consignor, and other ice companies, against the defendant railroad company and other railroads. The original complaint in that proceeding was filed May 5, 1908, without demand for reparation, and on November 6, 1908, a supplemental petition was filed by the Mountain Ice Company, praying for reparation. In the report of the Interstate Commerce Commission, a copy of which is attached to the plaintiffs' statement of claim (21 Interst. Com. Com'n R. 45), the rate was declared to be unreasonable, and a reasonable rate declared to be \$1.20 per ton on ice shipped in box cars and \$1.35 per ton on ice shipped in refrigerator cars, and reparation was awarded to the complainants. It is alleged that, in pursuance of the order, the defendant, in conjunction with the connecting carriers, reduced the rate, by tariff effective May 26, 1911, from \$1.40 to the rates found by the Commission to be reasonable. The plaintiffs claim the difference between the amount paid during the period mentioned at the then established rate of \$1.40 per ton and the amount which should have been paid at the rate found reasonable by the Commission, namely, \$1.20 per ton on ice shipped in box cars and \$1.-35 on ice shipped in refrigerator cars. The plaintiffs were not parties to the proceedings before the Interstate Commerce Commission, and no award of reparation was made in their favor. On January 23, 1912, the defendant was ruled to plead, and on January 29, 1912, filed an answer setting forth:

"That it cannot be required to file a plea in the above-entitled case for the reasons following, to wit: (1) That plaintiffs have procured no award of reparation in their favor by the Interstate Commerce Commission by reason of the matters and things set forth in the statement of claim filed. (2) That the Interstate Commerce Commission has awarded to parties and persons other than plaintiffs the sum alleged by plaintiffs to be due to them from defendant upon the cause of action set forth in the statement of claim filed. (3) That this court is without jurisdiction in the premises in advance of an award of reparation to plaintiffs by the Interstate Commerce Commission"

—and praying that the rule to plead be vacated and that suit be dismissed for want of jurisdiction in this court.

It does not appear to be disputed that the rates found unreasonable by the Interstate Commerce Commission are the identical rates charged

the plaintiffs by the defendant on its shipments of ice, and the question is therefore squarely presented whether a suit may be brought, based upon the order of the Interstate Commerce Commission made in the proceedings by the Mountain Ice Company, to which the plaintiffs were not a party and in which no award was made in their favor. The contention of the plaintiffs is that the action is properly brought by reason of the provisions of section 9 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), which provides that a person claiming to be damaged may either make complaint to the Commission or bring a suit in any District or Circuit Court of the United States, but shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure he will adopt, and section 22, which provides that nothing in the act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies. It is urged that, inasmuch as the Interstate Commerce Commission has already passed upon the reasonableness of the rates and has awarded to other parties reparation for the excess, the present action will lie, because the Commission has passed upon the only question necessary to preserve uniformity of administration, which is one of the primary objects of the act, and because the ascertainment of the amount of damages of the plaintiffs is a mere question of mathematical calculation, upon which it is not essential to uniformity that the Commission should make a finding and award.

It has been settled by numerous decisions of the Supreme Court, beginning with *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, that where the claim of a shipper for damages is based upon alleged unreasonableness of rates either then existing or rates which have been altered or upon any question as to rates, regulations, and practices as to which it is essential that there shall be uniformity of decision, the courts are without primary jurisdiction to entertain the action. *Southern Railway Co. v. Tift*, 206 U. S. 429, 27 Sup. Ct. 709, 51 L. Ed. 1124, 11 Ann. Cas. 846; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288. As was said in the *Abilene Case*:

"The independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

In construing the provisions of the act in relation to proceedings brought before the Interstate Commerce Commission, the court held:

"Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct, not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission."

In the case of *Morrisdale Coal Co. v. Pennsylvania Railroad Co.*, 183 Fed. 929, 106 C. C. A. 269, where the question was whether a suit could be brought in the Circuit Court to recover damages arising from an alleged discriminatory practice in the distribution of coal cars in time of shortage, it was held by the Circuit Court of Appeals of this circuit that under the decision in the *Abilene Oil Case* no action would lie without a previous finding by the Commission upon a question of the alleged discriminatory practice. The question as to whether a finding by the Commission of damages was beyond its power in such a case was not decided; but there seemed to be no doubt in the mind of Judge Lanning, who rendered the decision, that, if the question involved were one of rates, and the damages claimed would be the result of a mere mathematical calculation, recourse must be had to the Commission, not only to pass upon the question of the unreasonableness of rates, but to award damages, if any were found to have arisen. And upon the right of action in suits for damages Judge Lanning held that:

"If, except for the act to regulate commerce, the *Morrisdale Coal Company* would have had a common-law right of action against the *Pennsylvania Railroad Company* for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time, and the Coal Company given a substituted right of procedure before the Commission, at any time within one year after June 29, 1906, for a determination by the Commission of the question whether the rule complained of was discriminatory, unless, indeed, the Commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory."

In the case of *Jacoby & Co. v. Pennsylvania Railroad Co.*, 200 Fed. 989, recently decided in this court, in passing upon the question whether, after a finding by the Commission of a discriminatory practice in the distribution of coal cars in time of shortage, the Commission had power under the act to award damages, it was held:

"It may be stated as established that the act to regulate commerce was intended by Congress to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference by carriers, and that a shipper cannot maintain an action at common law for damages arising from such wrong, but must first make his complaint to the Interstate Commerce Commission; in other words, his common-law remedy is abrogated by the procedure established by the act to regulate commerce. It was the evident intent of Congress that the procedure established by the act should be substituted for that which had theretofore obtained at common law. Section 9 provides that a person claiming damages must 'elect which one of the two methods of procedure herein provided for' he will adopt, and

the Supreme Court has held that the right to originally maintain actions in court for violations of the act conferred by this section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission. The method of procedure referred to in section 9 is clearly outlined in sections 13, 14, 15, and 16 of the act, and, as said by Judge Lanning in the *Morrisdale Case*, the procedure of the Commission in making the assessment constitutes no part of a judicial proceeding."

In the case at bar it must be assumed that the plaintiffs have elected which one of the two methods of procedure provided for by the act they would adopt. If the action is intended under section 9 as a "suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act," I think their action must fail, because it is not, in the language of the court in the *Abilene Oil Co. Case*, "confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission." If they have chosen the procedure outlined in the act, they are outside of its provisions, because they have not, in the language of section 9, made "complaint to the Commission as hereinafter provided for."

Excepting the right to bring an original action in the courts, which is limited under the decision in the *Abilene Case* to those cases which require no previous action by the Commission, the only remedy provided for the recovery of money damages of the character demanded in this suit is under the provisions of section 16, which provides as a prerequisite to suit a determination by the Commission that the "party complainant is entitled to an award of damages under the provisions of this act for a violation thereof," in which case it is provided that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." Section 16 then provides that, upon the noncompliance with an order for payment of money, suit may be brought in the Circuit Court by "petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises," which findings and order of the Commission are made *prima facie* evidence of the facts therein stated. The section further provides:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or state court within one year from the date of the order, and not after."

It is apparent, therefore, from the language of the act, that, where proceedings have been had by complaint before the Commission, a suit for the recovery of damages must be based upon an order of the Commission for the payment of money. I think the conclusion arrived at is sustained by the decision of the Supreme Court in the case of *Robinson v. Baltimore & Ohio Railroad Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288. In that case suit was brought in a state court of West Virginia to recover the excess of freight charges alleged to have been paid by a shipper upon coal loaded into cars from wagons above the rates charged other shippers whose coal was loaded from tipples. The plaintiff claimed to recover upon the ground that the

rate in question had been found to be unjustly discriminatory by a decision of the Interstate Commerce Commission, and the railroad company had been directed to desist from its enforcement. The plaintiffs contended that the court should take judicial notice of the decision of the Commission. Upon this point they were not sustained by the Supreme Court. The court held:

"The result, however, would have been the same, had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made; but that is without bearing here."

Referring to sections 22 and 9, in its opinion, the court held:

"Of course, the provision in section 22, as also the provision in section 9, must be read in connection with other parts of the act, and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, federal or state, in the absence of an appropriate finding and order of the Commission. *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, supra [204 U. S.] 442, 446 [27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075]."

Since the argument of the case at bar, the question in substantially similar form came before the District Court for the Eastern District of Wisconsin, and a similar conclusion was reached in a well-considered opinion by Geiger, District Judge, in the case of *National Pole Co. v. N. W. Ry. Co.*, 200 Fed. 185.

My conclusion is that the present action cannot be maintained, because this court has no power to primarily hear complaints concerning the redress of wrongs based upon unreasonable rates, as to which there must be previous action by the Commission; and, upon the other hand, it cannot be maintained as a suit to recover money damages upon a previous complaint to the Commission, because it is not based upon an order of the Commission for the payment of money, as provided by section 16 of the act, and, without an award of reparation to the plaintiffs by the Commission, this court is without jurisdiction. In view of this conclusion, it is not necessary to consider the defendant's second reason why it should not be compelled to file a plea.

It is ordered that the plaintiff's rule to file a plea be vacated, and that suit be dismissed.

H. B. WILLIAMS, Inc., v. WESTERN UNION TELEGRAPH CO.

(District Court, E. D. Pennsylvania. February 6, 1913.)

No. 1,666.

1. TELEGRAPHS AND TELEPHONES (§ 54*)—MESSAGES—MISTAKES IN TRANSMISSION—LIMITATION OF LIABILITY—CONTRACTS.

A telegraph company is not a common carrier and is entitled to stipulate for a limitation of its liability in case of mistakes in transmission of unrepeat messages to an amount equal to the tolls.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

2. TELEGRAPHS AND TELEPHONES (§ 54*)—MESSAGES—TRANSMISSION—ERRORS—ORDINARY AND GROSS NEGLIGENCE.

Plaintiff delivered a message to defendant telegraph company for transmission to defendant's agent notifying him to purchase tomatoes for shipment "June 5th." The message as delivered read "June 1st," and by reason of the change the agent was unable to purchase the fruit. There was evidence that the operator at the receiving station had been in ill health for several months and that he was negligent in his attendance at the office, but there was no evidence that his illness affected his ability to receive and transmit messages. *Held*, that the mistake resulted from ordinary, as distinguished from gross, negligence, and was within a limitation of the company's liability for mistakes in the case of unrepeat messages to the tolls paid therefor.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

3. TELEGRAPHS AND TELEPHONES (§ 33*)—TOLLS—REPEATED AND UNREPEATED MESSAGES—INTERSTATE COMMERCE ACT.

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) as amended (Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]), providing that messages by telegraph may be classified into day, night, repeated, unrepeat, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages, recognizes the right of a telegraph company to charge for repeated messages different rates from those charged for unrepeat messages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.*]

4. TELEGRAPHS AND TELEPHONES (§ 26*)—REGULATIONS—REASONABLENESS.

In an action against a telegraph company for alleged negligence in transmission of a telegram, the unreasonableness of a rule as to repetition of messages cannot be first considered in the District Court, but must be first raised before the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 14; Dec. Dig. § 26.*]

Action by H. B. Williams, Incorporated, against the Western Union Telegraph Company. On motion for a new trial and for judgment non obstante veredicto. Judgment non obstante granted.

George P. Rich, of Philadelphia, Pa., for plaintiff.

H. B. Gill, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This suit was brought to recover from the Western Union Telegraph Company damages for loss of

contracts with tomato growers in Florida for the purchase of growing crops of tomatoes to be delivered in the future, by reason of the alleged gross negligence of the defendant in the sending of a telegram from the plaintiff to its purchasing agent at Palmetto, Fla.

It appeared at the trial that the plaintiff, after a series of communications by telegram sent through the defendant company, was informed that certain tomato growers in Florida would sell their growing crops to be shipped by June 5, 1911, and, on April 18, 1911, delivered a message to be telegraphed by the defendant as follows:

"James E. Taylor, Palmetto, Florida. Buy three thousand fail must be graded same as east coast buy two thousand more best terms buy only early patches must be all shipped June fifth to be paid for when loaded.

"H. B. Williams, Inc."

The word "fail," according to a secret code between the plaintiff and its agent, meant "Brown," one of the parties with whom the agent had been negotiating for a sale of his growing crop. In the telegram as delivered to plaintiff's agent, Taylor, the word "first" was substituted for "fifth."

The testimony showed that Taylor had obtained offers of tomatoes to be shipped June 5th from two growers, Brown and Reeder, and that, upon receipt of the telegram, he informed the parties that his principals would buy the tomatoes to be shipped June 1st, and that the parties refused to sell deliverable at that time. Taylor did not make any further efforts to procure tomatoes, and, according to his testimony and that of other witnesses, the price of tomatoes rose so that it was impossible to purchase except at higher prices, and he was instructed by the plaintiff to leave the vicinity and buy cucumbers, beans, and lettuce. The plaintiff called witnesses to prove the difference in the price of tomatoes owing to the rise in the market at Palmetto and claimed as damages the difference between the price at which the tomatoes were offered and the market price thereafter. The jury returned a verdict in favor of the plaintiff for \$1,000. The defendant moved for a new trial and, having moved at the trial for binding instructions, moved for judgment non obstante veredicto under the provisions of the Act of Assembly of Pennsylvania of April 22, 1905 (Laws 1905, p. 286).

The telegram in which the error was made was upon a regular form of the Western Union Telegraph Company, which contained at the top the following words:

"Send the following message subject to the terms on back hereof, which are hereby agreed to."

Upon the reverse side were printed a number of stipulations, among which were the following:

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the unrepeatd message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeatd message and paid for as such. In consideration whereof it is agreed between the sender of the message and this company as follows:

"(1) The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, beyond

the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

"(2) In any event, the company shall not be liable for damages for any mistakes or delay in the transmission or delivery or for the nondelivery of this message, whether caused by the negligence of its servants, or otherwise, beyond the sum of \$50, at which amount this message is hereby valued, unless a greater value be stated in writing hereon at the time the message is offered to the company for transmission, and an additional sum paid or agreed to be paid on such value, equal to one-tenth of one per cent. thereof."

[1] The position of the defendant's counsel in support of his motion non obstante veredicto is that, under the terms of the telegram, the defendant company is not liable in damages for its error beyond the amount paid for the telegram because the message was unrepeatable; that there was no evidence that the plaintiff suffered any amount of damage because of the error in the message; and that there was no evidence of any negligence beyond ordinary negligence upon the part of the defendant. The stipulation in relation to unrepeatable messages that the company shall not be liable for mistakes or delays beyond the amount received for sending the same is substantially the same stipulation which was before the Supreme Court in the case of *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. In that case the Supreme Court held, citing *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, and *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067, that telegraph companies are not common carriers; that their duties are different and performed in different ways and they are not subject to the same liabilities; that they are not bailees in any sense; that they are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes; and that the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company, citing *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, reaffirmed in *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. — (Oct. T. 1912, Jan. 6, 1913), where it is held that a common carrier of goods may, by special contract with the owner fairly made, giving the shipper the advantage of a lower rate, restrict the sum for which it may be liable, even in case of a loss by the carrier's negligence. The court held:

"By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence, but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering, a message, whether happening by negligence of its servants, or otherwise."

The court cites the opinion of Judge Hare in *Passmore v. Western Union Telegraph Co.*, 9 Phila. (Pa.) 90, and 78 Pa. 238. The lan-

guage in the concluding part of the quotation of Judge Hare's opinion is:

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition."

In distinguishing the case of *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. Rep. 38, where the court held that the regulation requiring the message to be repeated, printed on the blank of the company on which a message is written, is not a contract binding in law, for the reason that the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be, the Supreme Court held:

"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message. * * * There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted."

The message under consideration in that case was a cipher message, and in discussing the stipulation as to cipher messages the court said:

"But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employé of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader. Beyond this, *under any contract* to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Western Union Telegraph Co. v. Hall*, 124 U. S. 444 [8 Sup. Ct. 577, 31 L. Ed. 479]."

The conclusion of the Supreme Court in brief is that a stipulation such as that in the case at bar, providing that the company shall not be liable for mistakes in transmission or delivery beyond the sum received for sending it unless the sender orders it to be repeated, is reasonable and valid, and that the recovery cannot exceed the amount agreed upon in that stipulation.

[2] The plaintiff, however, contends that, while the defendant may protect itself by such a stipulation from ordinary negligence, it cannot

in that way limit its liability for gross negligence. The distinction between "ordinary negligence" and "gross negligence" was discussed by the Supreme Court in the case of *Milwaukee & St. Paul Railway Co. v. Arms et al.*, 91 U. S. 489, 23 L. Ed. 374, as follows:

"'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employes of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been *some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences.* Nothing of this kind can be imputed to the persons in charge of the train, and the court therefore misdirected the jury."

As was said by Judge Hare in the *Passmore Case* cited by the Supreme Court in *Primrose v. Western Union Telegraph Co.*, *supra*:

"A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve; or, at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for willful wrong, or for the gross negligence which, *if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue.*"

Under the definition of gross negligence in the *Arms Case*, and upon a careful consideration of the evidence, I am convinced that the jury would not have been justified in finding more than ordinary negligence in the case at bar. To sustain the charge of gross negligence, it was shown by the plaintiff that errors in words had been made in other messages transmitted through the defendant company, and, in order to show the negligence of the company in the selection of its agent, it was shown that the operator at Palmetto had been under the treatment of a physician at times during the preceding months for indigestion and had been suffering from heart trouble; that he sometimes stayed away from the office, and the plaintiff's agent would be obliged to send messages through the railroad telegraph operator at Palmetto. No evidence was offered to show how the sort of ill health suffered by the defendant's agent would affect his ability to receive and transmit messages. The errors which were shown to have occurred in telegrams were such as must have been intended to be provided for by the stipulation limiting liability in the case of unrepeatable messages. The plaintiff, having knowledge of all of the facts, was in a better position to know of the importance of the telegram sent than were the agents of the defendant and could by paying one-half of the cost of the telegram in excess of that paid have protected itself from the error which occurred. The fact that the error occurred was not in itself evidence of negligence; the most skillful operator may

make mistakes, and there was nothing in the telegram itself to put the defendant upon notice which would require it to exercise unusual care in transmission in view of the plaintiff's assent to the stipulation as to unrepeatd messages. There was no evidence of willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

[3] At the argument the plaintiff raised a further contention that under section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3170]) the stipulation under which the message was sent was an unreasonable one and therefore unlawful. Inasmuch as section 1 of the act, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), which brings telegraph companies within its provisions, expressly provides that messages by telegraph may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages, it is apparent that the Interstate Commerce Act expressly recognizes the right of the telegraph company to charge for repeated messages different rates from those charged for unrepeatd messages.

[4] Even if the plaintiff's case were based upon an alleged unreasonable regulation, which it is not on the pleadings, it is a question which cannot be entertained primarily in this court. The question must be first raised before the Interstate Commerce Commission. *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292.

The plaintiff's statement claims for the profits which the plaintiff would have realized from the advance in price, and does not claim the cost of sending the message, nor was the cost of sending the message proved upon the trial. Under the decisions in the cases above cited, I am of the opinion that the plaintiff was bound by the stipulation in relation to unrepeatd messages; that the damages claimed cannot be held to have been contemplated by the parties in case of breach of the contract; that the plaintiff is not entitled to recover beyond the amount paid for transmitting the message, which has not been proved; further, that there is no proof of the gross negligence alleged as a basis of the plaintiff's claim for damages.

In view of these conclusions, it is not necessary to consider the sufficiency of the proof of damage caused by alleged loss of the contracts. The defendant's request for binding instructions should, in my opinion, have been allowed.

Judgment will therefore be entered for the defendant non obstante verdicto upon the whole record and the evidence certified and filed. An exception will be granted to the plaintiff.

UNITED STATES, for Use of BRADING-MARSHAL LUMBER CO. et al., v. WELLS et al.

(District Court, E. D. Tennessee, N. E. D. January 30, 1913.)

No. 24 at Law.

1. COURTS (§ 352*)—PROCEDURE IN FEDERAL COURTS—ISSUES IN LAW ACTION—JURISDICTION TO REFER.

The issues in a law action in the federal court, independent of statute, may be referred by consent of parties to a referee in the character of an arbitrator, whose report, when regularly made pursuant to such reference, and duly accepted by the court, is a proper foundation of judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

2. COURTS (§ 352*)—PROCEDURE IN FEDERAL COURTS—ACTIONS AT LAW—COMPULSORY REFERENCE.

Under Rev. St. §§ 648, 649 (U. S. Comp. St. 1901, p. 525), providing that in actions at law the trial of issues of fact shall be by jury, except when tried by the court pursuant to a written stipulation, a federal court has no authority to refer the issues in an action at law to a referee or other person, as an officer of the court, under a reference not intended as an arbitration, but for the purpose of having such officer determine the issues as a substitute for the trial by a jury or the court and giving his report the weight and effect of a master's report in equity, though the case involves an accounting, and though such procedure is authorized by a state statute and is consented to by the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

3. COURTS (§ 352*)—PROCEDURE IN FEDERAL COURTS—REFERENCE—GROUNDS—PRELIMINARY INVESTIGATION.

A federal court in an action at law, either of its own motion or on the motion of either party, may refer the issues to a referee as an officer of the court, as a tentative tribunal, for the purpose merely of making a preliminary investigation, in order to simplify the issues as a necessary step incident to the preparation of the ultimate trial of the case before a jury or the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

4. TRIAL (§ 11*)—MODE OF TRIAL—LAW OR EQUITY DOCKET—TRANSFERS.

Where a suit commenced at law is of a clearly equitable nature, the court has power to transfer it, by consent of parties, to the equity side of the court for further proceedings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

Action by the United States, for the use of the Brading-Marshall Lumber Company and others, against Mark P. Wells and others. On application for reference to a master. Denied.

This is an action at law commenced by the United States for the use and benefit of the Brading-Marshall Lumber Company and others, against Mark P. Wells and the Empire State Surety Company. The declaration alleged that the defendant Wells had entered into a contract with the United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the construction of a post-office building at Johnson City, Tennessee; that Wells, as principal, and the Surety Company, as surety, had executed bond to the United States conditioned as required by law to perform all undertakings in said contract agreed by Wells to be performed, and to pay all persons supplying labor or material in the construction of said building; that the building had been completed and final settlement made between the United States and Wells within one year before the commencement of the suit; that in the erection of said building the parties for whose benefit the suit was brought, had furnished labor and materials for which said Wells had failed to pay, and for which he then owed various sums, as alleged in the declaration; wherefore the United States sued for the benefit of said parties and of any other creditor of said Wells who had furnished labor and materials for said building which remained unpaid, who should intervene therein; and prayed judgment against Wells, as principal, and the Surety Company, as surety, for the amounts due such creditors, with interest. An order of publication was subsequently made notifying creditors of Wells of their right to intervene in the suit. Pleas having been filed by the defendants and replications thereto, and one other creditor of Wells having intervened in the cause, the parties filed a stipulation agreeing that the same might be referred to a special master or commissioner to take and hear proof upon various issues in the cause and report thereon.

Thad A. Cox, of Johnson City, Tenn., and Susong & Biddle, of Greeneville, Tenn., for plaintiff.

Shoun & Trim, of Greeneville, Tenn., for defendants.

SANFORD, District Judge. The clerk has forwarded to me a stipulation signed by counsel for plaintiffs and defendants, which will be filed herewith, agreeing that this cause may be referred to a special master or commissioner to hear and take proof upon certain items in the nature of an accounting; in pursuance of which an order of reference is desired. It is not clear from this stipulation whether it is desired that the master merely take and hear proof on the several items referred to, or that he also report his conclusions thereon, either of fact or law, or both. Furthermore clause (5) is vague and indefinite as to the matter proposed to be referred, and might involve questions beyond the scope of the pleadings.

This suit is brought under the provisions of the act of February 24, 1905, c. 778, 33 Stat. 812 (U. S. Comp. St. Supp. 1911, p. 1071), amending the act of August 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), providing for suits on contractor's bond for public works of the United States.

There is, in my opinion, strong ground for holding that the provision of this act that only one suit shall be instituted by a creditor or creditors and for notice to other creditors of their right to intervene, with the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors judgment shall be given to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity and distributed among creditors in an equitable proceeding; and that, in the language of Chief Justice Waite in *Pollard v. Bailey*, 20 Wall. 520, 525 (22 L. Ed. 376), the provision "for proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it." See, also, *Terry v. Tubman*, 92 U. S. 156, 161, 23 L. Ed. 537; *Hornor v. Hen-*

ning, 93 U. S. 228, 23 L. Ed. 879; *Handley v. Stutz*, 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706; *Bailey v. Tillinghast* (C. C. A. 6) 99 Fed. 801, 805, 40 C. C. A. 93; *Alsop v. Conway* (C. C. A. 6) 188 Fed. 568, 110 C. C. A. 366; *Merchants' Bank v. Stevenson*, 10 Gray (Mass.) 232. This view is emphasized by the fact that there is no right of intervention in a case at common law, and that a court of law has no adequate machinery for the entertainment and distribution of funds among the various beneficiaries entitled thereto. *McKemy v. Supreme Lodge* (C. C. A., 6) 180 Fed. 961, 966, 104 C. C. A. 117. See also 2 *Bates' Fed. Proc. at Law*, § 1042, p. 789. It is true, however, that on the other hand various actions at law have been maintained under this Act of 1905 in which no question as to the jurisdiction at law was suggested either by counsel or the court. *Hill v. Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 30 Sup. Ct. 174, 54 L. Ed. 315; *United States v. Construction Co.*, 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163; *United States v. Winkler* (C. C.) 162 Fed. 397. See also, generally, *American Surety Co. v. Cement Co.* (C. C.) 96 Fed. 25, and 110 Fed. 717; *United States v. Heaton* (C. C. A., 3) 128 Fed. 415, 63 C. C. A. 156; *Title Guaranty & Trust Co. v. Engine Works* (C. C. A., 9) 163 Fed. 169, 89 C. C. A. 618. But since a demurrer has not been interposed on this ground, the question of the jurisdiction at law is not now before me for definite determination.

Passing, then, this jurisdictional question, and assuming that, at least without objection of the parties, the jurisdiction at law may properly be entertained in this case, in spite of its clearly equitable nature, the question then arises as to the authority of this court, as a court of law, to refer by consent of parties, the issues in the case to a master for a determination in the nature of a general accounting. This question is to be determined in the light of the provisions of section 4236 of the Tennessee Code (Shan. 6074), that when any suit of an equitable nature is brought in the Circuit Court and objection has not been taken by demurrer to the jurisdiction, it may, if not transferred to the Chancery Court, be heard by the Circuit Court upon the principles and with the functions of a court of equity, and with the power to order and take all proper accounts.

After careful consideration, in which I have not had the benefit of briefs of counsel, I have reached the following conclusions:

[1] 1. Under a practice well known at common law, the issues in an action at law may, in a Federal Court, independently of any statute, be referred by consent of parties, to a referee in the character of an arbitrator, whose report when regularly made pursuant to such reference and duly accepted by the court, is a proper foundation of judgment. *Hecker v. Fowler*, 2 Wall. 123, 131, 17 L. Ed. 759; *Swift v. Jones* (C. C. A., 4) 145 Fed. 489, 493, 76 C. C. A. 253, and cases cited. And see *Dundee Mortgage Co. v. Hughes*, 124 U. S. 157, 160, 8 Sup. Ct. 377, 378 (31 L. Ed. 357), in which such consent order of reference is termed "a reference at common law," and *Shipman v. Mining Co.*, 158 U. S. 356, 361, 15 Sup. Ct. 886, 39 L. Ed. 1015, in which such consent reference was made to a so-called "master com-

missioner." And see, also, *Moore v. Webb*, 6 Heisk. (Tenn.) 301, as to the submission of a cause to arbitration under section 3432 of the Code of Tennessee (Shan. 5188). As to the practice in such cases and the questions presented by a writ of error therein, see the cases above cited; also 2 Foster's Fed. Pract. (4th Ed.) § 374b, p. 1291, and cases cited in note 4.

[2] 2. Since, however, the Federal statutes provide that in actions at law the trial of issues of fact shall be by jury, except where they are tried and determined by the court in pursuance of a written stipulation (R. S. §§ 648 and 649 [U. S. Comp. St. 1901, p. 525]), it is well settled by the great weight of authority, that, except by consent of parties, a Federal Court has no authority to refer the issues in an action at law to a referee and thus substitute a trial by referee for the statutory modes of trial by jury or court, in a matter of accounting or otherwise, and that even although such procedure be authorized by a State statute, the authority to make such reference is not, in such case, conferred upon the Federal Court by the provision of the Conformity Statute (R. S. § 914 [U. S. Comp. St. 1901, p. 684]). *United States v. Rathbone*, 2 Paine, 578, 27 Fed. Cas. 711 (Thompson, Circ. Justice); *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, 12 Fed. Cas. 708 (Blatchford, Circ. Judge); *Sulzer v. Watson* (D. C.) 39 Fed. 414; *St. Louis Elec. Co. v. Edison Elec. Co.* (C. C.) 64 Fed. 997, 1004; *Swift v. Jones* (C. C. A., 4) *supra*; 1 Bates' Fed. Proc. at Law, § 1052, p. 736. And, to the same effect, see *City of Cleveland v. United States* (C. C. A., 6) 127 Fed. 667, 62 C. C. A. 393, and, inferentially, *United States v. Harsha* (C. C.) 188 Fed. 759. In *City of Cleveland v. United States*, *supra*, in which the court below had referred the issues under a petition for mandamus to the clerk of the court as special master to hear proof and report, and in which, on writ of error, the order of reference was reversed, the Circuit Court of Appeals for this circuit, after holding that the mandamus was in the nature of a common law proceeding, said (127 Fed. at page 670, 62 C. C. A. at page 396):

"For this reason we are disposed to think it was altogether irregular to make a reference to the master to report the facts and law involved in the hearing of the petition. The master's office and functions are concerned only with the equity side of the court, and it would seem to follow that the judge sitting in the law side could no more order a reference to him than to a stranger. But here the court not only made the order referring it, but throughout treated the reference in all respects like a reference in equity."

In this connection it should be noted, however, that in *Davis v. Railway Co.* (C. C.) 25 Fed. 786, it was held by Brewer, Circuit Judge, without the citation of authority, that in a common-law action involving the examination of a long account, the court had authority, under the old common-law practice of the English courts, to refer the account, over the objection of one of the parties, to a referee to report on the facts, so that the court could then pass on the law. This holding is, however, I think, contrary to the great weight of authority.

3. Furthermore, in *Swift v. Jones*, *supra*, in which, in conformity to a State statute authorizing such procedure and by consent of parties, an action at law had been referred to a special master with authority to pass upon the issues of fact and to report his findings to

the court, and the master having made his report judgment had been rendered thereon by the court against the defendant, it was held by the Circuit Court of Appeals for the Fourth Circuit, on writ of error, upon an elaborate review of the authorities, that since the Revised Statutes provide for the trial of issues of fact in actions at law by jury or by the court, the court was not authorized, even in conformity to the State practice and by consent of parties, to refer the issues of fact in such action at law to a master, under a reference which was not in any sense intended as an arbitration, but was made for the plain purpose of having the master ascertain the facts, in lieu of the jury or the court, and thereby substitute his judgment as to the facts of the case for that of the jury or the court, and in effect create a new and additional method of disposition of common-law cases, neither provided for nor contemplated by the acts of Congress upon the subject; and that for this reason a new trial should be granted. The opinion in this case is carefully reasoned, and the rule thus laid down is one, I think, which should be followed.

[3] An exception to this general rule is, however, to be found in the carefully considered opinion of the Circuit Court of Appeals for the First Circuit in *Fenno v. Primrose*, 119 Fed. 801, 803, 804, 56 C. C. A. 313, 315, in which it was held that in an action at law where the accounts were so numerous and confused that it would be impossible for a jury to comprehend and intelligently decide it, by reason of the complexity and diversity of the issues and items, unless they were simplified by a preliminary investigation, and it would be impossible for that reason for the court to administer justice between the parties unless such preliminary investigation was had by way of preparing the case for the ultimate tribunal, the court undoubtedly had power, of its own motion, to direct a preliminary investigation and to "designate a suitable person as an officer of the court to call all parties before him as a tentative tribunal to simplify the items and the issues in order that the case may be intelligently presented to the jury." The court said:

"In cases at law, with numerous confused items and issues, where the ultimate right of trial by jury exists, in order to simplify the issues, such a preliminary trial or investigation may and oftentimes does become a necessary step incident to the preparation of the case for the ultimate tribunal, the jury. All this is to the end that the case may be intelligently presented to and understood by the ultimate tribunal."

And see *United States v. Harsha*, *supra*, in which Judge Denison, in refusing a trial by jury in an action at law in a matter of an accounting of vast complexity, stated that having found this case unsuitable for trial at length before a jury, he had urged upon counsel the advisability, if not the necessity, of some arrangement that should put the issues in shape where they could be tried and disposed of intelligently, and had, to this end, suggested either a general reference by consent, or the appointment by consent of an auditor under the State statute; and further stated that the case was so unsuitable for trial by jury "that such a trial, unless the issues were simplified, would be a mere farce."

4. The general conclusions which I have reached after a careful consideration of the foregoing authorities, is accordingly this: first, that in an action at law in a Federal Court the issues may be properly submitted to a referee for determination as an arbitrator, with the necessary incidents to such arbitration of the issues in the case; second, that even by consent of the parties, the court is not authorized to refer the issues in a case to a referee or other person, as an officer of the court and as a substitute for the trial of the issues of fact by a jury or the court, and for the purpose of giving his report the weight and effect of a master's report under a reference in equity; but, third, that the court may, either of its own motion or upon the motion of either of the parties or by consent of parties, refer the issues in the case to a referee as an officer of the court, as a tentative tribunal, for the purpose merely of making a preliminary investigation in order to simplify the issues as a necessary step incident to the preparation of the trial case by the ultimate tribunal. Under such preliminary reference it would undoubtedly often, if not usually result, that upon the coming in of his report many of his conclusions would be unquestioned and the disputed issues narrowed down to comparatively few questions, which could then be submitted directly for the determination of the ultimate tribunal.

5. I conclude, therefore, that if the parties, after consideration of this opinion, desire either a reference to a referee in the nature of an arbitration or a reference to a referee as an officer of the court for the purpose of a preliminary investigation and simplification of the issues to be tried, an order to that effect may be properly entered, such order to recite the consent of parties and to show specifically the purpose and scope of the reference. Otherwise an order of reference could not, in my opinion, be properly made. But if, on the other hand, the parties, after considering this opinion, should desire to transfer this cause to the equity side of the court to be there proceeded with as an equity cause, where undoubtedly the matters involved may be more conveniently investigated, and reference to a master, such as is apparently desired, may be appropriately made, with the effect incident to such reference in equity, I think it clear that by consent of the parties such a transfer can be made.

It will be noted in this connection that in the rules of practice promulgated by the Supreme Court November 4, 1912, it is provided in rule 22 (33 Sup. Ct. —), that:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This rule of equity practice clearly recognizes the fact that the difference between the equity and law side of the court is not jurisdictional, but that transfers from one side of the court to the other may be made as a matter of practice.

[4] I have in contemplation at this time the adoption of an analogous rule of practice on the law side of the court providing that when it appears at any time that a suit commenced at law should have been

brought on the equity side of the court, it shall be transferred to the equity side and there proceeded with; but in advance of the adoption of such general rule I have no doubt of the authority of the court, if the parties so desire, to transfer an action at law of a clearly equitable nature to the equity side of the court for further proceedings.

UNITED STATES ex rel. MYLIUS v. UHL, Acting Immigration Com'r.

(District Court, S. D. New York. February 19, 1913.)

1. ALIENS (§ 44*)—RIGHT TO ENTER—ACTS OF IMMIGRATION AUTHORITIES.

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity, and must follow definite standards and apply general rules.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102-104; Dec. Dig. § 44.*]

2. ALIENS (§ 47*)—RIGHT TO ENTER—OFFENSES INVOLVING MORAL TURPITUDE.

Immigration authorities, in determining whether an offense, of which an alien applying to enter the United States has been convicted, involves moral turpitude, must be governed by a determination of the question whether the inherent nature of the particular offense includes it; the authorities having no jurisdiction to go behind judgments of conviction and determine whether the acts disclosed by the testimony indicate personal depravity and moral turpitude.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 106; Dec. Dig. § 47.*]

3. ALIENS (§ 47*)—RIGHT TO ENTER—PREVIOUS CONVICTION OF OFFENSE—CRIMINAL LIBEL—"MORAL TURPITUDE."

Criminal libel of which an alien seeking to enter the United States had been convicted in England for publishing defamatory statements regarding His Majesty the King, being a misdemeanor at common law and as defined by Lord Campbell's Libel Act, under which he was convicted (6 & 7 Vict. c. 96), was not an offense involving moral turpitude for which petitioner could be lawfully excluded; the term "moral turpitude," as so used, meaning an act of baseness, vileness, or depravity, in the private and social duties which a man owes to his fellow man or to society, and as applied to offenses includes only such crimes as manifest on the part of the perpetrator personal depravity or baseness.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 106; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4580, 4581.]

Habeas corpus by the United States, on relation of Edward F. Mylius, to obtain his discharge from the custody of Byron H. Uhl, Acting Commissioner of Immigration. Writ granted.

Simon O. Pollock, of New York City, for relator.

Henry A. Wise, of New York City, U. S. Atty., for respondent.

NOYES, Circuit Judge. Congress has not declared in general terms that all immigrants who have been convicted of crime shall be denied admission to the United States. The immigration laws divide offenses. They provide that aliens shall be excluded in case they have been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

convicted of crimes involving moral turpitude. The inquiry is twofold: (1) Is the conviction of crime established? (2) Is the crime one which involves moral turpitude?

[1, 2] In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.

[3] This petitioner is an alien seeking admission to this country and it was established before the immigration officials that he had been convicted in England of the offense of criminal libel in that he had published defamatory statements regarding His Majesty the King. The officials went further, examined the report of the proceedings at the trial and determined therefrom that the acts of the petitioner involved moral turpitude. Thereupon they found that he had been convicted of a crime embracing it and ordered his exclusion.

For the reasons stated I shall not, in reviewing the action of the executive officers, follow them into a discussion of the proceedings before judgment in the English court. It is proper, therefore, to emphasize that no conclusion which I may reach in interpreting these immigration statutes can be regarded as in the slightest degree minimizing the serious character of the petitioner's acts as disclosed, nor as reflecting in any way upon the fairness and regularity of his trial. If the petitioner be discharged it will be solely because I regard the offense of criminal libel as not involving in its inherent nature moral turpitude.

What, then, is the crime of criminal libel and what is moral turpitude?

To maliciously publish defamatory words of a person was a misdemeanor at common law. To "maliciously publish any defamatory libel" is the provision of Lord Campbell's Libel Act under which the petitioner was convicted (6 & 7 Vict. c. 96). The statute adds nothing to the common law definition and the definition establishes little concerning the moral character of the offense until we ascertain what the elements really mean and imply.¹

"Moral turpitude" is a vague term. Its meaning depends to some extent upon the state of public morals. A definition sufficiently accurate for this case, however, is this:

"An act of baseness, vileness, or depravity, in the private and social duties which a man owes to his fellow man or to society." 20 Am. & Eng. Ency. of L. 872.

And, adapting this, we may say that a crime involves moral turpitude when its nature is such that it manifests upon the part of its perpetrator personal depravity or baseness.

We come then to the fundamental inquiry: Does the crime of criminal libel in its nature imply personal depravity or baseness upon the part of its perpetrator? In my opinion the answer to this question depends upon that which must be shown to establish his guilt. Undoubtedly there may be cases in which the facts will show upon the part of the libeler a malignity of purpose and depravity of disposition conclusively indicating moral turpitude. But if it be unnecessary to establish such purpose or disposition to make out the crime of criminal libel, it cannot be said in its nature to involve them or the conclusion to be drawn from them. If only the persons who publish false and defamatory libels with intent to injure were criminally liable for them, there would be no difficulty in finding moral turpitude in the offense. The evil intent would enter into it. But the law of libel, for the protection of society, goes far beyond this. Editors and publishers have in the past been held criminally responsible for the publication of libels wholly without their knowledge. In such cases a finding of guilt does not establish moral depravity. And now in England and in this country the same liability exists if the libel came into the newspaper through their want of care. But here the basis of liability is really one of negligence and does not in itself show moral baseness. Corporations are convicted of criminal libel but their guilt hardly implies their moral obliquity. So a mistake of facts or innocent intention does not excuse; malice does not imply personal ill will and the truth cannot be shown to exculpate unless—according to the English law—it appear that the public interests required the publication. Upon such requirements of proof it seems manifest that a conviction of libel establishes little concerning the moral status of the person convicted.

All this, however, does not tend to minimize the serious character of criminal libels. The very grievousness of the wrongs they inflict

¹ Another English statute provides that if any person shall publish a defamatory libel "knowing the same to be false" he shall be liable to a heavy punishment. This statute by making guilty knowledge an element may state an offense which upon its face involves moral turpitude but as the petitioner was not convicted under it, it is unnecessary to consider it.

and the difficulty of reaching responsible persons forces the imputation of responsibility. The well-being of society requires that persons only indirectly responsible should be held liable and that few obstacles should stand in the way of establishing their guilt. But every step in the direction of widening the scope of the law of libel and of eliminating defenses of the want of personal participation is a step away from establishing the crime as one involving personal baseness or depravity.

Upon the whole I am compelled to the conclusion that the offense of criminal libel does not in its inherent nature involve moral turpitude and that in classifying it under the immigration laws, it must be designated as one which does not possess that element.² It follows, therefore, that the petitioner does not belong to the excluded classes, and that he should be released from custody and admitted to the United States; and it is so ordered.

UNITED STATES *ex rel.* CASTRO v. WILLIAMS, U. S. Com'r of Immigration, *et al.*

(District Court, S. D. New York. February 15, 1913.)

1. ALIENS (§ 44*)—RIGHT TO ENTER.

Aliens are entitled to enter the United States except so far as the right is restricted by statutes defining the excluded classes; the burden being on the immigration authorities to show that any alien denied the right to enter falls within one of the exceptions to the general privilege.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 102-104; Dec. Dig. § 44.*]

2. ALIENS (§ 40*)—APPLICATION TO ENTER—RIGHTS.

Although an alien who has not yet entered the United States may not enjoy the constitutional guaranties of citizens, he nevertheless has rights under the immigration laws which the immigration authorities are bound to respect.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

3. ALIENS (§ 46*)—RIGHT TO ENTER—EXCLUSION—PERSONS HAVING COMMITTED A FELONY OR OTHER CRIME OR MISDEMEANOR INVOLVING MORAL TURPITUDE—EVIDENCE.

Under Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 500), providing for the exclusion of persons who have been convicted of or admit having committed a felony, or other crime, or misdemeanor involving moral turpitude, where there is no proof that an alien has ever been convicted of an alleged crime in the country where it was committed, the only proof that is competent for the immigration authorities to receive, on which to base an order of exclusion, is the alien's own admission, nor can this be presumed by his

² I do not question the correctness of the decisions like *Ex parte Mason*, 29 Or. 18, 43 Pac. 651, 54 Am. St. Rep. 772, that, in certain judicial causes, the willful publication of a malicious libel should be held to involve moral turpitude. In such causes there are judicial inquiries as to particular acts. In the present case, as pointed out in the opinion, the purpose is to state general rules to be followed in immigration cases where the inquiry is nonjudicial.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refusal to answer questions put to him by the immigration authorities with reference to such alleged crime.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

4. ALIENS (§ 46*)—EXCLUSION—IMMIGRATION ACT—CONSTRUCTION.

Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 500), providing that nothing contained in the act shall exclude an alien if otherwise admissible because of his having committed an offense purely political, had no application to an alien who has not been actually convicted of an offense, for the alleged commission of which he is sought to be excluded.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

At Law. Habeas Corpus by the United States, on the relation of Cipriano Castro, late president of the republic of Venezuela, to obtain his discharge from custody of William Williams, United States commissioner of immigration at the Port of New York, pursuant to deportation proceedings. Writ granted, and relator discharged.

Geo. Gordon Battle, of New York City, for relator.

Henry A. Wise, of New York City, for respondent.

WARD, Circuit Judge. [1, 2] Aliens have the right to enter the United States except so far as the right is restricted by our statutes. Section 2, Act Cong. Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 500), defines in separate classes the aliens that are to be excluded. The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under this law which must be respected.

The board of special inquiry has held, and its decision has been affirmed upon appeal to the Secretary of Commerce and Labor, that Gen. Castro shall be excluded because he has admitted the commission of a crime involving moral turpitude, viz., the murder of Gen. Paredes, and therefore falls within the excluded class of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."

[3] It is to be noted that Congress has required in respect to this particular class of aliens proof of a specified kind and no other, viz., either a conviction in the country where the crime was committed or an admission by the alien. There is no pretense of any conviction, and I think ordinary proof is not sufficient. Testimony of unimpeached eyewitnesses that they had seen Gen. Castro kill Gen. Paredes with his own hand in cold blood would not only be insufficient, but would be wholly incompetent. Therefore telegrams passing between the state department and its representative at Caracas upon which the board relied are not evidence whatever to connect Gen. Castro with the death of Gen. Paredes. When examined before the special board, he had the right to insist that the proof on this point be restricted to that required by the act, viz., his own admission. This provision must have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all. So it is a privilege to aliens because it insures them against any such trial. This privilege is entirely taken away if an admission may be rested upon presumptions arising from the alien's refusing to answer questions on the subject when under examination. I think the act contemplates an explicit and voluntary admission. The same kind of reasoning as is here relied upon by the government was passed upon by the Supreme Court in respect to the degree of proof in *Chaffee v. United States*, 18 Wall. 516, 21 L. Ed. 908. There the trial judge instructed the jury that, although the government was obliged to prove the offense charged beyond a reasonable doubt, still, if it had made out merely a *prima facie* case, the jury might, if the defendants did not meet it by producing their own books or taking the stand, arrive at the conclusion that there was no reasonable doubt by relying upon the presumption that they would have taken the stand or produced their books if their testimony or their books would have been favorable to them. The Supreme Court held that this doctrine would turn the defendants' constitutional right not to testify, intended for their protection, into an engine for their sure destruction:

"The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors. Their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and, if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The case of *Clifton v. United States*, in 4 How. [242, 11 L. Ed. 957], cited by the court below, was divided upon a statute which cast the burden of proof upon the claimant in seizure cases after probable cause was shown for the prosecution, and therefore has no application. The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction."

How very different was the board's understanding of the law appears from the two findings which it made as follows:

"In the course of this examination this alien has committed frequent perjury. He has pretended to be ignorant of the matters concerning which a man of his intelligence and holding the position which he did undoubtedly possesses knowledge. Speaking of Louis Varela, who sent him frequent telegrams in regard to the capture and death of Gen. Antonio Paredes, he says, 'I do not know who he is.' We consider him an unreliable witness. His testimony to the effect that no foreigners suffered losses of property through his actions during the years when he was president we decline to believe. His refusal to reply to many questions put to him bearing upon his right to land convinces us that there exist damaging facts which he desires to conceal. Upon information received from official sources he was charged with responsibility for the unlawful killing of Paredes, but declined repeatedly to offer

any explanation or give the government any information in regard to the latter's death. He refused either to affirm or deny his guilt, even after he had been warned that unfavorable inferences would be drawn from such refusal, and that he must take the consequences. Such refusal, together with his manner and demeanor when asked concerning these matters, constitute in our opinion an admission of the truth of the charge. He is therefore excluded on the ground that he has admitted the commission of a crime and felony involving moral turpitude. * * * The additional evidence strengthens materially and confirms the grounds upon which the board based its first excluding decision. The State Department now submits this telegram sent by Castro to Varela on February 13, 1907, upon hearing of the capture of Paredes: 'You should give immediate orders to shoot Paredes and his officers. Advise me of receipt and fulfillment.' The State Department also submits sworn testimony taken in court showing that these orders were complied with. Such testimony shows that Paredes was not killed in any attempt to escape, but that, on the contrary, he was by order of Castro killed in a cold-blooded manner, without a pretense of a trial, and in violation of the rules of civilized warfare. Notwithstanding Castro was summoned before this board to hear and explain, if he could, the additional evidence, he refused in an insolent and defiant manner to listen to it or to answer. He stands before this board applying for admission to the United States, and yet declines to give information bearing directly on his admissibility. Nor is his attitude consistent with that which an innocent person would assume when confronted with proof of a crime. His silence and behavior are under the circumstances an admission of guilt. He is again excluded as admitting the commission of a crime involving moral turpitude, namely, the murder of Gen. Paredes."

Everything said about the alien's frequent perjury and pretended ignorance of things he must have known and about his refusal to answer questions relating to the death of Gen. Paredes in the first finding and about the telegrams and diplomatic correspondence in the second is irrelevant. He was not bound to submit to examination upon the subject. It is not enough as the government contends that there should be some evidence to support the findings of the board. In this particular class of aliens there must be some evidence of the specific kind prescribed by the act.

The Secretary, as might naturally be expected, confined himself to the material question whether the proof established an admission within the meaning of the act. He relied upon *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, which justified the board in drawing the conclusion that Chinamen were not born in the United States from the fact that they refused to answer questions upon the subject or stood absolutely mute. But the Chinese Immigration Acts put the burden of proof expressly upon the Chinamen, and contain no restriction whatsoever as to the kind of proof upon which the immigration authorities are to act. He also cited *United States v. Williams* (D. C.) 175 Fed. 274, in which the court justified a deportation on the ground that there was some evidence that the alien was likely to become a public charge. This was a matter of proof generally and not of restricted proof as in the case here under consideration.

[4] Finally, he considered whether the offense charged fell within the proviso of section 2, "that nothing in this act shall exclude, if otherwise admissible, persons convicted of an offense purely political." Gen. Paredes was killed while engaged in an insurrection against the government of Venezuela while Gen. Castro was president. If Gen. Castro ordered him to be killed, the offense was plainly political, but

the proviso does not apply because Gen. Castro has never been convicted of the offense, and therefore inquiry whether such an act involves moral turpitude is immaterial. It is but fair to state that Gen. Castro was amazed, excited, and alarmed by much connected with the examinations he was submitted to from the moment he arrived, which not unnaturally excited his indignation. I think the immigration authorities have erred as a matter of law in their construction of the statute, and so have exceeded their jurisdiction. *United States ex rel. Jehiel Rosen v. William Williams, etc.*, 200 Fed. 538 (opinion of the United States Circuit Court of Appeals for this Circuit).

The prayer of the petition is granted, and the alien discharged.

UNITED STATES v. YAZOO & M. V. R. CO.

(District Court, W. D. Tennessee, W. D. February 22, 1913.)

No. 1,276.

MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE ACT—REPORTS BY CARRIER
—FAILURE TO MAKE—PENALTIES.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 556 (U. S. Comp. St. Supp. 1911, p. 1305), after authorizing the commission to require certain reports from carriers touching income, expense, and indebtedness, and to fix the time and manner in which the reports shall be made, provides that, in case of failure to file such reports within 30 days after they may be lawfully required, the carrier shall forfeit to the United States \$100 for each day's default. It then authorizes the commission, by general or special order, to require carriers to file monthly reports concerning any matters about which the commission is authorized to inquire, and for a failure to file such reports the carrier is made "subject to the forfeitures last above provided." *Held* that, the commission having required carriers to report all instances where employes had been on duty for a longer period than 16 consecutive hours in violation of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1911, p. 1321), the act was mandatory as to the carrier's liability in case of a failure to make such reports; and hence the court, in an action to enforce the penalty for such failure, could not consider matter in mitigation as ground for reduction of the penalty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

Action by the United States against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff.

Casey Todd, U. S. Dist. Atty., of Memphis, Tenn., for the United States.

P. J. Doherty, of Washington, D. C., for the Interstate Commerce Commission.

Chas. N. Burch, of Memphis, Tenn., for defendant.

McCALL, District Judge. This action is brought on the suggestion of the Attorney General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by said commission, against the defendant, the Yazoo & Mississippi Valley Railroad Company. The suit is to recover \$400 as penalties for the failure of the defendant to comply with an order of the said commission, which requires all carriers subject to the provisions of the act, entitled "An act to promote the safety of employes and travelers upon railroads by limiting the hours of services of employes thereon" (commonly known as the "Hours of Service Act"), to report within 30 days after the end of each month all instances where said employes had been on duty for a longer period than that provided in said act. Common carriers subject to the provisions of said act are prohibited from requiring or permitting their employes to be or remain on duty for more than 16 consecutive hours. Section 2, 34 Statutes at Large, pp. 1415, 1416.

The defendant admits the allegations in the petition, and thereby says that it is technically guilty of disobeying the said order of the Interstate Commerce Commission, but it insists that it should not be subjected to a penalty of \$100 for each day it so failed to report to the commission the particular infractions charged, after the report was due, because of the situation existing at the time of the said failure to report.

At the hearing, it was conceded in open court that the violations of the Sixteen Hour Act, set out in the petition of the government, occurred at a time when the defendant company was operating its railroad in and out of Memphis under the most unfavorable circumstances, growing out of a strike by its employes in its yards. A detailed statement of the conditions existing at that time is not necessary, but it is sufficient to say that they were of such character that the court should take them into consideration in fixing the penalties in this case, if authority for so doing can be found under the law.

The only question presented for decision, therefore, is whether it is discretionary with the court to impose a less or a different penalty than is prescribed by the twentieth section of the act to regulate commerce, approved Feb. 4, 1887, c. 104, 24 Stat. 386, as amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 556 (U. S. Comp. St. Supp. 1911, p. 1305). After authorizing the commission to require certain reports, from all common carriers subject to the provisions of the act, touching their income, expenses, indebtedness, etc., and to fix the time and prescribe the manner in which such reports shall be made, it provides that:

"If any carrier, person or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special

reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided."

As has been seen, the commission, in its effort to enforce the "Hours of Service Act," has deemed it necessary to promulgate an order, requiring common carriers subject to the provisions of the act to make reports to it within 30 days after the end of each month of all instances where such employes have been on duty for a longer period than 16 consecutive hours.

The contention of the government is that the same penalty is provided, for a failure by the carrier to comply with the order of the commission last above stated, as is provided for a failure by the carrier to file its annual report touching its financial operations and condition, and that the statute is mandatory in both instances.

The defendant concedes that the statute is mandatory wherein it imposes a penalty of \$100 for each and every day that the carrier shall be in default in respect to filing its annual report, but asserts that it is not mandatory in respect to the carrier's failure to make a report to the commission within 30 days after the end of each month of all instances where employes have been on duty for a longer period than that provided in the act, presumably upon the ground of the relative importance of the subject-matter and purpose of the two classes of reports. It is urged that there is a difference between the mandatory provision that a carrier shall forfeit \$100 per day for failing to file its annual report, and the provision in respect to its failure to file special reports, which provides that "it shall be subject to the forfeitures last above provided," and argues that, had Congress intended that the same mandatory penalty should accrue as to special reports as accrue in reference to annual reports, the same language would have been employed.

The exact difference in the language employed by Congress is that in the one instance, to wit, the failure to file the annual report, the act provides that "such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default in respect thereto," and in the other instance, to wit, the failure to file the special report, it provides, "and if such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided," which forfeiture last above provided is the penalty of \$100 per day.

The purpose of this legislation is the protection of the lives of employes of railroad companies, and also the lives and property intrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation are needful to the health and efficiency of men engaged in the hazardous work of railroading. The benefit it is intended to confer is to better enable employes to serve their employers, and to promote the needs of commerce, and also to promote the safety of travelers upon railroads. The limiting of hours of labor of those who are in control

of dangerous agencies, it is believed, will relieve the employes of overfatigue and resulting indifference, and thus avert accidents which lead to injuries and destruction of life and property. Such purpose could scarcely be said to be of less importance than making of annual reports, showing in detail the amount of capital stock issued, the amounts paid therefor, the dividends paid, the surplus funds, etc., unless we have unhappily fallen upon times when it is of greater moment to enact and enforce laws, the purpose of which is to safeguard the financial interests of the public and the carrier, than it is to enact and enforce laws, the purpose of which is to protect the lives and limbs of human beings. To this latter doctrine, I cannot subscribe, and am therefore unable to agree with the contention of the defendant. The provision of the act under consideration indicates that it was the purpose of Congress to prohibit common carriers from subordinating the welfare of their employes or passengers aboard their trains, either in health, life, or limb, to the interest of earnings or dividend sheets.

I am of the opinion that the statute is mandatory in respect to the penalty for failure to comply with the order of the commission in question, and that the court has no discretion in the premises.

It is pressed upon the court that the statute in question and the rule of the commission thereunder are harsh, and bear too heavily upon common carriers.

When the language of a statute is plain and unambiguous, its harshness should not be ameliorated by construction of the courts. Those interested must apply to the lawmaking body enacting such statutes for relief, and, until Congress changes the law now under consideration, we must enforce it as it is plainly written.

A judgment will be entered for \$400 in this case, and, for a like reason, a judgment will be entered for \$500 in case No. 1,282, *United States of America v. Illinois Central Railroad Co.*

In re REYNOLDS.

Petition of BIRDSELL MFG. CO.

(District Court, E. D. Kentucky. December, 1912.)

BANKRUPTCY (§ 140*)—GOODS—CONTRACT—BAILMENT FOR SALE—AGENCY CONTRACT.

A contract, by which wagons were consigned to the bankrupt for sale as agent, provided that the agent's right to dispose of the goods should extend only to actual sales made in the regular course of trade for a sum not less than the invoice price with freight added and until so sold the title and property rights should remain in the consignor. It also provided that, on the first of each month, the bankrupt should account for all goods sold during the preceding month and settle for all goods sold for cash at the invoice price, less 5 per cent., and for such goods as were sold on credit he should settle to the extent of \$100 by executing his four months' note. *Held*, that the contract was not a conditional sale, but a contract of bailment for sale, so that the consignor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was entitled to reclaim such part of the goods as remained in the hands of the bankrupt at the time of the institution of bankruptcy proceedings, though not so as to goods sold.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

In Bankruptcy. In the matter of bankruptcy proceedings of T. F. Reynolds. On petition to review a referee's order in favor of the Birdsell Manufacturing Company to reclaim certain goods in the possession of the bankrupt. Reversed.

The following is a copy of the contract referred to in the opinion:

Birdsell Manufacturing Company, of South Bend, St. Joseph county, Indiana, hereinafter designated as "Company," and T. F. Reynolds of Cynthiana, in the county of Harrison, state of Kentucky, hereinafter designated as "Agent" hereby agree as follows:

First. Said Company hereby grants said Agent the privilege of handling its wagons on consignment in Cynthiana, county of Harrison, state of Kentucky, until such time as this contract may be terminated as hereinafter provided.

Second. Said Agent shall transact all business pertaining to the sale of said wagons, and shall pay all taxes, freight, storage and other expenses on same, and keep the same fully protected from the weather, and in good order, all at the Agent's own expense. Company agrees to keep said goods properly insured against loss by fire at its own expense. Agent's right to dispose of such goods as may be shipped him shall extend only to actual sales made in the regular course of trade, for a sum in no instance less than invoice price with freight added, and until so sold the title and property rights in said goods shall remain in the Company. All orders for goods, given by Agent to the Company under this contract, shall be subject to the approval of the Company.

Third. The entire proceeds from the sale of such goods shall be the sole property of the company, and shall be kept by the Agent separate and apart from his other funds, and shall be accounted for as hereinafter provided.

Fourth. Agent shall, on the first day of each month, and when requested to do so by the company, or its duly authorized representative, render a statement showing all goods on hand, and all goods sold during the preceding month, and shall at once settle for goods sold, in cash, at the invoice price thereof, less a discount of five per cent. In case Agent shall sell any wagons on time, he may settle with Company for same by executing his note due in four months, without interest, for the invoice price of goods sold, and in such case shall not receive five per cent. discount; but the amount of unpaid notes owing by Agent to the Company shall not, at any time exceed the sum of \$100.00.

Fifth. If any goods delivered by the Company to the Agent shall remain unsold and in the possession of the Agent at the expiration of twelve months from the date of invoice of such goods, the Agent shall, if required by the Company, surrender said goods to the Company; or if the Company shall require it, Agent shall purchase said goods from the Company, at the invoice price thereof, less five per cent. discount.

Sixth. Should the Agent die or dispose of the business in which he is engaged at the time of making this agreement, or should he for any reason desire to terminate this contract, he shall, if requested by the Company, surrender all goods on hand to the Company; or if required by the Company, he shall purchase said goods of the Company, and pay the invoice price of same less five per cent. discount.

Seventh. The said company reserves the right to revoke this agreement whenever it may, in its judgment, deem it necessary for the protection of its interests, and receiving notice of such revocation, the Agent shall sur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

render to the Company all goods and property in the possession of Agent at the time, the goods to be in as good condition as when received by the Agent, and Agent shall pay for all damage to same and all charges, except freight only, and in such case Company will pay the Agent for such freight as Agent may have paid on goods so surrendered to the Company; no freight shall be repaid by the Company, if Agent becomes a bankrupt or insolvent.

Eighth. As compensation for all services and all outlays made by him under this contract, the Agent shall receive the five per cent. discount specified in clauses fourth, fifth and sixth, and also the surplus received by him over and above the invoice price of each article sold.

Ninth. All repairs shall be settled for by Agent in thirty days from date of shipment, whether sold by him or not, by remitting to the company the full invoice price for same, no five per cent. discount being allowed on repairs.

Tenth. All goods sold by Agent shall be sold under the warranty contained in the Company's current catalogue and none other.

Eleventh. Said Agent shall be governed by instructions of said Company, and shall reimburse said Company for any loss or expense resulting from any departure by him from the terms and conditions of this agreement, including all attorney fees, costs, and expenses incurred by the Company in enforcing this contract.

Twelfth. The failure of the Company to enforce at any time any provision of this contract, or the failure of the Company to exercise any of the options herein granted it, shall not affect or impair the validity of any part of this contract; and the Company may at any time exercise such options or enforce such provisions.

Thirteenth. This agreement embodies the entire understanding between the parties, and cannot be modified except by writing, duly executed by both parties. It shall be binding on both parties when signed by said Agent, and also by the Company at South Bend, Indiana, by one of the officers thereof.

C. M. Jewett, of Cynthiana, Ky., for petitioner.

Harry Bailey, of Cynthiana, Ky., for trustee.

COCHRAN, District Judge. This cause is before me on petition for review filed by the Birdsell Manufacturing Company, complaining of an order of the referee denying its petition, whereby it asserted ownership to certain property in the possession of the trustee. Its right thereto depends on the nature of its contract with the bankrupt under which the unsold property in the possession of the trustee and claimed by it was delivered to him. Was it a bailment for sale or a conditional sale? If a conditional sale, it was a mortgage, and, not having been recorded, the trustee takes precedence over it by virtue of the amendment of 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]) to section 47a (2) to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), and the petition was properly denied. It is only on the basis that it was a bailment for sale that the petitioner was entitled to any relief. I think that the contract was a bailment for sale under these authorities. In *re Galt* (C. C. A., 7th Cir.) 13 Am. Bankr. Rep. 575, 120 Fed. 64, 56 C. C. A. 470; *John Deere Plow Co. v. McDavid* (C. C. A., 8th Cir.) 14 Am. Bankr. Rep. 653, 137 Fed. 802, 70 C. C. A. 422; In *re Columbus Buggy Co.* (C. C. A., 8th Cir.) 16 Am. Bankr. Rep. 759, 143 Fed. 859, 74 C. C. A. 611; In *re Pierce* (C. C. A., 8th Cir.) 19 Am. Bankr. Rep. 664, 157 Fed. 757, 85 C. C. A. 14; *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

The fourth clause of the contract is mostly relied upon in support

of the position that it was a conditional sale. By virtue thereof undoubtedly on the 1st day of each month all notes and accounts for wagons sold on time became the property of the bankrupt. The bankrupt at that time had to account for all goods sold during the preceding month, and for such as were sold on time he could settle to the extent of \$100 by executing his four months' note without interest. But this did not have the effect of making a sale of such goods as had not been sold. In case of *Parlett v. Blake* (C. C. A., 8th Cir.) 26 Am. Bankr. Rep. 25, 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620, it was assumed that an agency contract, containing a provision that at the expiration of its term the agent should buy all goods not theretofore sold at the then current prices, was not a sale contract before the expiration of the term. It became such only upon the expiration of the term as to goods then unsold. So here this contract, otherwise an agency contract as to goods not sold, is not made a sale contract as to them because on the 1st day of each month it became a sale contract as to the proceeds of goods sold during the preceding month on time. I think, however, that the petitioner's right is limited to the unsold goods. He has none as to the proceeds of goods sold because of this fourth clause.

The order of the referee is reversed, with directions to allow petitioner the unsold goods claimed by it.

ATCHISON, T. & S. F. RY. CO. v. KINKADE.

(District Court, D. Kansas, Second Division. December, 1912.)

No. 98.

COURTS (§ 289*)—JURISDICTION OF FEDERAL COURTS—SUIT ARISING UNDER INTERSTATE COMMERCE ACT.

An action by a railroad company against a shipper to recover the difference between the freight paid on an interstate shipment and the amount due under the legally established and published rate schedules in force is within the jurisdiction of a District Court of the United States, regardless of the citizenship of the parties or the amount in controversy, under Judicial Code, § 24, par. 8 (Act March 3, 1911, c. 231, 36 Stat. 1092 [U. S. Comp. St. Supp. 1911, p. 136]), which gives such court jurisdiction "of all suits and proceedings arising under any law regulating commerce except those suits and proceedings exclusive jurisdiction of which has been conferred on the Commerce Court."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

At Law. Action by the Atchison, Topeka & Santa Fé Railway Company against M. L. Kinkade. On motion to dismiss for want of jurisdiction. Overruled.

Wm. R. Smith, of Topeka, Kan., for plaintiff.

McGill, Blood & McCormick, of Wichita, Kan., for defendant.

POLLOCK, District Judge. The facts are the plaintiff, a corporate citizen of this state, brought this action in this court against defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant, a citizen of this state, to recover the sum of \$143.71; same being the difference between the amount of \$267.37 heretofore received by plaintiff from defendant for the shipment of two cars of emigrant goods carried by plaintiff and other railway companies from the city of Indianapolis, in the state of Indiana, to the town of Holcomb, in this state, and the regularly established and published tariff rate of \$411.08 chargeable for the performance of such service under the provisions of the Interstate Commerce Act. Defendant moves to dismiss the case against him for want of jurisdiction in this court.

Section 24 of the new Judicial Code, regardless of the amount in controversy, provides:

"This court shall have jurisdiction of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

Exclusive jurisdiction of the controversy here presented has not been by law conferred upon the Commerce Court, nor is such contention made by defendant. The only question presented by the motion is: Does this action arise under the provision of any law of the United States regulating commerce between the states? In the absence of what is known as the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the parties would have been free to make any contract they might desire covering the shipment of the emigrant goods of defendant, and such contract when made would have been binding and enforceable. No amount in excess of that stipulated in the contract would have been chargeable or collectible. However, the price to be paid for the performance of such service as is involved in this case is no longer a matter of private contract between the parties, but both the shipper and the carrier are alike bound by the established and published tariff rate made under the Commerce Act. No other amount may be lawfully either charged, received, or paid. If a greater amount is charged and received, the shipper may recover the excess. If a less amount for any reason is paid by the shipper or received by the carrier, the difference between such amount and the legally established tariff rate may by the carrier be recovered from the shipper. In other words, the rate of carriage by law established, and not the acts or contract of the parties, must control. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Texas & Pacific Railway Co. v. Cisco Oil Co.*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556; *Robinson v. Balto. & O. R. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Carson Lumber Co. v. St. L. & S. F. R. Co.* (D. C.) 198 Fed. 315.

As the duty of the plaintiff to charge and collect the regularly established and published rate in this action from defendant, and the corresponding obligation of the defendant to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from

any contract between the parties, this court has jurisdiction, and the motion to dismiss must be overruled and denied.

It is so ordered. Defendant, if so advised, may answer the petition filed in this case within 20 days from this date.

TITLE GUARANTY & SURETY CO. v. DUTCHER et al.

(District Court, W. D. Washington, S. D. March 7, 1913.)

No. 1,861.

SUBROGATION (§ 8*)—SURETY—RIGHTS OF CREDITOR.

A surety on the bond of a contractor for public work, who assumed to complete the work after its abandonment by the contractor, was subrogated, so far as necessary to protect it from loss, to all the rights which the city might have enforced against the contractor if it had declared the contract forfeited and completed the work itself, and therefore had a prior right to the bonds of the city to be issued to the contractor in payment of the indebtedness as against assignees of the contractor to whom portions of his bond issue had been assigned to secure loans received by him, the proceeds of which were deposited to his general account and used indiscriminately in the furtherance of other work as well as that required by the particular contract.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 19; Dec. Dig. § 8.*]

In Equity. Suit by the Title Guaranty & Surety Company against William Dutcher and others. Decree for complainant.

James B. Murphy, of Seattle, Wash., for complainant.

Boner & Boner, of Aberdeen, Wash., for defendants.

CUSHMAN, District Judge. This cause is now for decision upon an agreed statement of facts. The suit was brought by complainant, the surety upon a contractor's bond, given the defendant, city of Aberdeen, to secure the performance of a contract for improving certain streets. Complainant's prayer is that the city be enjoined from recognizing certain assignments made by the defendant contractor, and that it be required to pay the complainant all amounts due upon the contract.

The contract provided:

"(3) In consideration of the full performance of said work by said contractor, the said city agrees to pay the said contractor in local improvement fund bonds issued on said local improvement district No. 322, at the following rates as measured and estimated by the said city engineer, to wit: * * * Payment to be made as the work progresses, upon estimates of said city engineer, no such bonds to be issued, however, until after the equalization of the assessment roll as provided by the ordinances of the city of Aberdeen.

"(4) The plans, specifications and details for said work on file in the office of the city engineer, and a part of the bid in said contract, is hereby referred to and made and part of this contract as fully as though set out herein in detail.

"(5) The said contractor is required to furnish a good and sufficient bond to the city of Aberdeen for the faithful performance of said contract and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the protection of all contractors, subcontractors, laborers, mechanics and materialmen and all persons who shall supply such contractor or subcontractors with provisions or supplies for the carrying on of said work in a sum not less than thirty-one hundred dollars (\$3,100) which sum is approximately fifty (50) per cent. of the amount of said contract.

"(6) Said contractor further agrees to save and protect the city free and harmless, from all loss, damage and liability caused by any neglect or want of proper care or act or omission done or suffered to be done by the said contractor, his agents, employes or subcontractors in the performance of said contract."

The complainant became surety for the contractor on a bond for \$3,100, which bond provided:

"Now, therefore, if the above bounden principal, Wm. Dutcher, shall and does, well and truly, faithfully and fully comply with and carry out the terms and conditions of said contract, and shall complete the same in the time and manner specified, and shall pay all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such contractor or subcontractors with provisions and supplies for the carrying on of the work contemplated in said contract, any and all just debts, dues and demands incurred in the performance of said work, and shall comply with all the requirements of the laws of the state of Washington with relation thereto, then this obligation to be void, otherwise to be and remain in full force and effect."

The contract and bond were executed in July, 1910.

Before the completion of the contract, the contractor abandoned the work, and failed to pay certain indebtedness incurred in connection therewith on account of labor and materials furnished in the work, and was thereafter adjudged bankrupt.

The contract price for the entire work was \$6,251.66. At the time of the abandonment, May 6, 1911, there was work completed to the amount of \$3,717.90. Nothing has been paid by the city to the contractor or otherwise. The contractor left unpaid labor and material bills which have been paid by the complainant to the amount of \$2,675.71. On March 1, 1911, the contractor borrowed \$3,500. The defendant Sargent indorsed his note for this amount, which the indorser, was afterwards compelled to pay. At the time of such indorsement, the contractor agreed to assign to the indorser sufficient of the city's contract bonds to cover the obligation of the indorser. The assignment was not actually made until May 6, 1911. This assignment was for \$4,000 of the bonds to become due on account of the improvement. It was recited therein that it was made to secure the indorser, and authorized the city clerk to turn over the bonds to him. In borrowing this money, the contractor represented that it was to be used upon this and other contracts which he then had with the city.

The contractor also borrowed from the defendant Flora M. Weatherwax \$1,500, and assigned \$1,600 of said bonds to her as security. This transaction was in all things similar to the first, except that the assignment was made at the time the money was borrowed.

After the abandonment of the contract, the city called upon the complainant to complete the contract. This it did at a cost of \$2,850, and the city accepted the work, which, with the labor and material claims incurred by the contractor, amounting to \$2,675.71, filed and made a lien upon the bond and paid by the complainant, makes a total

of \$5,325.71 expended by the surety on account of the bond. Nothing has been realized on these claims from the contractor's bankrupt estate.

All the money borrowed by the contractor went into his general bank account with other of his money. During the time involved, he had four separate contracts with the city. No account was kept of the particular work upon which disbursements were made, and it is not shown how much, if any, of the money borrowed, or other money of his, was paid upon the contract in question. Complainant relies upon the following authorities: *First Nat. Bank v. City Trust, etc.*, 114 Fed. 529, 52 C. C. A. 313; *Prairie State Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Henningsen v. U. S. F. & G. Co.*, 143 Fed. 812, 74 C. C. A. 484, affirmed 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; *Hardaway & Prowell v. Nat. Surety Co.*, 150 Fed. 465, 471, 80 C. C. A. 283, affirmed 211 U. S. 552, 29 Sup. Ct. 202, 53 L. Ed. 321. Defendants cite the following authorities: *McAllister v. City of Tacoma*, 9 Wash. 272, 275, 37 Pac. 447, 658; *Ætna Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Greenville Sav. Bank v. Lawrence*, 76 Fed. 545, 22 C. C. A. 646; dissenting opinion, *First Nat. Bank v. City Trust, etc.*, 114 Fed. 529, at 534, 52 C. C. A. 313; *Dowling v. City of Seattle*, 22 Wash. 592, 61 Pac. 709; *Hipwell v. National Surety Co.*, 130 Iowa, 656, 105 N. W. 319; *Sheldon on Subrogation*, § 240.

The question thus presented is whether the right of the contractor's surety, or that of the contractor's assignees to the bonds and funds held by the city on account of the contract, is superior. This point is concluded in this circuit in favor of complainant by *First Nat. Bank v. City Trust, etc.*, 114 Fed. 529, 52 C. C. A. 313; *Henningsen v. U. S. F. & G. Co.*, 143 Fed. 812, 74 C. C. A. 484; *Id.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547. The following cases are to the same effect: *Prairie State Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Hardaway & Prowell v. Nat. Surety Co.*, 150 Fed. 465, 471, on petition for rehearing at 473, 80 C. C. A. 283. The complainant will be allowed interest at the legal rate from the actual dates of the payments made by it for the completion of the contract, and for the unpaid labor and material claims which it satisfied. These dates are not disclosed in the statement of facts. If the bonds of the city are already issued and bearing interest, allowance will be made so as to only allow complainant interest at the legal rate upon its payments.

On account of the rights of creditors, other than the assignees, to the balance, if any, remaining after the satisfaction of complainant's claim, no order will be made concerning such balance.

TITLE GUARANTY & SURETY CO. v. DUTCHER et al.
(District Court, W. D. Washington, S. D. March 7, 1913.)

No. 1,832.

Suit by the Title Guaranty & Surety Company against William Dutcher and others. Decree for complainant.

James B. Murphy, of Seattle, Wash., for complainant.
Boner & Boner, of Aberdeen, Wash., for defendants.

CUSHMAN, District Judge. The controlling facts in this case are the same as those in the case of Title Guaranty & Surety Co. v. William Dutcher et al., 203 Fed. 167, being cause No. 1,861, this day determined, which is held to be decisive of the present case.

The only difference to be noted is that in this case the contractor had been paid almost half of the contract price, after the assignment by him, as security for money borrowed, of a part of the city's bonds, and, further, that in the present case, there will be no balance in the hands of the city after paying the complainant the amounts expended by it in completing the contract and paying the labor and materialmen's claims.

Findings and decree will be prepared in accordance with this, and the decision in case No. 1,861.

In re MILLER.

(District Court, E. D. New York. February 19, 1913.)

BANKRUPTCY (§ 407*)—DISCHARGE—FRAUD.

A bankrupt having filed a voluntary petition, stating that he had no assets, it appeared on an application for a discharge that the proceeding was largely brought to relieve him from liability as an indorser of certain accommodation notes. It appeared that he had conducted a business which he had got rid of at the time when trouble appeared, and the proceeds of the business had disappeared. He built up another business which his sister allowed him to run and for the good will and stock of which a substantial payment was made, without keeping any record of what was done. This was sold, and the proceeds passed into the hands of the sister, who had done nothing to produce the business, and a third business was started without capital, which was being conducted apparently for the sister's benefit as a present from the bankrupt. *Held*, that such facts required a denial of the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Isaac Miller, formerly doing business as the Brooklyn Glass Works. On petition for discharge. Denied.

James H. Hickey, of New York City, for objecting creditor.
Adolph Cohen, of New York City, for bankrupt.

CHATFIELD, District Judge. The bankrupt has applied for discharge. The records show that he filed a voluntary petition upon the 22d day of May, 1911, and that he had no assets. The principal debts from which he wished to be freed by bankruptcy are two arising from notes which he had made to Goldberg & Rothman, of Boston. One of these has been put in evidence, signed by him on the 9th of July, 1907, for \$1,846.16, payable four months after date, to the order of Goldberg & Rothman. It appears that this note was discounted by Goldberg & Rothman, that subsequently Rothman became insolvent, and the note was not paid. The indorsee, James Berkman, assigned the note, and suit was brought thereon in the Supreme Court of New York county. Judgment was docketed upon the 10th day of March, 1908, but service of the summons and complaint upon which this judgment was entered was set aside on December 2, 1909, and a new action was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

then started, which has not yet been disposed of. In 1907 the bankrupt was doing business under the name of the Brooklyn Glass Works, and soon after the date of Rothman's difficulties sold the business to one Henry G. Feinberg for the sum of \$1,085, of which \$700 represented a prior debt and \$385 was paid by check. Feinberg was interested in a dairy, and did not continue the glass business, but merely took over the stock of glass on hand. He testifies that he repaid himself as much as he could by the sale of this glass. The testimony shows that the business consisted of buying glass (such as photographers' used-plates), cleaning the same, and disposing thereof to picture-frame dealers. The good will and knowledge of such a business would seem to comprise a considerable part of its value, and yet Feinberg left all this in the hands of Miller, and contented himself with such security as he had from the stock of secondhand glass at the time of this sale. Shortly thereafter the bankrupt's sister, Yetta Miller, filed a certificate on the 14th of October, 1907, with the county clerk in Brooklyn, that she was doing business under the name of the Williamsburg Glass Works, and employed Isaac Miller at a salary to run the business for her. He did so, opening a store at 195 Bedford avenue, Brooklyn, and this business was being conducted in that way at the time the notes above referred to became due. Isaac Miller did nothing to take up the Berkman note, and alleges that it was not a genuine loan, but an accommodation indorsement for Goldberg & Rothman. Be this as it may, he was liable, if the note had been transferred to the hands of an innocent purchaser. The sales of his business, coupled with his desire to go through bankruptcy, seem to have involved him in more difficulty than to have contested the validity of the note at the outset.

After the Williamsburg Glass Works had continued until June 25, 1910, a sale was made to Louis Miller, another brother of Yetta Miller, who paid her \$1 therefor, but gave one check of \$1,000 upon the 29th of March, 1910, and one check for \$275, upon the 25th of June, 1910, which it is testified were the real consideration for the transaction. These checks were paid through the North Side Bank, in which a new account was opened upon the 15th day of September, 1910, under the name of the "North Side Glass Works, Yetta Goldberg, Proprietor." The testimony does not show the previous form of the account, but Yetta Miller had in the meantime married a man by the name of Goldberg, and immediately after the sale to her brother Louis Miller transferred the business of buying and selling glass to No. 183 North Sixth street, Brooklyn. She filed a certificate upon the 15th day of September, 1910, that she was doing business at that address under that name, and opened the bank account referred to with a deposit of \$200. The North Side Glass Works has also been conducted by the bankrupt Isaac Miller, as manager for his sister, and he receives a small salary therefor. The books of the North Side Glass Works have been produced in court, consisting of a bank book and of a ledger, which contains nothing more than the memorandum of sales to different customers, with the rubber stamp record of payment therefor. No check books or vouchers are produced, no books of any sort were kept to show what became of the proceeds, and nei-

ther the bankrupt nor his sister has furnished any evidence, except their general statements, to show how these separate businesses could be built up by the bankrupt's efforts so as to sell for \$1,085, then to start from nothing and grow into a business worth \$1,275, and then from a bank deposit of \$200 to another successful business, going on at the present time. This has all been done without accounting for the disposition of the proceeds of the first sale to Feinberg, or the second sale to Louis Miller, or of any of the profits or accumulations from the present business, in any way whatever. Both the bankrupt and his sister testify that she pays the rent, receives all the profits, and helps run the business by going to the store two or three times a month, but with absolutely no knowledge of what is being done, and with no evidence whatever of the turning over of profits or accounting for the business to her. In short, the bankrupt conducted a business which he got rid of at the time when trouble was in sight because of an accommodation note, and the proceeds of the business disappeared. He built up another business which his sister allowed him to run, and for the good will and stock of which a substantial payment was made, without keeping any record of what was done. Upon the sale of this and another disappearance of the proceeds into the hands of the sister who had done nothing to produce the business, and who was therefore the recipient of a present from her brother of everything except the return represented by his salary, a third business is started, again without capital, and is being conducted apparently for the sister's benefit as a present from the bankrupt, who meanwhile seeks to avoid his legitimate debts. On such testimony a discharge in bankruptcy cannot be granted. If the bankrupt has an honest defense to the action upon the promissory notes, he can dispose of the only debts which can cause him trouble, and can then pay his creditors and be relieved of the bankruptcy proceedings.

A finding by the commissioner that he believes or disbelieves the witnesses, and that certain facts exist or do not exist, would be upheld by this court, if a clear issue of fact had been presented, but in this case the special commissioner has intimated that the story of the bankrupt is unworthy of belief, and then finds that he is not satisfied with the proof offered by the creditors. The court does not feel that such doubt can be predicated upon the testimony, for the burden is upon the bankrupt to show that he is entitled to a discharge, if the creditors sustain their accusation that he has so conducted his business as not to indicate good faith, and has caused his assets to disappear from his creditors.

The report cannot be confirmed, and the application for discharge will be denied.

CALIFORNIA-OREGON POWER CO. v. CITY OF GRANTS PASS et al.

(District Court, D. Oregon. March 3, 1913.)

No. 5,914.

ELECTRICITY (§ 11*)—POWER AND LIGHTS—PUBLIC SERVICE CORPORATION—RATES—PUBLIC UTILITIES ACT—EFFECT.

Public Utility Act Or. 1911 (Laws 1911, p. 483), vesting in the railroad commission jurisdiction to supervise and regulate every public utility, including corporations furnishing heat, light, water, or power, requiring such companies to file rate schedules and conferring on the commission jurisdiction to pass on the reasonableness thereof, and on applications for changes therein, superseded municipal charter provisions authorizing cities to fix rates to be charged by such corporations, so far as the same were in conflict or inconsistent with the powers of the railroad commission, and hence an electric light company having filed its rate schedule as prescribed by such act, a subsequent city ordinance prescribing lower rates was invalid and unenforceable.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

In Equity. Suit by the California-Oregon Power Company against the City of Grants Pass and others. Decree for complainant.

A. C. Hough, of Grants Pass, Or., for plaintiff.

Robert G. Smith and Geo. W. Colvig, both of Grants Pass, Or., for defendants.

BEAN, District Judge. This is an application for a preliminary injunction restraining the defendant city from enforcing an ordinance fixing rates to be charged by the plaintiff for supplying the inhabitants of the city with electricity for light and power purposes.

The plaintiff owns and operates in the defendant city an electric light and power system constructed and maintained under an ordinance dated January 5, 1905, granting to its predecessor in interest, the Condor Water & Power Company "and its successors and assigns forever," the right to occupy the streets, alleys, and highways of the city for the purposes stated. The Condor Water & Power Company assigned its franchise and plant to the Rogue River Electric Company, and on March 29, 1910, the latter company and the mayor and auditor, assuming to act on behalf of the city, entered into a contract fixing the terms and rates upon which the company would supply the city with light for a term of 10 years. The plant and franchise and all rights of the Rogue River Electric Company were subsequently assigned to the plaintiff. On April 4, 1912, the city passed an ordinance declaring the rates which could lawfully be charged for furnishing light and power to the city, and prohibiting the city officers from auditing or allowing any other or further sum than in such ordinance named, and thereafter refused to pay the plaintiff the amounts specified in the contract of March 29, 1910.

On January 15, 1913, the plaintiff filed with the Railroad Commission, pursuant to an order of such commission, a schedule of its rates, tolls, and charges as required by section 29 of the Public Utility Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of 1911. Laws 1911, c. 279. On the next day the defendant city passed an ordinance with an emergency clause making it unlawful for any person, firm, or corporation supplying the inhabitants of the city with electricity for light or power purposes to charge or receive from private consumers any rates in excess of those prescribed in the ordinance, which were less than as stated in the schedule filed with the commission.

The only question necessary to consider on this application is the power of the city to pass and enforce the ordinance last above referred to. Other questions were discussed at the argument, but are deemed immaterial to the present controversy. The city has not attempted to revoke or annul the franchise under which the plaintiff is maintaining and operating its plant, but only to fix the rates to be charged by it, and hence the validity of such franchise is not involved in this suit, and the adoption of the ordinance of 1912 is but an effort to repudiate the contract of March 29, 1910. The plaintiff has a full, complete, and adequate remedy in an action at law to recover on the contract, in which the rights of the parties can be determined. Nor is it important whether the charter gives the city the power to fix the rates to be charged private individuals or consumers by the plaintiff. The ordinance sought to be enjoined was enacted after the plaintiff had filed its schedule of rates with the Public Service Commission as required by law, and thereafter it became and was unlawful for it to charge any greater or less compensation than as specified therein, until the rates should be changed as provided in the Public Utility Act. Section 31. That act defines the term "public utility" to embrace all corporations, companies, individuals, etc., that now or hereafter may own, operate, or control any plant or equipment for the conveying of telegraph or telephone messages, or the transportation of passengers by street railways as common carriers, or for the production, transmission, delivery, or furnishing of heat, light, power, or power (section 1); vests in the Railroad Commission power and jurisdiction to supervise and regulate every public utility thus defined, and to do all things necessary and convenient in the exercise of such power and jurisdiction (section 6); requires every public utility to file with the commission within a time to be fixed by it schedules which shall be open to inspection, showing the rates, toll, and charges in force at the time for any services performed, and all rules and regulations that in any manner affect such rates (sections 25, 26, and 77); requires a copy of so much of such schedule as the commission shall deem necessary for the use of the public to be printed and kept on file in the station or office of the company where payments are made by customers or users, and open to the public (section 27); provides that no change shall thereafter be made in the schedule of rates except upon notice to the commission (section 29); requires copies of all new schedules to be filed in every station and office of the company where payments are to be made by the public 10 days prior to the time the same are to take effect, unless the commission shall provide a less time (section 30); provides that the rates, tolls, and charges named in such schedules shall be the lawful rate until changed as provided in

the Public Utility Act, and makes it unlawful for a public utility to charge or receive a greater or less compensation for any service than as specified therein (section 31); whenever the commission shall believe or when a complaint is made to it that the rates charged by a public utility are unreasonable or unjust or discriminatory, or that its services and regulations are insufficient, etc., the commission, after notice to the utility, is authorized and empowered to hear and determine such matters (sections 41, 42); if upon such hearing any rates, tolls, regulations, or practices are found to be unreasonable, unjust, insufficient, or unjustly discriminatory, etc., the commission is given power to fix and order substituted therefor such rates and other regulations as shall be just and reasonable (sections 43, 45, 46, 51, and 52); all rates, tolls, and charges fixed by the commission shall be *prima facie* lawful until found otherwise in a suit brought for that purpose as provided in sections 54, 55, 56, and 57 (section 53); and a penalty is provided for the failure of the utility company to observe them (section 63); municipalities are given certain powers over public utilities within their limits, subject to revision by the commission, but not to fix rates (section 61).

It thus appears that the purpose of the Legislature in adopting the law and the people in approving it was to provide a uniform system throughout the state for the control and regulation of public matters, and fixing the rates to be charged by them, and to create a tribunal for that purpose. By that act the power to fix the rates to be charged by public service corporations conferred on the different cities of the state by their charters is transferred to the Railroad Commission, and such charter provisions are therefore amended or superseded as far as they are in conflict or inconsistent with the powers so conferred. *Warren v. Crosby*, 24 Or. 558, 34 Pac. 661; *Hoffman v. Branch*, 24 Or. 588, 38 Pac. 4; *Northern Counties Trust v. Sears*, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188. When a public utility has filed its schedule of rates, as required by the law, such schedule fixes the only rates which it may lawfully charge or collect until they are changed in the manner provided by the law. If it does charge or receive any greater or less compensation, it is liable under the public utility law to a forfeiture for each offense, and its agent or officer offending to a fine.

It follows, therefore, that, after such schedule has been filed, the power of a municipal corporation to change or modify the rates therein stated no longer exists, because it is inconsistent with the provisions of the Utility Act and the obligations and liabilities of public service corporations thereunder. If the rates stated in the schedule filed by the plaintiff company are unreasonable or unjust, the city has a remedy by the proper proceedings before the commission, but it cannot prescribe other rates by ordinance and punish the plaintiff or its officers for a failure to observe them.

Preliminary injunction will issue as prayed for.

SCHWAHN et al. v. MIELE et al.

(District Court, D. New Jersey. March 5, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—INJUNCTION.

Complainants manufactured and sold a special massage cream continuously since 1904 under a registered trade-mark, consisting of spaced circles surrounding a woman's head, the entire design being printed in black and white. Between the circles were the words "Aubry Sisters," and in the space beneath the head the word "Beautifier." The label as used was pasted on the cover of a glass jar, and consisted of narrow concentric circles in gold, between which was a much broader circle or band of a deep red color, and on the upper part of this the words "Aubry Sisters" were printed in black letters, and on the lower part the word "Beautifier," while in the center inclosed by a red band was the picture of a lady's head. Defendant manufactured a massage cream, and after hiring one of complainant's demonstrators put out his cream in a similar jar, with a label consisting of an alleged picture of such demonstrator, surrounded by separated circles, between which was a black band, so well covered with words including the word "Beautifier" printed in large red letters as to give the casual observer the impression that the band itself was red. *Held*, that defendant's label was calculated to deceive the ordinary purchaser, and that its use constituted unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Suit by Matilda R. Aubry Schwahn and another, trading as Aubry Sisters, against E. A. Miele and others to restrain alleged unlawful competition. On final hearing. Decree for complainants.

Goepel & Goepel, of New York City, for complainants.

Charles F. McKinney, of Newark, N. J., for defendants.

CROSS, District Judge. The bill of complaint herein charges the defendants with unfair competition in trade and also with infringement of trade-mark No. 58,388, registered December 11, 1906, belonging to the complainants, and adopted and used by them in placing upon the market massage creams, rouges, and depilatory powders. The trade-mark consists of circles somewhat spaced apart, surrounding a woman's head. In the space between two of the circles and over the head are the words "Aubry Sisters," while in the same space beneath the head is the word "Beautifier." The entire design is shown in black and white. The label as used is pasted upon the cover of a glass jar, and consists of narrow concentric circles in gold, between which is a much broader circle or band of a deep red color, on the upper part of which the words "Aubry Sisters" are printed in black letters, and on the lower part the word "Beautifier," while in the center space inclosed by the red band, appears the picture of a lady's head.

The complainants, according to the testimony, have for a number of years been engaged in the manufacture and sale, among other things, of so-called massage and beauty creams, and especially in manufacturing and selling a special cream under the name of "Beautifier." Upon the covers of the jars containing this cream when offered for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sale were pasted the trade-mark and label above mentioned. It appears in the case that the complainants, first as partners and subsequently as a corporation, have used such design and label upon the covers of jars containing the above preparations when offered for sale by them from 1904 continuously to the present time, and in connection therewith have built up a very large business which, with the good will connected therewith, is shown to be worth two hundred thousand dollars.

The main allegations of the bill are denied by the answer of the defendants. The evidence, however, shows that the defendants M. A. Miele & Co. and M. A. Miele had for a short time prior to the commencement of this suit been engaged in manufacturing and selling a massage cream under a label bearing the name "Beautifier," which label was pasted upon the cover of the jar containing the cream, while the jar itself was of the same general size, shape, material, and color as that used by the complainants, that on such label appeared the head of a woman surrounded by separated circles, between which was a black band, so well covered, however, with words (among them the word "Beautifier") printed in large red letters as to give the casual observer the impression that the band itself was red. Furthermore, the pose of the head and general appearance of the label were such as would be likely to deceive a purchaser of ordinary intelligence and capacity purchasing the article in question in the usual course of business into the belief that it was the cream manufactured and sold by the Aubry Sisters in the jars and under the labels above mentioned. There are undoubtedly differences between the labels of the complainants and defendants, but there is also a very strong general resemblance, and one well calculated to deceive the ordinary purchaser. It is a matter of common knowledge that articles, such as these parties dealt in, are generally of small value, and likely to be purchased hurriedly and without other than a hasty examination. Under such circumstances, the purchaser might readily accept the defendants' preparation as the complainants', for it must be borne in mind that the rival labels on such occasions are not usually in juxtaposition and consequently capable of direct comparison.

In this connection, it is proper to note that Isabel Hoffman, a defendant herein, who, however, was not served with process, was at one time in the service of the complainants as a "demonstrator" of the cream in question, but left their employment in the latter part of October, 1911. Shortly afterward she was employed by the defendant Miele as a demonstrator of a massage cream manufactured and sold by him. Until she entered his employment he admits that he had never used the alleged infringing label, but immediately thereafter adopted it, and in the form adopted the woman's head shown thereon is a likeness of Miss Hoffman. Both he and she, however, deny that she in anywise suggested or described the label of the Aubry Sisters to him, and he swears that he had never seen it prior to the adoption of his own label. The circumstances, however, more than suggest that there was as a matter of fact some hidden connection between the complainants' label and the adoption of the Miele label just after Miss Hoffman.

entered his employment. Without doubt, the Aubry label and its successful and profitable use by the complainants lay at the foundation of Miele's adoption and use, as and when he did, of a similar label upon a like preparation having on its face Miss Hoffman's likeness. It is altogether probable that Miss Hoffman described the Aubry label to Miele and advised him to get up one in that form, which he accordingly did, and it is also more than probable that she was prompted thereto by her knowledge of the Aubry label and its successful use. At all events, he adopted it and used it, and continued to use it after he was served with notice of a motion for a preliminary injunction in this suit, to which motion, however, he offered no opposition.

I think the proofs establish a case of unfair trade competition, the further prosecution of which should be enjoined. For that reason and upon that ground a decree in favor of the complainants will be entered, with costs.

In re TYGARTS RIVER COAL CO.

(District Court, N. D. West Virginia. February 7, 1913.)

1. BANKRUPTCY (§ 115*)—RECEIVER—RIGHT TO MAINTAIN ANCILLARY PROCEEDINGS.

Temporary receivers appointed for an alleged bankrupt corporation before adjudication have no such interest as entitles them to institute ancillary proceedings in the court of another district to secure a confirmation of their appointment and be put in possession of property of the corporation in such district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 115.*]

2. BANKRUPTCY (§ 16*)—CORPORATIONS—JURISDICTION OF COURT—"PRINCIPAL PLACE OF BUSINESS."

A corporation engaged in the business of mining and selling coal whose lands and mining operations are all in the state by which it is chartered is not subject to bankruptcy proceedings in another state, although it may maintain its principal office there, which does not in such case constitute its "principal place of business."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5559, 5560.]

In the matter of the Tygarts River Coal Company, alleged bankrupt. On ancillary petition by receivers. Petition denied.

John L. Hechmer and W. R. D. Dent, both of Grafton, W. Va., for receivers.

DAYTON, District Judge. The Empire Coal Mining Company, a corporation, R. A. Shillingford and William A. Webb, creditors, have filed as of the 29th of January, 1913, in the Eastern district of Pennsylvania their petition, verified and in usual form, charging the Tygarts River Coal Company to be bankrupt. Upon this petition an order to show cause has been entered returnable February 13, 1913. Webb, one of the petitioners, has also filed in the same court his sepa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rate petition asking for the appointment of receivers to take charge of and operate the mine of the alleged bankrupt in Barbour county, W. Va., and upon motion of creditors the Real Estate Title Insurance & Trust Company of Philadelphia and William Morgan were on February 3, 1913, appointed by the District Court for the Eastern District of Pennsylvania such receivers. These receivers have presented to me their petition with which they tender a certified copy of the proceeding above referred to had in the District Court for the Eastern District of Pennsylvania and pray the entry and confirmation by me in this district of that court's order of their appointment. After mature consideration, this I feel compelled to decline to do for two reasons:

[1] First. I do not think the temporary receivers appointed in bankruptcy, pending the election of a trustee, have such interest in the controversy as warrants them to institute in this court of different jurisdiction an ancillary proceeding to secure its aid in confirming their appointment and securing for them the custody of property in this district. Their appointment is merely temporary; they are presumed to be wholly disinterested parties, not creditors, directors, stockholders, officers of, or in any way interested in the affairs of the bankrupt; therefore such ancillary proceeding cannot in my judgment be instituted by them. 2 Loveland on Bankruptcy, 120; Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; Great Western Min. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163; In re Nat. Mer. Agency (D. C.) 128 Fed. 639.

[2] Second. The above objection may be regarded as technical, and based upon it alone I might hesitate to deny this application. Independent of it, I am fully convinced that the District Court for the Eastern District of Pennsylvania, sitting in the city of Philadelphia, has no jurisdiction to entertain the petition filed in it to have the alleged bankrupt adjudicated as such. It is set forth in the petition of the receivers here and in the petitions filed in the Philadelphia court that the alleged bankrupt is a corporation chartered under the laws of the state of West Virginia; that it is engaged in the business of mining and selling coal; that its coal land and mining operations are wholly in the state of West Virginia, but, it is alleged, its principal office is situate in Philadelphia. Ever since the decision of Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274, it has been settled that a corporation can have no legal existence outside the boundaries of the sovereignty by which it is created; it exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence; it must dwell in the place of its creation, and cannot migrate to another sovereignty. Its operations in other states or sovereignties are purely permissive on the part of such other states, and such permission may at any time be withdrawn by them.

The Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) provides that the petition shall be filed in the district in which the "principal place of business" of the corporation is situate.

I am not ignorant of the fact that some of the federal courts have construed this phrase "principal place of business" to be the place where its chief officers reside and maintain an office; but in my judgment the determination of the question of where the principal place of business is depends upon where the actual business of the concern is transacted. It is a question of fact to be determined in each particular case largely on the character of the corporation, its purposes, and the kind of business it is engaged in. As regards a coal mining corporation like this, it is very evident that the basic necessity for its doing business at all is to have somewhere a body of coal, owned or leased, from which it may mine and ship coal. It is not sufficient for the officers of such a corporation to gather together in a city office and call it "the principal place of business" of the concern because it better suits their convenience to live and meet in such city. Unless the coal exists in place somewhere else to be mined and shipped to consumers, such city organization cannot exist. It is purely incident to and dependent upon the practical mining operations, "the doing of business" elsewhere. The fact that such city organization may control the company's sale of the coal cannot avoid the inevitable conclusion. In such case the city office becomes only the agent of the corporation for a limited purpose, that of selling what cannot be sold until it has first been elsewhere mined, prepared for, and shipped to, market for sale. It is very clear that it was not the purpose of the bankrupt law to either discriminate against, suppress, or destroy the rights of creditors; nevertheless, for a court in bankruptcy sitting in a city far distant from where the corporation's property is situate and its practical operations are conducted to assume jurisdiction is, in every case, calculated to accomplish that very thing. To illustrate: Let us assume that the alleged bankrupt here has acquired its coal holdings by purchase, as is generally the case, from numerous farmers. Coal in place in West Virginia is real estate, and title in fee thereto can be acquired only by deed. These deeds are of record in the county in West Virginia wherein the coal purchased is situate, not in the city of Philadelphia. Assume that the company has not paid in full for the coal, and that vendors' liens have been retained by the farmers upon the several tracts of coal sold by them to the company, to secure unpaid purchase money. In some companies 40 to 100 different conveyances may have been made under such conditions; each vendor having such lien. Finally let us assume, what would be entirely true in many cases, that the company in bankrupt condition had suffered judgments to be recovered and docketed against it and was indebted to many local people at its mines for labor, material, and merchandise. All these farmers, merchants, laborers, and lienors would have to go to Philadelphia (it could be as well to San Francisco) to have their claims and liens adjudicated, solely because the officers of the corporation saw fit for their convenience to establish an office in such distant city, and call it the company's "principal place of business." I cannot for a moment believe that Congress ever contemplated such a construction of its act, nor can I for a moment believe the language of the act itself can be warped by construction so as to create or justify such a condition of affairs.

I therefore decline to entertain the receivers' petition in ancillary proceeding, and I decline, until my conclusions herein are by a higher court held to be erroneous, to recognize that the District Court for the Eastern District of Pennsylvania has any jurisdiction in the premises.

IN re SCHIMMEL.

(District Court, E. D. Pennsylvania. February 26, 1913.)

No. 3,932.

BANKRUPTCY (§ 228*)—ORDERS OF REFEREE—REVIEW.

A trustee filed a petition with a referee for an order requiring the bankrupt to turn over property and the bankrupt appeared and answered. At the close of the evidence introduced by the trustee, the bankrupt made a motion to dismiss, which was denied with leave to him to introduce evidence. *Held*, that such order was not final, but interlocutory and discretionary, and was not reviewable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In the matter of Samuel Schimmel, individually and trading as the Central Gas Appliance Company, bankrupt. On rule to dismiss proceedings for review of order of referee. Rule made absolute, and proceedings dismissed.

Carr, Beggs & Steinmetz, of Philadelphia, Pa., for trustee.
Wessel & Aarons, of Philadelphia, Pa., for bankrupt.

THOMPSON, District Judge. The trustee filed with the referee a petition averring that the bankrupt had in his possession or under his control the sum of \$18,192.12 in cash, which was the property of his estate in bankruptcy, and praying that an order be made on the bankrupt requiring him to pay the above sum to the trustee. The bankrupt, being ordered to show cause, filed an answer denying generally the averments of the petition, and praying that it be dismissed with costs. Testimony in support of the petition was taken before the referee, at the conclusion of which counsel for the bankrupt moved that the petition be dismissed for want of proof, reserving the right to take testimony contra, if the motion was denied. The referee thereupon made the following order:

"Referee enters of record that without minutely considering the proof it appears bankrupt is chargeable with recently purchased goods approximately of the value of \$40,000, and had on hand at time of his insolvency goods valued by him at approximately \$10,000. On this showing it is incumbent on the bankrupt to explain the loss of his assets. The motion to dismiss the petition is refused."

The bankrupt filed a petition for a certificate for review assigning as error the action of the referee in overruling the bankrupt's motion to dismiss the petition for order to pay for want of proof and in deciding that the trustee had established a prima facie case sufficient to put the bankrupt to a defense in reply thereto. In the certificate, the ref-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eree, after stating the circumstances in connection with the motion to dismiss and his order thereon, states:

"Under these circumstances I consider my order a discretionary order, not properly a subject of review, as I do not think that the referee should hear argument in a matter of this nature until the attorney for the bankrupt is prepared to rest his proof on the testimony taken."

Upon petition of the trustee the court granted a rule upon the bankrupt to show cause why the petition for review should not be dismissed, the certificate stricken off, and the bankrupt directed to proceed with his defense to the trustee's petition. The question presented, therefore, is whether the order of the referee refusing the bankrupt's motion to dismiss the petition for want of proof is, under the circumstances of this case, such an order as should be certified for review. The referee in refusing the motion in effect sustained the evidence as *prima facie* sufficient to support an order upon the bankrupt to pay. Upon a review of the present order, the effect of the bankrupt's reservation of his right to produce testimony would be to give him his day in court before the referee, and then, if the decision should be adverse to him and the referee's order should be affirmed, to give him the benefit of another day in court before the referee to make his defense. No precedent has been cited by counsel upholding such a rule of practice. Upon refusal of the motion to dismiss, the bankrupt should either proceed with his case or rest it upon the testimony produced by the trustee. If he chose the latter course, the referee would make an order upon the bankrupt to pay or dismiss the petition for want of proof.

Under section 38 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]) jurisdiction is conferred upon referees as follows:

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

General Order 27 (89 Fed. xi, 32 C. C. A. xxvii) provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The extent of the jurisdiction of referees has been quite thoroughly examined in the case of *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In that case the referee had made an order on Nugent, a creditor, to show cause why an injunction should not be issued restraining him from disposing of certain money alleged to belong to the estate of the bankrupt, and for an order requiring him to pay the money to the trustee. The respondent objected that neither the court nor the referee in bankruptcy had any jurisdiction to make an order or to require the respondent to answer. The referee held the answer insufficient, and made absolute the rule and entered an order on

Nugent to pay over the sum in question. The referee on petition of the respondent certified the proceedings to the District Court, which affirmed the order of the referee. The conclusion of the Supreme Court upon review of the applicable sections of the Bankruptcy Act and the general orders was in the following language:

"We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases 'much of the judicial authority of that court.' *White v. Schloerb*, 178 U. S. 542 [20 Sup. Ct. 1007, 44 L. Ed. 1183.]"

The proceeding before the referee in the case at bar was upon a rule to show cause based upon petition of the trustee, and issue was joined by the filing of an answer by the bankrupt. The order consequent upon such proceeding would be an order upon the bankrupt to pay or an order dismissing the petition. Until a final order is made in those proceedings, the bankrupt is not entitled by section 39 (5) of the Bankruptcy Act taken in connection with general order 27 to have the proceedings before the referee on the trustee's petition reviewed. It clearly is within the jurisdiction of the referee upon refusing the motion to dismiss the petition to require the bankrupt to proceed with his proof, and, if he fails to do so, to enter either an order upon the bankrupt to pay or an order dismissing the petition. It is unnecessary to review the provisions of the Bankruptcy Act conferring jurisdiction upon referees, and the general orders in this connection, but it should be borne in mind that the purpose of the appointment of referees as stated in section 37 is to "assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy." The review of an order of a referee before a final order is made in the particular proceeding pending before him would tend to delay rather than expedite the transaction of bankruptcy business, and to impose upon the court the determination of questions which must in the first instance be left to the discretion of the referee if the purpose of his appointment is to be carried out. That a review is intended to lie only upon a final order in the pending matter is apparent by the provisions of general order 27, which provides what is to be set out in the certificate for review as follows: (1) The question presented; (2) a summary of the evidence relating thereto; (3) the finding of the referee; and (4) the order of the referee thereon. The finding of the referee in the present case should be such as would warrant either an order to pay or an order dismissing the petition. Therefore the refusal of the motion to dismiss should be followed by a final order upon the rule, unless the bankrupt proceed with his defense.

The proceedings upon certificate for review should therefore be dismissed, and it is so ordered.

RAPHAER v. LEADER.

(District Court, E. D. Georgia, S. D. February 27, 1913.)

1. FALSE IMPRISONMENT (§ 20*)—PLEADING AND PROOF.

A declaration in an action for false imprisonment against a single defendant, which contains no charge of conspiracy, cannot be supported by evidence directed entirely against a third person.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 86-97; Dec. Dig. § 20.*]

2. FALSE IMPRISONMENT (§ 31*)—ACTION—SUFFICIENCY OF EVIDENCE.

There is a presumption of innocence in favor of a defendant charged with false imprisonment, in either a criminal or civil proceeding, the burden of removing which rests on the adverse party; and proof that a defendant, in obedience to a message from his brother, caused plaintiff's arrest on a charge of larceny, of which he was acquitted, is insufficient in itself to support an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 108; Dec. Dig. § 31.*]

At Law. Action by Alex Raphaer against Moses Leader. On motion to direct verdict for defendant. Motion sustained.

Osborne & Lawrence and Ed. Cohen, all of Savannah, Ga., for plaintiff.

Adams & Adams and M. H. Bernstein, all of Savannah, Ga., for defendant.

SPEER, District Judge (orally). This is an action brought by Alex Raphaer against Moses Leader. It is for alleged imprisonment. No person is mentioned in this declaration, except the plaintiff and the defendant. H. Leader is not referred to. So far as the court knew when the declaration was read, and so far as the defendant knew when it had been served, there was no such person as H. Leader.

[1] Now there is a fundamental principle which governs; that is, that the defendant is entitled to be informed by the declaration or the indictment of the case or the accusation brought against him. This is a case against M. Leader. But the proof is exclusively against H. Leader. There is no charge of conspiracy in the declaration, no charge that there are joint tort-feasors; there being no proof to warrant the action against M. Leader in the opinion of the court, there is an utter variance between the case brought by the plaintiff and the case which he has attempted to sustain by evidence. There is no charge of malice, no charge of joint malicious intent. For these reasons, in my judgment, the case brought by the plaintiff has not been sustained.

[2] As to the case now made by the proof against M. Leader, even if the pleading justified it, in my judgment it was perfectly consistent with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

good faith on his part. A citizen is not to be reprehended or mulcted in damages for being active in the apprehension of those charged with crime. M. Leader lived in Vidalia. His brother, H. Leader, was conducting a business in which this plaintiff had been employed at Dublin some 30 miles away. M. Leader came to Savannah to visit his friend Krouskoff. From the proof it seems that he got information either by telephone or telegraph that Alex Raphaer had stolen something from his brother, H. Leader, was on his way to Savannah with trunks containing stolen goods, was requested to look out for him and have him arrested. He did nothing wrong when that information came to him. He proceeded to look for the police authorities. He called in the detectives. He went, as he had a right to under the law, to the depot with the detectives, and pointed out this man, who was charged to be fleeing, carrying off the goods and chattels of his brother, H. Leader. The detectives, with the by no means indirect methods which prevail here, had opened the trunk. Immediately thereafter M. Leader did the next thing which the law requires. He had a warrant taken out in the county where the crime was alleged to have been committed. In conformity to our law, Alex Raphaer was taken back there. The case was inquired into and the defendant was acquitted. That does not destroy the presumption of good faith which the law preserves in favor of M. Leader. The burden to remove that presumption is on the plaintiff. But all the proof indicates (except one phase to which I will presently advert) that he stood by, while the detectives opened the trunk and went through the goods, and only said:

"The goods were sold by me to my brother. This rifle and pistol came from my store, and was sold to my brother."

This in fact was true. H. Leader had bought the articles identified from M. Leader.

I now come to the proof made by Leonard, viz., that he strolled in the store of H. Leader, that he sat himself down where the Leader Brothers were talking, and he heard M. Leader say that if Raphaer did leave he would bring him back with handcuffs on. If that is true, and although there is something a little fishy about it, I am obliged to assume it is true for the purpose of this motion, it is not evidence of false imprisonment but might be evidence of malicious prosecution.

There is a fundamental difference between false imprisonment and malicious prosecution. The distinction made by the authorities is fundamental. They are made up of different elements, and are supported by different causes of action, and are subject to different defenses.

The pleadings here might justify proof of malicious prosecution, but the court, on a declaration alleging false imprisonment by M. Leader, cannot sustain the case on proof of malicious prosecution by H. Leader. The case as stated is wholly against H. Leader.

The presumption of innocence obtains in behalf of a defendant against whom an action is brought for false imprisonment. The charge constitutes a crime, and might be presented by indictment.

Taking this presumption into consideration, along with the other matters I have discussed, I am constrained to conclude, and accordingly hold, that a verdict for the defendant must be directed.

BROTHERS VALLEY COAL CO. v. MINOTT et al.

(District Court, S. D. New York. February 25, 1913.)

SHIPPING (§ 43*)—CHARTERS—BREACH BY DELAY IN REPORTING FOR LOADING.

Where a vessel chartered to proceed without unnecessary delay on discharging the cargo then on board to the place of loading for the charterer was delayed by the necessity of making repairs to render her seaworthy for the voyage, not due to any mishap occurring after the charter was made, she was chargeable with breach of the contract, and liable for the loss occasioned to the charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 165-168; Dec. Dig. § 43.*]

In Admiralty. Suit by the Brothers Valley Coal Company against Charles V. Minott, Jr., and others. Decree for libelant.

Wallace, Butler & Brown, of New York City, for libelant.

Howard M. Long, of Philadelphia, Pa., for respondents.

HAZEL, District Judge. Libel to recover damages sustained on account of breach of charter party.

In view of the charter party, containing an implied warranty that the schooner Frances M. should be seaworthy and fit for carrying the merchandise therein specified, and that, on discharge of her cargo then on board, she would proceed without unnecessary delay to load at Baltimore, her failure to do so on the ground specified does not relieve her from the breach. The contention that the warranty as to her seaworthiness did not, in fact, attach until the beginning of the voyage, is not germane to the facts under consideration. The master of the Frances M. was presumed to have known of the condition of the vessel and the character of the overhaul repairs necessary to be made after the discharge of the cargo of lumber, and should, therefore, have protected his ship in the charter party against delays of this description. That it was subsequently learned that her rudder post was unfit does not operate to relieve her from liability for the expenses incurred by libelant on account of the breach of the condition of seaworthiness. It was the duty of the vessel to give reasonable notice to the libelant that repairs were necessary before proceeding to Baltimore, so that it could take measures to be relieved from the expenses of reconsigning the merchandise. I think that the decision of Judge Adams in *Heller v. Pendleton* (D. C.) 148 Fed. 1014, is an authority for holding here that, as the vessel stipulated that she was seaworthy and fit for carrying coal and would proceed to load without unnecessary delay, she had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

no margin for repairs, and is not excused for her breach of the agreement.

The cases to which my attention was directed by proctor for respondents—*Cole v. Davidson*, *Aspinwall*, 374; *Gill & Fisher, Ltd., v. Browne*, 53 Fed. 394, 3 C. C. A. 573; *Sumner v. Caswell* (D. C.) 20 Fed. 249, and *Worms v. Storey*, 25 L. J. (Ex.) 1—are not applicable. The case of *Gill & Fisher, Ltd., v. Browne*, *supra*, is claimed to be on all fours with the case in suit, but reference thereto will show that, while the vessel agreed to sail with all convenient speed, the charterer was given the right to cancel the charter party if the steamer was not ready for cargo on or before the 31st day of January. It was known at the time the charter party was entered into that, before sailing with the merchandise specified in the agreement, the vessel had to proceed on a voyage from Charleston to Bremerhaven. Her voyage to Bremerhaven was made with reasonable dispatch, but she was detained for necessary repairs, and was unable to get back to Charleston until the last day of the month when the charterer's option to cancel would expire.

In *Sumner v. Caswell*, *supra*, the charter party contained the usual clause relating to seaworthiness, and the vessel, after proceeding on the voyage, was found to be unfit and unsteady. It was necessary to her safety that she jettison a portion of her cargo, and, when she arrived at her destination, a claim was made by the cargo owners for the cargo jettisoned. The court held that the implied terms of the charter party and the bill of lading included an implied warranty of the seaworthiness of the vessel at the time she sailed, and hence she was bound to make good the loss. So, also, in *Worms v. Storey*, *supra*, the vessel's unfitness was discovered after the commencement of the voyage, and in such circumstances the court held it was the duty of the owner either to repair or to refrain from proceeding to sea, and, having gone to sea in an unworthy state, the vessel was liable for the loss sustained by reason of a partial jettison of her coal cargo.

These cases are on a different principle from the case in suit, wherein the libellant seeks to recover its outlay for the reconignment of the merchandise, made necessary by respondents' breach of the charter party in failing to provide a seaworthy vessel in accordance with its terms, and in unnecessarily delaying her arrival at Curtis Bay. The stipulation, as heretofore stated, was that the *Frances M.* was seaworthy, and in every way fitted for carrying the coal in question, when, in fact, she presumably was not in such condition. If, after making the charter party, a mishap had incapacitated the vessel, then, no doubt, she would be in a position to protect herself from liability by the exception clause, but not where the circumstances are such as are shown by the evidence. The proofs show that, had the *Frances M.* been seaworthy and fit for carrying the merchandise specified in the contract, she would, after unloading her cargo of lumber at the port of New York, have arrived in due course at the port of loading on or about May 15, 1912. As she did not arrive until June 2d following, she did not proceed without unnecessary delay as provided in the charter party, and the libellant is entitled to a decree, with costs, and reference to a commission to ascertain the amount of the damages.

THE CRASTER HALL

(District Court, E. D. Georgia, S. D. February 25, 1913.)

SALVAGE (§ 30*)—RESCUE OF STRANDED STEAMSHIP—COMPENSATION.

Tugs of the aggregate value of \$155,000, which after three days' effort rescued a steamship valued with her cargo at \$500,000, which was stranded on the Atlantic coast and lying in a position of great danger, without injury to vessel or cargo, *held* to have performed a highly meritorious salvage service, and to be entitled to an award of 5 per cent. of the salvaged value.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 72-74; Dec. Dig. § 30.*]

In Admiralty. Suit for salvage by the Propeller Towboat Company and others against the steamship Craster Hall and cargo. Decree for libelants.

Garrard & Gazan and A. Minis, all of Savannah, Ga., for libelants.

Convers & Kirlin, and Chas. R. Hickox, all of New York City, for claimants.

SPEER, District Judge (orally). The Craster Hall was a very fine steamer, which left port on the west shore of South America and voyaged to Savannah. When close to Tybee Light, in the daytime, she was steered up upon a dangerous shoal. Whether she went ashore at one point or another, it matters not. According to the testimony of her own people, she went ashore at six or seven knots an hour. According to the testimony of others, her speed was faster, and her grounding therefore harder and more immovable. She had a cargo of more than 6,000 tons of nitrate of soda. Efforts were immediately made by a powerful tug in sight, which went immediately to her relief, to pull her off. It was not possible to move her. Her head thereafter was slued around until she was lying a little east of south and in a more favorable position. Continued efforts were made by successive tugs to move her for the greater portion, or for portions, of three days and nights. During a considerable part of this time she was pounding. For a while she was pounding heavily. Now, with the long experience the court has had with this coast and the dangers of its navigation, we are very clear that this fine vessel was in a highly hazardous situation. Twenty-four hours, or half of 24 hours, 2 hours even, might have made it impossible to extricate her from that position with all the power which could have been exerted, and hers would have been the fate of the melancholy list of ships which have gone ashore on those treacherous sands, known not as the learned proctors for libelant would term it, "the Norwegian Graveyard," but "the Graveyard of the Atlantic."

Finally, after three days' effort, she was, by the efforts of all the available tugs, so far as the evidence discloses, hauled off the bank, and gotten off without any injury whatever. The service was most handsomely performed. Her cargo, nitrate of soda, which could have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been easily destroyed by water, being highly soluble, was all saved. While she was aground, the wind was from the northwest. This was most favorable. She was relieved in the very nick of time. Next day the wind changed to the east, and the Atlantic rollers, with nothing to impede them between Tybee sands and the coast of Morocco, would have soon made sad work of the Craster Hall. A day later it is quite doubtful that she would have gotten off at all. The values salvaged are a little more than \$497,000. That is agreed on. It is practically undisputed that \$155,000 worth of tugs were utilized in her salvage. The services rendered were meritorious, though not the highest class of salvage. There was actually no great danger incurred. But with such conditions the gravest danger to the tug is ever possible. The risk is an actuality. I consider the service meritorious, and in view of the promptitude and skill in which it was rendered, I regard it as highly meritorious, such salvage as courts ought to reward. It is such salvage as shipowners ought to be willing to pay. Here, at this prosperous harbor, where there is much shipping, these fine tugs are essential to the commerce of the world. Their presence here has results both humane and benevolent, though they are doubtless designed in larger measure for pecuniary profit. True, the chief factor in the calculation of salvage here was the eminent hazard to quite a half million of dollars invested in the Craster Hall, hard aground on unstable sands, and exposed to the full force of the winds and the waves of the Atlantic.

My judgment in this case, which I fear will not be satisfactory to either litigant, is that a reasonable allowance of salvage would be 5 per cent. of the value of the ship and cargo saved, with costs, and that a decree for this amount should be entered.

THE FRED A. DAVENPORT.

(District Court, E. D. Georgia, S. D. March 1, 1913.)

SALVAGE (§ 30*)—NATURE OF SERVICE—ACTION FOR COMPENSATION.

An ocean steamer, not engaged in the towing business, but on a voyage with a valuable cargo on board, which, at the request of a lightship and at considerable risk to herself and cargo, went to the rescue of a schooner stranded on Frying Pan Shoals, and skillfully released her without injury from a dangerous position, in which she had lain all night signaling for assistance, *held* entitled to a salvage award of \$6,500.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 72-74; Dec. Dig. § 30.*]

In Admiralty. Suit for salvage by the Baltimore & Carolina Steamship Company and others against the schooner *Fred A. Davenport* and cargo. Decree for libelants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edward S. Elliott, of Savannah, Ga., Ernest Dart, of Brunswick, Ga., and Marbury, Gosnell & Williams, of Baltimore, Md., for libellants.

Daniel H. Hayne, of Baltimore, Md., and Garrard & Gazan, of Savannah, Ga., for respondents.

SPEER, District Judge (orally). The great trouble in cases of this sort is the conflicting evidence of the officers and crews of the vessels in controversy. Here, however, we have some testimony wholly impartial, evidence that I heard myself. I was very much impressed with the witness who gave it. He was the marine engineer on the lightship stationed on Frying Pan Shoals. He said:

"On the morning of August 31st the mate of the Davenport and two seamen came up and asked permission to come aboard. The captain told them to come ahead. When they got on the mate asked if he could send a wireless message; that their vessel had been ashore since last night. The captain asked them if they had had breakfast, and they said they had not, and breakfast was fixed while the wireless operator was preparing his engine to send the message. After eating breakfast the wireless operator took the mate in the room and sent a message to the commandant at the navy yard at Charleston. He tried to get Wilmington first. After he got the commandant, that message was relayed by the Western Union, and afterwards got into communication with the revenue cutter Seminole. He [the mate] said that he had been sounding around the vessel all night and found shallow water. The sounding showed less water than the ship drew, and it struck several times very hard on the shoals."

It is not disputed that this vessel was on the most dangerous shoals on the coast. This man goes on to testify that the mate who came with these seamen in the boat stated that they had been firing guns of distress and making signals during the night. It is in evidence that they felt they were in very great danger; that they wanted to get out of there; that the cost must not be considered. The Weems comes along, a steamer not engaged primarily in towing. She had a valuable cargo on board, of \$60,000 in value, which she jeopardized when she undertook to save the vessel. I do not consider those values in estimating the salvage. I consider them in a sense as showing the courage and determination the master manifested in going in and risking them for that purpose. It is impossible not to admire the skill with which the Weems was handled. The Weems was called upon by signals from the lightship; the blowing off of steam. She was informed of the danger of the Davenport and was urged to rescue her. She came in, throwing the lead; came very skillfully, very slowly; came in at high tide. She was in an exceedingly dangerous situation herself, for if she had gone ashore on one of those dangerous lumps on high tide, in view of the character of the sand, the chances are very strong that she herself would have been a complete wreck. In three hours' time the Weems rescued the stranded vessel, absolutely uninjured, nothing more than a scratch somewhere about her garboard strake, and the Davenport went on her course.

Now, a steamer not devoted to towing, or in the wrecking business, is accorded higher remuneration than tugs kept for that purpose,

whose owners look to ventures of that sort for remuneration. This was not salvage service of the very highest character, but it was salvage service of very meritorious character, and I think I am entirely justified in allowing \$6,500 to the Weems as salvage; and this I do.

If the decree can be drawn so that a month's wages could be given the officers of the Weems and the crew aboard engaged, I will be glad to have that done. It is so ordered.

In re PEACOCK.

(District Court, S. D. Georgia, S. W. D. February 10, 1913.)

BANKRUPTCY (§ 399*)—EXEMPTIONS—FORFEITURE OF RIGHT.

A bankrupt who made a grossly false statement of his financial condition to a mercantile agency only 10 months prior to his bankruptcy, in which he claimed assets of several thousand dollars, for which he has not accounted, is not entitled to his exemption from property not paid for, and which he presumably obtained on credit by reason of such statement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of E. Julian Peacock, Jr., bankrupt. On review of order of referee allowing exemption. Reversed.

Oliver C. Hancock, of Macon, Ga., for the bankrupt.

J. R. L. Smith, of Macon, Ga., for objecting creditors.

SPEER, District Judge. In this case we have merely the finding of Wilfred C. Lane, Esq., late referee in bankruptcy, that the bankrupt is entitled to his exemption. The referee filed no report. This has occasioned a more detailed review of the evidence than is usually necessary in such cases.

It seems clear from the evidence that the bankrupt made a statement, as follows:

| Assets. | |
|--------------------------------------|-------------|
| Merchandise | \$ 6,000 00 |
| Notes and accounts receivable..... | 700 00 |
| Cash on hand and in banks..... | 700 00 |
| Fixtures | 2,500 00 |
| Other real estate..... | 2,000 00 |
| | <hr/> |
| | 11,900 00 |
| Liabilities. | |
| On open account for merchandise..... | 500 00 |
| To banks for borrowed money..... | 300 00 |
| | <hr/> |
| | 800 00 |

This statement was made to Bradstreet & Co., a well-known business agency, on January 26, 1911, and indicated that the bankrupt had a net worth of assets amounting to \$11,100. Ten months later he went into bankruptcy, and had no assets at all, but he had accumulated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

liabilities of \$4,137.24. There was a disappearance of values, and an increase of debts, in the sum of \$15,237.24, all in the short period of 10 months. Of this amazing change the bankrupt makes no explanation, except the declaration that he had sold the \$2,000 worth of real estate before his statement to the business agency had been made, and this fact he had forgotten. The bankrupt testified that he did not remember what his statement to the Bradstreet Agency contained; that he did not know how much he owed at that time; that he did not know what his assets were, but he added that he did not own anything at the time the statement was made in January, 1911, except the stock of goods and "fixtures." By this is meant show cases, furniture, and the like. He also admits that \$6,600 of his indebtedness was for borrowed money, and the balance was made up of his obligations to creditors from whom he had bought his merchandise.

While there is no positive proof of intentional fraud upon creditors at the time the bankrupt made this statement to the Bradstreet Agency, his utter disregard of his duty to his creditors is not commendable. He knew that this statement would be published and would be considered by merchants from whom he would afterwards seek credit. His failure to make any satisfactory accounting of the large values he had received is also not commendable.

It is fairly presumable from all the facts that the values allowed him by the referee as an exemption had been obtained from creditors who have not yet been paid for their goods by means of his careless and inaccurate statement. It would not be, in the opinion of the court, in accordance with the principles of equity which control the administration of the bankruptcy law, to give him title by way of an exemption, to the property of creditors whom he had thus misled, unintentionally we may trust, and whom he has not paid.

The bankrupt, we gather from the record, is quite a young man, and to this his business errors may probably be ascribed. It is however, true that such palpable disregard of the rights of his creditors seems to make it the unavoidable duty of the court to disapprove or disallow the exemption he seeks.

The order of the referee granting it is therefore reversed.

BUNTING v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. February 19, 1913. Rehearing Denied April 14, 1913.)

No. 1,589.

1. RAILROADS (§ 222*)—OPERATION—EMISSION OF SMOKE—NEGLIGENCE—EVIDENCE.

In an action by an adjoining property owner for injuries to his property by the alleged negligent operation of a railroad through the emission of smoke while the engines were drawing trains into a terminal, and while they were standing apart in the yard preparing to leave, evidence of four retired engineers who had been in the habit of running trains into the Washington terminal and the Grand Central Terminal in New York City that for several years they had successfully used coke as a fuel was insufficient to charge defendant with negligence in using bituminous coal for such engines, instead of coke or anthracite.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

2. RAILROADS (§ 222*)—NEGLIGENT OPERATION—SMOKE.

In support of a charge of negligence against a railroad company for permitting its terminal engines to emit smoke to the damage of adjoining property by the use of bituminous coal, it is not sufficient for plaintiff to show a use of other fuel, but he must also show that the use of a non-smoke producing fuel was not only scientifically practicable, but also economically and financially so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.*]

3. TRIAL (§ 145*)—QUESTIONS OF LAW OR FACT—WITHDRAWAL FROM JURY.

Where there was no sufficient evidence to support a verdict on one of the grounds of negligence alleged, the court properly withdrew the same from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.*]

Bradford, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

Action by Annie E. Bunting against the Pennsylvania Railroad Company. Judgment for defendant (189 Fed. 551), and plaintiff brings error. Affirmed.

E. Spencer Miller, of Philadelphia, for plaintiff in error.

John Hampton Barnes, of Philadelphia, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. The plaintiff, a citizen of the state of New Jersey, brought suit in the court below against the defendant, a corporation of the state of Pennsylvania, to recover damages for injury to certain property of hers, by reason of the alleged negligence of the defendant company.

The defendant is a railroad company, chartered for the purpose of carrying on a transportation business for passengers and merchandise by means of cars and the use of locomotive engines upon its tracks.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
203 F.—13

In this suit, the plaintiff seeks to recover for loss and diminution of the rentals during the last six years of her lot and dwelling house, which she had owned for nearly 20 years, situated at the southwest corner of Thirty-Second and Baring streets, caused, as she alleges, by great volumes of smoke, gases and soot negligently discharged from the engines of defendant company.

It is charged that the locomotives actually engaged in moving trains to and from the terminal at Broad street were in part the source of this nuisance, but that a very large proportion came from a permanent, but always changing, collection of waiting locomotives in the yards of the defendant company, 600 feet away, on the open tracks and in one or more roundhouses; that in the yard there were constantly between 50 and 150 locomotives, and in the roundhouse always upwards of 40 more. The evidence shows that these locomotives, in something like the numbers charged, were constantly kept at the places named, awaiting orders to take out trains from, or standing there after delivering trains at, Broad Street Station. Here the necessary facilities were provided for reloading fuel and letting down and relighting fires. The locomotives were in the care of "hostlers" at these waiting places, who cleaned and made them ready, by building fires, etc., for the next run. It is not denied that this parking of the engines at the end of their runs, and their preparation for taking out trains, was necessary to carry on the large transportation business which the defendant was authorized by its charter to conduct for the public service.

It is charged, and there is evidence to support the charge, that when the wind blew from this quarter, the locality of plaintiff's house was much affected by the smoke from these engines; that the atmosphere was sometimes clouded by it, houses discolored and paint deteriorated, flowers and other growths damaged and killed, and the interior of houses often rendered uncomfortable until all windows were closed. In fact, there is no dispute as to the annoyance caused by this smoke to those living in, and in the neighborhood of, plaintiff's house. That the defendant company, in the exercise of the extensive and necessary powers conferred upon it by the Legislature for the conduct of its business, was authorized to fire its locomotives for the production of steam, and keep them in the places adapted and necessary for their service, cannot be questioned, and it is not claimed that smoke discharged by the defendant's locomotives, in the ordinary and proper operation of its business, constitutes an offense for which any person can recover damages. But to say this, does not concede the right of this defendant, or any other person, to conduct its lawful operations negligently or carelessly. If by such negligence or want of care, injury is done to others, a right of action, of course, accrues to those who have been so injured.

The proposition on which the plaintiff's case is put is, that the defendant company has been negligent in firing these engines where they stood, and in going in and out of Broad Street Station, so as to produce an unnecessary and avoidable quantity of smoke, constituting the nuisance complained of. This negligence is charged in two respects, viz., in making use of a variety of fuel on these engines while so stand-

ing, or while going in and out of the Broad Street terminal, which emits, when burning, a large and unnecessary amount of smoke, and also in the manner in which its employes handle the furnaces and fires in its said locomotives and shops, and in omitting such devices and safeguards as would prevent such excessive production of smoke.

The case was heard upon the issues joined as to these charges, and, after having been submitted to the jury in a well considered charge by the learned judge of the court below, the verdict was rendered in favor of the defendant, and from the judgment upon this verdict, the present writ of error was sued out by the plaintiff. Of the assignments of error, the only one that especially challenges our attention is the second, which alleges error in the following portion of the learned judge's charge:

"The plaintiff's case is put upon two grounds. There are two branches of it. Perhaps that is the better way to state it. One of them is: It is said that by the use of a different kind of fuel in the operation of these locomotives the injury complained of could have been avoided, and some evidence has been offered to you upon that subject. I have just this to say to you upon that matter. I shall not submit that question to you, because I do not think the evidence justifies me in so doing. * * * I refer to the use of anthracite coal and the use of coke. Therefore you may lay that question aside from your determination."

As to its manner of using bituminous coal, the jury found in favor of the railroad, and that it was guilty of no negligence in that respect. But it is contended the trial judge erred in withdrawing from the jury the question, whether, in spite of this nonnegligent use of bituminous coal, the railroad was guilty of negligence in not substituting coke or anthracite coal therefor. We have given this contention the deliberate and thorough consideration which so grave and far-reaching a question demands. We are not convinced, however, that error was committed by the court's action in the premises.

[1] The evidence thus withdrawn from the consideration of the jury, was the testimony of four retired locomotive engineers. Two of them were employed upon the Baltimore & Ohio Railroad. One of them testified that he had had experience for about a year in running trains into the new terminal at Washington, and that under general orders in that respect, he had successfully used coke in going in or out of the terminal. The other testified to a like experience for about two years, as to the use of coke in going into or leaving the same terminal. The other two engineers testified as to their experience in running engines into the Grand Central Station in New York,—one of them employed on the New York Central and the other on the New York, New Haven & Hartford, both of which roads, however, used the Grand Central Terminal. They also testified that they had for several years successfully used coke as a fuel in going into and out of this station. Their testimony is not clear as to the operative conditions under which coke was so used, except that the approach to the New York Central Terminal is through several miles of tunnel, where the smoke problem is one of great moment.

The testimony of these engineers as to the two terminals—one in Washington and one in New York—was the only testimony adduced

or relied upon as tending to support its allegation that it was negligent in the defendant company not to use coke or anthracite in starting its fires at the roundhouse and on the tracks where locomotives were parked, and in approaching and leaving the Philadelphia terminal. It is to be noted that the testimony of these witnesses touched only upon the running in and out of the terminals in question, with passenger trains, and did not go to the extent of showing how far the use of coke or anthracite was practicable with the 150 engines—largely freight engines—parked in the yard and the 40 or 50 more in the roundhouse, from which the greater part of the smoke complained of in the plaintiff's neighborhood came, when the wind blew in that direction. It is significant, also, that this testimony was the testimony of four retired engine drivers of limited experience, and not of operating officers of those roads, who could speak generally as to their practice in this regard, or as to the practicability of the use of either coke or anthracite by defendant under the conditions surrounding the conduct of its business at and near its Philadelphia terminal. There was no attempt to show that there was use, general or otherwise, of coke or anthracite for the purpose stated by any of the large number of the other roads of the United States, or indeed, that it was generally possible. It cannot, therefore, be claimed that any such use or practice was shown by the testimony as would establish a standard or test of defendant's duty in this respect. On the contrary, it can hardly be questioned from such testimony as was adduced by plaintiff, that the defendant's practice conformed to the general usage in this regard, as, for example, in Chicago, where plaintiff's witnesses testified that all of the 30 railroads entering that city used bituminous coal in approaching and leaving stations. So also as to the city of Cleveland.

[2] We do not mean to say that a general usage is an exclusive or final test in the premises, but that, where plaintiff undertakes to show, in a business so large and wide extended as railroading, what has been done by other railroads as a test or standard of duty for the defendant, it must be made evident that what is proposed is not only scientifically practicable, but also economically and financially so. No superintendent of motive power on any railroad, or other responsible or scientific person whose experience or observation would give weight to his testimony, was adduced by plaintiff to testify as to the practicability of the use of anthracite or coke by the defendant for the purposes stated. On the contrary, defendant produced its own responsible officers, qualified by study and experience as to the matters inquired about, who testified that the use of such fuel was not reasonably practicable, under the circumstances surrounding defendant's business, for the purpose stated. Among others, Vice President Atterbury, of the defendant company, testified that he was completing his thirty-fifth year in railroad service; that he served as an apprentice in the Altoona shops of the defendant company; that he then became assistant foreman of engines for three years, having charge of locomotives, enginemen and firemen, successively on the Philadelphia Division, the Maryland Division, and the Pittsburgh Division; that he

afterwards had charge of motive power of the Western Division, and then came back to the main line as superintendent of motive power at Altoona, and later became general superintendent of motive power for the whole system. He was examined and cross-examined at great length, and testified substantially that the use of either coke or anthracite for leaving or entering the Philadelphia terminal, or building the fires in the region complained of, was not reasonably practicable, explaining the difference between conditions at Philadelphia and those obtaining either at Washington or at the Grand Central Station in New York. To the same effect was the testimony of Edward D. Nelson, engineer of tests at Altoona, and former superintendent of motive power; of John R. Alexander, general foreman of engines; of Alfred W. Gibbs, the then general superintendent of motive power; and of William Colledge, road foreman of engines, who also testified as to the instructions given to firemen, and the devices used, in order to prevent an unnecessary emission of smoke in firing locomotives. Another witness was also introduced, who had long experience as an engineer and fireman and who ran engines out at Washington for a number of years, and experimented with coke; he testified to the difficulty experienced in using it, and that on heavy trains it was not a success. Other practical witnesses were produced, who testified as to the method of firing and the precautions used to prevent the unnecessary emission of smoke.

It was in view of the deficiency of plaintiff's testimony and the positive character of defendant's testimony, that the learned judge of the court below, in charging the jury at the close of the case, withdrew from their consideration the question as to the use of anthracite or coke as a fuel for the purposes stated, submitting however, to the jury the other branch of the question as to defendant's negligence, viz., whether it had failed to use reasonable care in the management and firing of its locomotives to prevent an excessive or unnecessary emission of smoke. As to this, there was evidence on both sides, and upon that evidence the jury found its verdict.

The question that has just been discussed is raised by the second assignment of error. The other assignments relate to this question, but are subsidiary thereto. They are without merit and require no special consideration.

[3] The aspect, then, in which the case is now presented to this court, is the narrow and frequently recurring one, whether the court below, in holding that the evidence in support of a specific allegation of negligence did not justify a verdict in favor of the plaintiff, properly exercised its judicial discretion. The question in no wise differs in character from what it would have been if the use of an improper fuel had been the only ground upon which negligence was charged and the court had given peremptory instructions to the jury in favor of the defendant, for the reason that there was no sufficient evidence to support that charge, or if it had on that ground, after verdict for plaintiff, granted a motion in arrest of judgment.

The plaintiff's case, as set forth in the statement of claim and as

tried in the court below, as we have seen, rested solely upon two grounds:

First. That by the use of a different kind of fuel in the operation of these locomotives, the injury complained of could have been avoided, and therefore that failure to use such fuel was negligent.

Second. That there was negligence upon the part of the Railroad Company's servants, in the operation and management of these locomotives, and particularly in the operation and management of the fires therein, which caused an undue and excessive emission of smoke.

It was not claimed in the pleadings nor seriously contended in argument, that defendant was liable, as for a nuisance, for maintaining its tracks, roundhouse, and terminal in the place and position in which they were maintained. Liability was based on the specific charges of negligence in using a fuel that produced an unnecessary amount of smoke, and in not using reasonable care in firing the locomotives, so as to prevent the unnecessary emission of such smoke. In this salient feature, this case differs from that of the *Balto. & P. Ry. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, cited by plaintiff in error. The facts in that case were briefly these:

The church of the plaintiff below was situated on a public street in the city of Washington and had been used as a church for many years. After its erection, the defendant company was authorized by act of Congress to lay its tracks within the limits of the city and to construct other works necessary and expedient to the proper completion and maintenance of its road. Some years after the erection of the church building and its occupation as a place of worship, the defendant erected upon a parcel of ground acquired by it immediately adjoining the church property, and until the commencement of the suit, maintained, an engine house and machine shop, where a large number of locomotives and steam engines were housed and their fires made, and to and from which the locomotives were propelled and in which they were coaled, watered, repaired, and otherwise used. When the ground was first broken for the erection of these works, plaintiff protested to the company that they would prove a nuisance and be ruinous to plaintiff's enjoyment of its property. The defendant company, however, proceeded to erect the works upon the building line of its own premises, within five and a half feet of the church edifice, and constructed upon the engine house 16 smokestacks, lower in height than the windows of the main room of the church; from the time of the erection and occupation of these buildings, church services were habitually interrupted and disturbed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam, and it was alleged that in summer time, when the windows of the church were open, smoke, cinders, and dust were blown from the smokestacks, through the windows, settling upon pews and furniture and soiling the clothes of the occupants, accompanied by an offensive odor which greatly annoyed the congregation. For the almost wanton maintenance of this undoubted nuisance, action was brought by the church corporation.

There is nothing in the report of the case to show that the action

was maintained for, or that there was any question as to, the mere negligent use of the shops and premises of the defendant, in consequence of which negligent use the nuisance arose. It was not the negligent use of lawfully maintained shops and roundhouse, but the maintenance itself of such shops in such close proximity to the church, that the necessary and nonnegligent use and occupation thereof constituted the injury complained of. It was the placing and maintenance of these works themselves so close to the church property, with their necessary and unavoidable accompaniments of noise, steam and smoke, and obstruction on the tracks entering the same, that constituted the nuisance. Such works could have been and should have been erected elsewhere. This case belongs to the category of those where actions are brought for nuisances in the maintenance of noisome trades and occupations in the built-up portions of towns, and so near human habitations as to constitute both a public and a private nuisance. Butchers' shambles, bone boiling establishments, tallow and soap making factories, and certain chemical works are well known examples of nuisances of this kind. In these cases, it is the necessary and unavoidable odors or hurtful gaseous emanations from such establishments that constitute the nuisance. The trades themselves are useful and lawful, and the gravamen of the cases as presented to the courts is, not that the injury complained of has been occasioned by a negligent conduct of the business, but that it is by reason of the carrying on of the business at all in a closely built neighborhood or contiguous to a private habitation, however carefully and nonnegligently the same may have been conducted. Mr. Justice Field himself places the case in this category, when, by way of illustration, he says:

"There are many lawful and necessary occupations which, by the odors they engender or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughterhouses, lime-kilns, and tallow furnaces, are, therefore, generally removed from the occupied parts of a city, or located beyond its limits."

In the immediately preceding paragraph, he says:

"If, as asserted by the defendant, the noise, smoke, and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

Quoting in his brief this paragraph from Mr. Justice Field's opinion, counsel for the plaintiff in error frankly says:

"We do not lay stress upon this point, because we chose to prosecute the case before the jury on the broad contention that the defendant had been negligent."

And we may add that, from what has been said, it is apparent that no other course was open to the plaintiff.

In the present case, we are not concerned with the legal questions discussed by Mr. Justice Field in the case above referred to, as to what facts and circumstances were sufficient legally to constitute a nuisance, or what defenses could be maintained against a charge of the same, but merely with the question, whether sufficient evidence had been adduced by the plaintiff, as to one branch of the negligence charged, to justify the jury in finding a verdict against the defendant, and the only question before us is, whether the learned judge of the court below properly exercised his judicial discretion in deciding that the evidence was not sufficient for that purpose.

We think the learned judge of the court below has made no mistake in this exercise of his judicial discretion, and the judgment below is therefore affirmed.

BRADFORD, District Judge, dissents.

LIBBY, McNEILL & LIBBY v. JORGENSEN.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1913.)

No. 2,131.

1. SHIPPING (§ 58*)—CHARTERS—LOSS OF VESSEL—LIABILITY OF CHARTERER.

Libelant, as managing owner, chartered a vessel to respondent, a corporation operating a fishing station in Alaska for a voyage from San Francisco to such station and return for a monthly hire for the "bare vessel," respondent to furnish the crew and pay all expenses. The vessel was to be delivered in good seaworthy condition and returned in the same condition in San Francisco, reasonable wear and tear excepted. It was intended she should bring a return cargo of fish at the close of the season. Libelant was hired as master, and the crew were to work as fishermen at the station, and to be paid a stated sum as "run money" for the voyage up and back. The vessel suffered some damage to her masts on the outward voyage, but nothing to affect her practical efficiency. She entered the lagoon on which the station was situated in charge of a pilot furnished by respondent, and was stranded, but not seriously injured. She was floated, anchored at the station, and her cargo discharged in good condition. Respondent's superintendent then ordered all the crew off except libelant, and gave him a notice of cancellation of the charter on the ground of the unfitness of the vessel to carry a return cargo. He afterward had her insufficiently anchored at a different place, and she finally dragged her anchors, and was stranded and lost. There were no men at the place except respondent's employes, and when libelant attempted to hire some of the crew to help take the vessel back, offering a bonus of \$150 each, the superintendent refused to settle, and allow them run money on the return trip, and they would not go. *Held*, that the loss of the vessel was not due to a peril of the sea or an accident of navigation within the exceptions of the charter, but to the fault and negligence of respondent's agents, for which it was responsible as charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SHIPPING (§ 53*)—CHARTERS—CONSTRUCTION.

While such charter was a demise of the vessel for the voyage, under which respondent became the owner *pro hac vice* as to third persons, it remained a charterer as to the general owners, and as between them the acts of negligence of its agents and servants were not attributable to such owners, but to respondent as charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 214–218, 225; Dec. Dig. § 53.*]

Appeal from District Court of the United States for the First Division of the Northern District of California; R. S. Bean, Judge.

Suit in admiralty by Walter Jorgensen, managing owner of the vessel *Jessie Minor*, against Libby, McNeill & Libby, a corporation. Decree for libellant, and respondent appeals. Affirmed.

Albert Raymond and L. Oppenheimer, both of San Francisco, Cal., for appellant.

H. W. Hutton, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Walter Jorgensen, appellee herein, obtained a decree against the appellant corporation, awarding damages for the loss of the vessel *Jessie Minor*, and for the expense of his return from Nelson's Lagoon, in Alaska, to San Francisco, Cal. From such decree appeal was taken to this court. The libel filed by Jorgensen set up a certain charter party entered into February 7, 1911, wherein Jorgensen as party of the first part, managing owner of the *Jessie Minor*, agreed to charter "the whole" of the vessel to Libby, McNeill & Libby, parties of the second part, appellants herein, for a period of five to six months for a voyage from San Francisco to Nelson's Lagoon, Alaska—

"and return to San Francisco (the act of God, perils of the sea, barratry of master and crew, fire, enemies, pirates, piratical thieves, arrest and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master mariners or other servants of the shipowners, always mutually excepted), on the terms following:

"The vessel shall be tight, staunch, strong and in every way fitted and provided for such a voyage.

"Parties of the second part agree to pay to party of the first part for charter of said vessel, at the rate of three hundred and twenty-five dollars (\$325.00), U. S. gold coin, per month, for bare vessel, two months (2) charter money to be paid on the date when the vessel is turned over to charterers, and balance at the expiration of the voyage, and when the vessel returns to San Francisco and is discharged.

"Parties of the second part also agree to pay the master's and crew's wages, provisions, towages, wharfage and all and every expense incurred on the voyage, and until said vessel returns to San Francisco, and is discharged and delivered to her owners.

"It is further agreed that parties of the second part may have the said vessel inspected by an approved and competent marine surveyor, and if found that repairs are necessary, to make said vessel safe or put her in proper condition for the aforesaid voyage, the party of the first part will

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

promptly make such repairs in accordance with the report of said surveyor, and pay the surveyor's charges.

* * * * *

"Movements of vessel to be at discretion of the master.

"In case of wreck, charter money to be paid up to time of wreck only, in such an event, any money paid in advance and in excess of amount due at that time, said amount to be refunded to charterers.

* * * * *

"Vessel to be delivered to charterers in good seaworthy condition, and to be returned to owners in like good seaworthy condition, reasonable wear and tear excepted."

Jorgensen, as libelant, pleaded performance of all the conditions of the charter party on his part to be performed, and alleged that, under the terms of the charter party, the appellant took possession at the port of San Francisco, provided the ship with a master and crew, and dispatched her from San Francisco to Nelson's Lagoon, in Alaska, where she arrived June 10, 1911; that when the appellant took possession the vessel was tight, staunch, strong, and seaworthy; that the appellant did not return the vessel to libelant in San Francisco or at any place or at all, but on account of negligently and carelessly anchoring the vessel in Nelson's Lagoon, and by reason of taking the crew of the vessel from on board thereof, and neglecting and refusing to furnish a crew or any man to care for the vessel, and by reason of abandoning her on July 1, 1911, the vessel thereafter, on August 3, 1911, became and was wrecked, and a total loss at said Nelson's Lagoon. Allegations follow to the effect that the appellant paid the charter money agreed upon up to June 1, 1911, but not thereafter, that the ship would have returned to San Francisco about September 17, 1911, except for her loss as aforesaid. It is alleged that Jorgensen was employed by appellant herein to serve as master of the Jessie Minor on the voyage contemplated, and that he served as master, but that, when the ship was lost through the fault of the appellant, appellant refused to return libelant to San Francisco, and he was obliged to pay his own expenses down. Libby, McNeill & Libby, a corporation, denied all liability, denied performance by Jorgensen, denied that the failure to return the vessel was due to any negligence on its part in any way, and denied the value of the vessel to be \$8,000 as alleged. It alleged that the libelant was the master, part owner, and managing owner of the Jessie Minor; that about June 10th previous to the arrival of the vessel at Nelson's Lagoon she had lost a mast, and upon arrival at Nelson's Lagoon was stranded upon a sand spit in the lagoon, although at high tide she floated clear on her anchorage; that at the time of the arrival of the vessel at Nelson's Lagoon appellant furnished a competent and experienced pilot to take her into Nelson's Lagoon; that the pilot objected to taking her in at the time, as the tide was low, but libelant directed him to proceed, and that by reason of such instructions by libelant, and because of the neglect and carelessness of libelant the vessel was stranded; that thereafter, about June 27, 1911, the corporation notified libelant that the condition of the vessel was unseaworthy and dangerous, and that she could not carry a return cargo in the condi-

tion in which she then was, and that, unless she was made tight, strong, and seaworthy and put in good condition, appellant could not furnish a return cargo; that libelant refused and neglected to make the vessel tight or seaworthy, or to put her in good condition, although appellant and its agents and employes offered to aid him in every way possible to repair the vessel. It is alleged that all charter moneys due or earned under the charter party have been paid, and that all wages have been paid. The defendant, appellant here, filed a cross-libel, wherein it set up the charter party, and pleaded the neglect and unskillful navigation of libelant as a cause for the damage and unseaworthy condition in which the vessel was when she arrived at Nelson's Lagoon; that libelant refused to make the vessel tight or strong or fit for a return voyage; and that cargo could not be put into the vessel for a return voyage, and that by reason thereof 800 barrels of salmon had to be abandoned at Nelson's Lagoon, to the damage of the cross-libelant in the sum of \$10,000.

Testimony was heard, and the District Court found that the vessel was delivered in good seaworthy condition; that after the arrival of the ship at Nelson's Lagoon on June 27, 1911, Libby, McNeill & Libby, the corporation, notified the owner that it canceled the charter party, ordered the mate and crew ashore, and thereafter refused and neglected to care for or protect the vessel, but insufficiently moored her, by reason of which she drifted ashore about August 1st, and was lost. It was also found that it was impossible for the master to obtain a crew with which to bring the ship back to San Francisco, inasmuch as all the available men about Nelson's Lagoon were in the employ of the company; that, while some men were willing at the close of the fishing season to return to the ship in consideration of large bonuses offered by Jorgensen, they could not settle satisfactorily with the company, and for that reason refused to go.

[1] The evidence sustains the findings of the District Court. Jorgensen, the libelant, testified that the vessel was seaworthy when delivered, and up to the time of the last gale of wind, about July 31st, that blew her ashore. It is true that on her voyage up, when about 1,000 miles north of San Francisco, during heavy weather, she lost her mizzen mast, and sprung her foremast. But, notwithstanding these things, she appears to have sailed well, and arrived off Nelson's Lagoon on or about June 10, 1911. Upon her arrival, the company sent a pilot to take her in. Capt. Jorgensen testified that he had never been to Nelson's Lagoon before; that he told the pilot not to go in until the following morning, unless he could take her in safely; that the pilot said there was plenty of water, and started in under a leading wind, but got out of the channel, struck bottom, and "knocked the shoes off of her." Some cargo was removed, and the vessel floated. He testified that she then proceeded to a salting station, and by direction of Mr. Johnson, the superintendent of Libby, McNeill & Libby in Alaska, he moored the vessel in the channel with two anchors out at 30 fathoms on each anchor; that, before the cargo was all discharged, the superintendent ordered the crew to go ashore, leaving Jorgensen and the mate alone on the ship; that afterwards the crew

came aboard, and about June 27th discharged the cargo in lighters; that on June 27th Johnson, superintendent for the company, handed the following letter to him:

"Nelson's Lagoon, Alaska, June 27th, 1911.

"Capt. Jorgensen, Master of Str. Jessie Minor.

"Sir: I hereby notify you, that the charter of Str. 'Jessie Minor' is canceled at this date, the vessel having arrived here in a wrecked condition, her cargo has been discharged more or less damaged, she is therefore unfit to load a return cargo, as the Insurance Co. would object to insure the same.

"Respectfully,

Capt. C. A. Johnson.

"Superintendent for Libby, McNeill & Libby."

Jorgensen says that he told Johnson that appellant could not abandon the vessel; that it had to deliver in San Francisco; that he asked him for a crew, stating that he would go to San Francisco with her; that there were no men in Nelson's Lagoon other than the employees of the company; that the mate remained for two days, and that he was then taken ashore by the superintendent, Johnson; that thereafter he was left alone on the vessel with provisions for five or six days, the rest of the provisions having been taken ashore by the superintendent; that he remained on the ship about two months; that after June 27th there was a strong wind during which she dragged her anchor; that later Johnson returned to the ship with men and a tug, took her out, and anchored her on the flat, and then announced that "that was the last he would do for the Jessie Minor"; that he had the men bore holes in the back of the casks of water, and left none for Jorgensen to drink; that before the vessel went ashore, about July 31st, he tried to get some men who were up there or who had gone up in the Jessie Minor to go down to San Francisco with him; that the men wanted \$150 a month each to take the vessel down, but that the superintendent did not want to settle with them on that basis, and offered them \$62.50 each in place of \$125 each "run money"; that up to July 31st, or when the ship went ashore, the ship had two masts which could have been put in good condition by a day's work with the crew; that the hull was tight, and that the ship was seaworthy, but that he could get no crew; that about August 2d a heavy gale of wind prevailed, and, although the vessel had usually heavy anchors, they were insufficient, and the ship blew onto a gravel bank, tore off part of her keel, and commenced to leak badly, having two feet of water in the hold; that he then left the ship; that afterwards he saw Johnson, and asked him for passage to San Francisco; that Johnson said he would give it to him, but afterwards wrote him it would be impossible for him to send him down on the schooner Zampa, which belonged to the company, whereupon he (Jorgensen) took a mail boat and reached San Francisco about September 15th. Jorgensen says that, when the superintendent told him he would do nothing more for the ship, she was on the gravel bank high and dry at low water, lying on her side. On cross-examination Jorgensen again said that he asked Johnson to help him to get a crew to take the vessel back to San Francisco; that he could only go among the men there to get a crew, but that he could not get men; that after the

27th of June the ship went onto the beach; that he did all he could to prevent her dragging her anchor, but was alone and quite helpless; that he went ashore finally on the 3d of August; that before he went ashore he hoisted his signal of distress, which attracted the mate and some hunters; that, if he had had men and a place to pull the ship up, he could have repaired her while she was in Nelson's Lagoon; that before she was injured he had tried to get the sailors to take her back; that she was damaged about August 2d, when the false keel broke a piece off, and she commenced to leak badly; that about July 31st Hughes, an employé of appellant, told him to go ashore and try to get a crew, and that he could get a crew, provided he could make arrangements; that after August 3d Hughes wanted him to sell the vessel, but that he told him he would not do it, and that he was going to sue appellant for the loss of the ship; that he offered sailors \$150 each to go down, because Johnson told him to offer the men a bounty; that they would have accepted that sum, but thought that the voyage might be dangerous, as Johnson had spoken to them of the danger from the time the vessel arrived, saying that she was not fit to go; that he thought the men wanted the bounty because they might have to do a little more pumping, as the ship had been bumping on the beach for a long time, and was likely to spring a leak if they had bad weather; that after August 3d he made no effort to get men because the ship was a wreck; that he was to get \$100 per month as master; that when at Nelson's Lagoon, Johnson wanted to give the men orders on the company for money to take the ship down, but that they would not take such orders, and that that was the reason why he did not get a crew; that the men were engaged, not only as sailors, but as fishermen, too, but that the fishing season ended July 28th. On redirect the witness said that the men signed for \$125, but that on July 31st Johnson said that he would not pay them more than \$62.50; that thereupon the men said they would not go, as they wanted \$125; that the men claimed \$125 for the whole run, but that Johnson said he would not pay but \$62.50; that the men then said they would not go; that Johnson offered to give them an order on the company for \$62.50, but they wanted drafts.

Breamer, a sailor, testified that Capt. Hughes, a pilot sent by Libby, McNeill & Libby, gave orders how to steer the ship in taking her into Nelson's Lagoon; that two or three days after she got inside the lagoon the crew was ordered by Johnson to go ashore; that the cargo was taken off in good condition.

Bardmon, another sailor, said that he had a talk with the mate about bringing the Jessie Minor down; that he was willing to serve for \$150, but that Capt. Johnson only wanted to pay him \$62.50 because he belonged to the Zampa, another vessel belonging to the same corporation.

Malmstrom, a seaman, testified that he remembered when the ship lost her mizzen topmast and mizzen mast; that she was rolling heavily at the time; that they were reefing the mainsail when the mizzen mast was carried away; that Capt. Hughes, as pilot, took the ship into Nelson's Lagoon, and acted as if he did not know that he was out

of the channel; that the ship struck the bar; that Capt. Johnson ordered the men to go ashore, and afterwards to go to the fishing grounds; that later Jorgensen asked him and others to go and make an arrangement with Johnson, as he wanted a crew to go down, and offered \$150 to each man. Witness said he was willing to go, but that Johnson said he could do nothing for them, and that, if they took the Jessie Minor down, they would get no more than \$62.50, because the company could not use the vessel for cargo. Witness declined to go for that sum, and afterwards, by direction of Johnson, went down to San Francisco as a passenger on the Zampa.

Harry Hughes, an employé of the appellant corporation, testified that, before taking the Jessie Minor into Nelson's Lagoon, he told Capt. Jorgensen that he had orders from Capt. Johnson, the superintendent, to bring the ship to an anchorage; that Jorgensen would not consent to an anchorage on the outside, but said the ship had to go in; that thereupon witness told Jorgensen that he could not take the responsibility, but that Jorgensen insisted, and they started in about 7 o'clock in the evening. He says the vessel would not come quick enough to the wind, and that she thumped a little on the spit and lost some of her shoe; that the ship would not come to; that the shank of the anchor was broken; that he procured another line and an anchor from Capt. Johnson, and brought them aboard the vessel; that at the next high tide he took the ship into the channel and dropped the anchor, but that the line broke; that he put the ship in a safe and good place in deep water, and had no more to do with her; that on August 1st he went on board and told the captain to try and get men and "get out of this," or he would lose everything, to which the captain replied, "No; if they do not get me out of here, I do not care; I will simply sue Libby, McNeill & Libby for \$10,000;" that then he took the captain on shore; that he was aboard between the 4th and 5th, after Jorgensen had said he had abandoned the vessel; that he found some hunters on the ship; that he examined the ship on August 6th, and found she had only lost a shoe; that there were a few scratches which the anchor had made, and a little cement out of a seam; that, when high tide came and the vessel was afloat, she was dry as ever; that the keel was in good condition, although Jorgensen had told him the water was running into her, and that the keel was lying athwartships.

Johnson, the superintendent of the appellant in Alaska, said that, when he handed the letter of cancellation of the charter party to Jorgensen, nothing was said; that on July 1st he asked Jorgensen if he was going to let the vessel stay on the beach, to which he replied no, he wanted to get up the beach where the tide was not so strong; that Jorgensen selected her moorings himself; that he did not see Jorgensen again until about the 1st of August, when he told him that he was willing to assist him in any way he could, with the exception of furnishing men to go aboard the vessel; that he could not do that, but must do it himself; that he would give him such provisions as he could spare; that on the 2d of August he saw the flag hoisted with the Union down, whereupon he sent the mate and the watchman out

to the ship; that afterwards he examined the ship, some time between the 4th and the 8th of August, and found cement loosened in her seams, as she had settled down on the anchor, and had two gashes in the planks about an inch deep; that there were no holes; that the keel was not torn away; that salt had dropped out of the sacks, and was on the floor of the vessel, but that there was no other damage, except to the rigging. Witness was asked whether he had ever asked the captain whether he intended to take the vessel out. He replied:

"Well, I think I put the question to him once, but I could not state the date when I did it. * * * He said that Libby, McNeill & Libby were the responsible parties for his vessel."

Witness said that the captain told him that he had abandoned the ship; that on August 1st he asked the men whether they were willing to go down to San Francisco in the ship; that they had been offered \$150 extra run money to take the ship down, and wanted him to pay the full run money up and down; that he said he could not pay it; that it could be settled in San Francisco, providing they were entitled to get it, but that he was willing to pay them the run money \$62.50, and wanted them to sign statements substantially to that effect; that the men said they did not want to go in the Jessie Minor, unless they got checks or cash, and that he told them the only thing he could do was to give them an order on Libby, McNeill & Libby, and they could collect it when they got home; that he offered each an order for \$62.50, and the other \$62.50 could be settled down in San Francisco; that he intended to send fish down in the ship, but that he could not put it on board the vessel in the condition in which she was, as he could not insure the vessel; that there were men at places from 20 to 50 miles away where an effort to get a crew might have been made. On cross-examination the witness said he thought he had canceled the charter when he wrote the letter of June 27th, but that there was nothing so far as the hull was concerned to prevent the ship from being brought back to San Francisco as late as August 8th.

Other witnesses, examined by the appellant corporation, testified to the effect that after August 3d a number of stores and other things were taken from the Jessie Minor over to the shore. Jorgensen, upon being recalled, said that he had no such conversation with Hughes as Hughes had testified to, and that on August 3d, when he abandoned the ship, she could not have been brought back to San Francisco.

Another witness, on redirect, said that it would have been impossible to get the ship out, because she was sunk in the gravel, and there was a hole in her, and that the water ran in at high tide and out again at low tide.

Stangeland, the mate, said that Hughes, the pilot, directed the steering of the ship in, going into the lagoon; that he got out of the channel and ran onto the spit; that they took some cargo off, and then took the ship up the river under orders of Johnson, the superintendent; that she was then anchored in the middle of two anchors, and in a very strong current; that ordinary moorings are insufficient in the current

there; that they lost one anchor when they first went in by the vessel thumping on top of it; that she was finally moored at a place where Johnson directed she should be taken; that he moored her himself; that Johnson told the crew to go ashore, and left only himself and the captain on board; that thereafter the salt was discharged in lighters; that he stayed there until the 27th of June, when Johnson took him ashore, leaving the captain alone; that he tried to get a crew, acting under Jorgensen's orders, offering as high as \$150 for men to take the ship down; that he got four men and a cook willing to go, but that, when the men were willing to take \$125 run money to take the vessel down, Johnson stopped half of the run money, and only wanted to pay them for taking the vessel up, and that as a result the men would not go; that the men were fishing on a percentage, and it was impossible to get them while they were so occupied; that the vessel was properly anchored until after he left, when Johnson shifted the vessel himself to another place, "away up on the flat"; that there was no reason why the ship should not have gone back to San Francisco if they could have obtained a crew and provisions. This witness explained that the men had shipped for \$125 to take the vessel up and down, but that in getting another crew to take her down the captain offered \$150, but that Johnson wanted to stop half of the run money going up and down; that the usual contract was \$125 for the run going up and returning; and that when they got up, and they were in some danger of the vessel not returning, Johnson offered them \$62.50 to pay them off for half the voyage that they had completed—the going part—because he would have to get another crew to return.

The position of appellant is that the lower court erred in its decree awarding the value of the ship because, under the clause (quoted above) in the charter party exempting both parties from liability for loss by peril of the sea and negligence, libelant could not recover, inasmuch as the proximate cause of the loss of the *Jessie Minor* was by "either a peril of the sea, the gale which drifted the ship on the bank, or a stranding due to the negligence, default, or error in judgment of either the libelant or Johnson, the servant of the appellant, who was owner pro hac vice." With these contentions, however, we cannot agree. Nothing of the loss of the ship is to be attributed to a peril of the sea. The carrying away of the mizzen mast and the springing of the main mast during the voyage northward had no real relation to the things which happened after June 10th, when the ship reached Nelson's Lagoon. The ship was seaworthy when she left San Francisco, and notwithstanding the accidents on her voyage sailed well with two masts, having beaten against the wind for about 3,000 miles. Upon arrival at the lagoon, the charterer, through its superintendent, furnished the pilot. There is some conflict in the testimony concerning the circumstances surrounding the action of the pilot in taking the vessel in, but it is clear that it was under the guidance of the pilot that the ship first ran aground. It is also clear that about June 18th, Johnson, appellant's superintendent, directed the crew to go ashore, and ordered them to discharge the cargo, and later, about June 27th, ordered the mate to go ashore, leaving the master, Jorgensen, alone on

the ship. The letter of notification of the cancellation of the charter was delivered on this same date, June 27th. The statement in the letter to the effect that the cargo had been discharged more or less damaged is in direct opposition to the evidence of the master, who, when asked what condition the cargo was in when taken out of the ship, replied that it was "all right; as good as when it came in. Some of the sacks were broken by handling." On July 1st the superintendent, Johnson, with some men, again anchored the ship, and announced that that was all he wanted to do with her. The circumstances were these: The appellant corporation was in control of the labor situation in and about the lagoon, as there were no men to be had except its employés. Johnson's act in taking the crew away rendered the master practically helpless. The master could get no crew without the aid of the superintendent. The superintendent, however, seems to have acted upon the belief that he could take the crew away, render the master helpless, write that the charter was canceled, and thus relieve the chartering corporation of liability for anything that might happen. But the appellant had contracted to take the vessel back to San Francisco. The fact that Jorgensen, owner, was hired by appellant to serve as master, did not change the relation of the parties to the vessel. As master Jorgensen was subject to the general orders of the appellant. If the superintendent had not been unwilling to make terms with some of the men who were ready to go back with the ship to San Francisco, Jorgensen could have taken her back before August, when she was wrecked; but the superintendent refused to assure them the sum of \$125 each, which was the run money they had contracted for before they left San Francisco in April. No sufficient excuse for taking the crew away was offered; nor was it satisfactorily explained why Johnson, superintendent, thwarted the efforts of the master to hire a crew. There was no good reason for detaining the ship at Nelson's Lagoon, and none for allowing her to be wrecked. The decided weight of evidence is that she was not properly anchored when she went ashore about August 1st. It was not an accident of navigation, but an act of negligence in insufficient mooring which caused the ship to drag and go ashore where she was wrecked. Stranding under such conditions cannot be regarded as one of the exemptions from liability for losses.

[2] Our construction of the charter party is that it was one where the mercantile corporation agreed to pay a stipulated price to the ship-owner for the use of his whole ship for the voyage by the month, and took the ship and the owner into its service, the corporation to receive the freight actually earned by the ship to its own use, the master and sailors becoming subject to the orders of the merchant, the general management and control being with the merchant corporation. Such a contract was a letting of the vessel with her crew for the voyage specified. *Drinkwater et al. v. The Spartan*, Fed. Cas. No. 4,085. Ordinarily, and as against third persons in such a case, the charterer becomes the owner *pro hac vice*, entitled to the rights and subject to the responsibilities which attach to that character; but in a contest with the actual owners for the value of the vessel, under the terms of the charter party, the merchant is not in such relationship to the general

owner. *Wilkinson v. Dalferes*, 27 La. Ann. 379. It is to be remarked, too, that the terms of the charter party in this case refer to a delivery of the ship to "charterers" and in certain contingencies to amounts to be refunded to "charterers." Appellant itself, by its letter to Jorgensen, dated June 27th, when it elected to cancel the charter as of the date of the letter, recognized that as against it there was a real owner, and that it did not stand as owner pro hac vice, but merely as a charterer. Appellant was under contract to pay the master's and crew's wages, provisions, and all and every expense incurred on the voyage. It could have dismissed Jorgensen as master. Johnson, the superintendent, never was the servant of the shipowner, and never acted in any capacity other than in behalf of appellant. As a consequence what he did is to be attributed to the appellant as charterer, and for the direct results of Johnson's acts appellant is responsible. It follows that when as superintendent he ordered the crew ashore and prevented the master from getting sailors to return with the vessel, and notified the master that the charter was canceled, and anchored the vessel carelessly and then left her, he pursued a course which resulted in a loss for which appellant is liable, as found by the District Court.

Affirmed.

LE MASTER v. SPENCER.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1913.)

No. 3,532.

1. **BANKRUPTCY (§ 116*)—RECEIVERS—RIGHTS AND POWERS—JURISDICTION OF DISTRICT COURT.**

A marshal appointed to take charge of the property of an alleged bankrupt under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), has the right, and it is his duty, to seize and hold property which there is reason to believe belongs to the estate of the bankrupt, although it is in the possession of a third person who claims ownership, and the District Court has jurisdiction to determine the title thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

2. **BANKRUPTCY (§ 116*)—ADVERSE CLAIM—JURISDICTION OF BANKRUPTCY COURT—CONSENT.**

An adverse claimant of property in the possession of a marshal as receiver in bankruptcy who files a petition for its recovery in the bankruptcy court consents to the jurisdiction of such court to summarily determine his rights.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

3. **BANKRUPTCY (§ 107*)—RECEIVERS—SEIZURE OF PROPERTY.**

That property was unlawfully taken from one in possession by state authorities through an unreasonable search and seizure affords no reason why it may not be lawfully seized while in possession of such authorities by a marshal as receiver in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 149, 151; Dec. Dig. § 107.*]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

In the matter of the D. F. Le Master Brokerage Company, bankrupt; Fernor J. Spencer, trustee. From an order of the District Court, D. F. Le Master appeals. Affirmed.

Thomas M. Morrow, of Denver, Colo., for appellant.

Edward C. Stimson, of Denver, Colo. (James A. Marsh and Page M. Brereton, both of Denver, Colo., on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The D. F. Le Master Brokerage Company claims to have been established in 1903. It was incorporated in January or February, 1908. It carried on business at Denver. E. L. Le Master was president, Mrs. Clara Josephine Le Master was vice president, and David F. Le Master was secretary and treasurer, and these three constituted the board of directors. Early in the spring of 1910 Edward L. Le Master, being sick, tendered his resignation as president, but no action was taken upon it. David F. Le Master and Clara Josephine Le Master were husband and wife, and thereafter had sole charge of the business.

David F. Le Master was general manager. Upon the letter head of the company it was stated that their capital stock was \$20,000; that they were merchandise brokers, and made a specialty of fruits and produce. On June 6, 1910, they wrote the Mulvane Mill & Elevator that they believed themselves worth \$30,000. August 24, 1910, David F. Le Master was arrested by the sheriff of the city and county of Denver under a warrant issued by the clerk of the state district court charged with larceny and obtaining money by means of the confidence game. Upon being taken to the jail, he was told to place what property he had upon the desk. He then deposited six silver dollars, four quarters, one nickel, and three pennies, three diamond rings, one ring having a red setting, a diamond stud and horseshoe scarf pin set with diamonds, a gold watch, a pair of diamond set cuff buttons, and a pair of gold plated cuff buttons. Upon being asked if that was all he said, "Just wait a minute, let's talk this over." Upon being informed he would be searched, he went behind the desk, opened his trousers, and, after some difficulty, extracted from within them a wallet containing eight one hundred dollar bills, two fifty-dollar bills, and forty-five ten-dollar bills. He also turned over to the sheriff a Port Arthur Route railroad ticket, one receipt from Will A. Collins for "Pride of the Valley Flour," one duebill from A. M. Earhart, and other property not necessary to mention. He stated to the officers that all the property belonged to his wife. The same day the Phillipsburg Mill & Elevator Company, the Buhlar Mill & Elevator Company, and the Haven Milling Company prepared a petition in involuntary bankruptcy against the D. F. Le Master Brokerage Company, alleging that the Brokerage Company owed the Phillipsburg Mill & Elevator Company for flour \$1,715, the Buhlar Mill & Elevator Company for flour \$1,747.20, the Haven Milling Company for flour \$1,128. This petition was filed August 25th, and was ac-

companied with an application also executed on the 24th by all three of the petitioners for a special warrant to the marshal.

Clause 3 of section 2 of the Bankruptcy Act provides that the courts of bankruptcy are hereby vested with jurisdiction to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the court should find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

The following appears in section 3, subdiv. "e":

"(e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt."

A warrant was issued and the property seized in the custody of the sheriff. September 12, 1910, the D. F. Le Master Brokerage Company was adjudged a bankrupt, and Fermor J. Spencer was subsequently duly appointed and qualified as trustee. On October 10th David F. Le Master filed a petition alleging that none of said money, goods, or chattels, except the railroad ticket, belonged to or was the property of the D. F. Le Master Brokerage Company; that the same were his and never had at any time been owned by the D. F. Le Master Brokerage Company; and that such company had never had at any time any right, title, or interest in or to any of said property, and asked an order that said property be turned over to him, but he did not specially question the jurisdiction of the court. October 21, 1910, Fermor J. Spencer, trustee, filed his answer, alleging that said property belonged to said D. F. Le Master Brokerage Company, and that he was now entitled to the same as held by the marshal.

The case was heard October 21, 1910, four witnesses being examined for the claimant and three for the trustee, and on October 26th the court held that all the money, the horseshoe scarf pin, the diamond cuff buttons, one gentleman's solitaire diamond tooth setting ring, one receipt from Will A. Collins for "Pride of the Valley Flour," one duebill from A. M. Earhart, and the Port Arthur Route railroad ticket, were the property of the bankrupt, and ordered the marshal to turn them over to the trustee, and directed the balance of the property turned over to David F. Le Master, and he appeals.

Le Master testified that about the 1st of August he received \$246 and some cents from F. W. Woodrow, a student of a business college at Ashland, Or., which had been owed to him since in February, 1910; that early in August he received \$579.15 from Walt James, who had been owing him for nearly five years; that at the same time Warrier Grayson and Alfred Brown paid him \$516.50 upon a note

they had been owing for better than four years. He could not tell where they lived, except he thought they were farmers living near Muskogee. The cash book showed a payment to him in July, 1910, of \$3,900 for alleged back salary and two payments of over \$1,000 inside of 30 days for alleged traveling expenses, one of the payments on an impossible date—June 31st. He testified he purchased the diamond horseshoe and diamond cuff buttons with his own money for \$62.50 of a jeweler on the north side of Larimer street between Seventeenth and Eighteenth streets during the summer of 1910, but could not give the name of the man he purchased of, and that he purchased the diamond ring about the 1st of July, 1910, of a Jew at Raton, N. M., and paid \$115 for it, but could not give his name. He testified before Judge Harrison that there might be about a couple of hundred dollars of the money taken from him that belonged to the D. F. Le Master Brokerage Company, but claims he subsequently found out otherwise. Real estate carried on the books of the D. F. Le Master Brokerage Company at about \$27,000, and which must have constituted most of the \$30,000 referred to in the letter to the Mulvane Mill & Elevator, was sold on July 16, 1910, for \$1,800. He further testified that the corporation first banked at the Colorado National and changed to the Federal State Savings Bank in December, 1909, but that he ceased putting all money into the bank in May and from that time on kept the money in his personal custody in the safe in the office. It must be borne in mind that money and other property in his personal custody as secretary, treasurer, and general manager of the D. F. Le Master Brokerage Company passed to the trustee upon his appointment. It is claimed by appellant that the bankruptcy court has no jurisdiction over a suit involving the title to property in possession of a third party holding the same adversely to the bankrupt, and that the trustee must be remitted to bring a separate suit for its recovery. This involves two questions: First. Did the federal court have jurisdiction without his consent? Second. Did he consent?

[1] Section 23, subdiv. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), as amended by Act June 25, 1910, c. 412, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1499), provides:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision 'b,' and section sixty-seven, subdivision 'e.'"

The third clause of the second section of the Bankruptcy Act of 1867 expressly gave to the Circuit and District Courts jurisdiction of such suits by or against the trustee (*Eyster v. Gaff et al.*, 91 U. S. 521, 23 L. Ed. 403), and the conferring of such exclusive jurisdiction upon the federal courts in the excepted cases in subdivision b of section 23 of the present law is valid (*In re Wood and Henderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046). It is therefore not

beyond the power of Congress to give the federal court jurisdiction of such suits, but the Supreme Court has held that, in fact, no such general jurisdiction was given to the District Court by the present bankruptcy law, basing its opinion largely upon subdivision "b" of section 23 of the act heretofore quoted. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Mitchell v. McClure*, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Louisville Trust Company v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, and *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620. This case arose under a seizure by the marshal under sections 2 and 3 of the Bankruptcy Act, and the question at once arises, Are such cases governed by the authorities cited?

In *Doyle v. Sharpe*, 74 N. Y. 154, where a similar seizure had been made under the act of 1867, it appeared that the bankrupts, Legrave and Otis, authorized their shipping clerk and salesman to dispose of certain goods, and pay themselves from the proceeds. They sold them to Landers and delivered to him the bill of lading at 9 a. m., May 30th. Not until 11 a. m. of the same day was a petition even filed in bankruptcy. Subsequently Landers sold the goods to Doyle. The Court of Appeals of New York start their opinion with the statement that:

"The sale of the goods to the plaintiff's assignor Landers was complete and the transfer of the same was made before the proceedings in bankruptcy were instituted against Legrave & Co."

The marshal was sued in the state court, which under that act had concurrent jurisdiction with the federal court, and it was held by the Court of Appeals that the law did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. The Supreme Court of the United States reversed this holding. *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277, and followed that holding in *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984. The question came before the Supreme Court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, as to whether the rule was the same under the act of 1898, and the court said:

"Bankr. Act March 2, 1867, c. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the court might issue a warrant to the marshal commanding him to forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." 14 Stat. 536; Rev. Stat. § 5024. It was held by the Court of Appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle v. Sharpe*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion said: 'The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee a considerable time often passes. During that time the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed

beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it.' *Sharpe v. Doyle*, 102 U. S. 686, 689, 690 [26 L. Ed. 277]. A like decision was made in *Feibelman v. Packard*, 109 U. S. 421 [3 Sup. Ct. 289, 27 L. Ed. 984]. These considerations are equally applicable to an application, after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal, under clause 3 of section 2 of the Bankrupt Act of 1898, to take charge of 'the property' of the bankrupt 'after the filing of the petition and until it is dismissed or the trustee qualified.' It is true that under this provision the appointment is only to be made 'in case the court shall find it absolutely necessary for the preservation of the estates.' But that condition of things is shown in the present case by the allegation of the application, and the finding of the court of bankruptcy, that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property. In the opinion in *Bardes v. Hawarden Bank*, 178 U. S. 524, 538 [20 Sup. Ct. 1000, 1006 (44 L. Ed. 1175)], it was indeed said: 'The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.' But the remark, 'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment."

We are fully aware that in *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, in which the basic question was "whether in a case in which the original court of bankruptcy could act summarily another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction," Mr. Chief Justice Fuller said:

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in

the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily, and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation. The former class falls within the ruling in the case of *Bardes v. Hawarden Bank*, 178 U. S. 524 [20 Sup. Ct. 1000, 44 L. Ed. 1175], and in the case of *Jaquith v. Rowley*, 188 U. S. 620 [23 Sup. Ct. 369, 47 L. Ed. 620], which hold that such a suit can be brought, only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere. In the latter class of cases a plenary suit is not necessary, but the case falls within the rule laid down in *Bryan v. Bernheimer*, 181 U. S. 188 [21 Sup. Ct. 557, 45 L. Ed. 814], and *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405], which held that the bankruptcy court could act summarily. The question was not discussed as to whether a court other than the court of adjudication could exercise this summary jurisdiction."

It must be borne in mind, however, that the question of the power of the marshal was in no wise involved in that case, and this statement, as said by the court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, was "upon a question not arising in the case then before the court." In *Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277, the Supreme Court had reversed the Court of Appeals of New York for holding that, when the sale of the goods "was complete and the transfer of the same was made before the proceedings in bankruptcy were instituted," a levy could not be made by the marshal, and it followed its holding in that case under the Act of 1898 in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814.

Assuming that a plenary suit was necessary, the District Court has a summary jurisdiction, and in a proper case has jurisdiction of a plenary suit, and the Supreme Court has repeatedly held that when under authority of the statute property is seized by receivers or the marshals, and thus comes into the lawful custody of the court, it has not only jurisdiction, but exclusive jurisdiction to determine the questions of title. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Murphy v. Hofman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327. The bankruptcy court is ordinarily a court of equity, and no objections were made, and no exceptions were taken to the method of trial. The marshal had the right, and it was his duty, to seize the property in question, and, if after such seizure the court must turn back the property to the third person claiming it without reference to the evidence, then "the purpose of Congress to prevent this evil is itself defeated." See *Clay v. Waters*, 178 Fed. 385, 392, 101 C. C. A. 645, 21 Ann. Cas. 897, and *In re Franklin Suit & Skirt Co.* (D. C.) 197 Fed. 591, 600.

[2] If it should be assumed that the law is as contended by appellant still, it must be borne in mind that the court in *Hicks v. Knost*, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183, said:

"The District Court has such jurisdiction by the consent of the proposed defendant, but not otherwise."

In this case there was no necessity for the marshal to bring suit. He had lawful possession of the property. It is worthy of notice that while Act March 2, 1867, c. 176, 14 Stat. 517, provided that the Circuit and District Courts should have concurrent jurisdiction of suits by or against the assignee the present bankruptcy law by its terms has reference only to suits by the trustee and not to suits against him. If it should be granted, however, that the statute applies to cases like the present at all, did Le Master consent to the jurisdiction of the District Court? He filed a petition in the United States District Court, and this in the absence of some repudiation of the jurisdiction of the court was itself a consent. If the court had ordered the property turned over to him and a subsequent suit had been brought to recover it by the trustee, what is there in this petition to preclude Le Master from claiming that the entire matter was *res adjudicata*?

It is true that D. F. Le Master could not have brought replevin to recover the property in a state court. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. But it does not follow that he could not have maintained a suit for damages against the marshal. Appellant cites *In re Sunseri*, 156 Fed. 103, but in that case the claimants pleaded:

"That it was beyond the jurisdiction of this court to seize any goods outside its territorial limits (the said town of Huntingdon being in the middle district of Pennsylvania); and that for the reasons above stated, as to their claiming this property adversely and with more than colorable title, this court is without jurisdiction to determine the title to it in this summary manner."

Le Master not only consented that the federal court exercise jurisdiction in this matter, but asked it so to do. It did so, and the statement of the evidence shows the decision of the court was fully sustained.

[3] It is contended that there was a violation of the law with reference to unreasonable searches and seizures. If there has been such a violation of the Constitution or laws of Colorado, no basis is furnished in this suit for action by the federal courts, and there is no claim that the provisions of the fourth amendment of the Constitution of the United States have been violated. The fourth amendment is a limitation upon the powers of the United States, and not upon a state. *Jones v. League*, 18 How. 76, 15 L. Ed. 263. "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people but to operate on the national government alone, was decided more than a half century ago and that decision has been steadily adhered to since." *Spies v. Illinois*, 123 U. S. 131, 166, 8 Sup. Ct. 22, 24 (31 L. Ed. 80).

This being true, if the state authorities took tangible property from Le Master by an unreasonable search, that is no reason why it could not be lawfully seized by the United States under a warrant to the marshal. *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37.

The decree of the District Court was correct, and is affirmed.

ADAMS, Circuit Judge (concurring). I think this record presents a clear case of consent to the summary jurisdiction exercised by the

trial court. Le Master invoked the jurisdiction by a formal petition, submitted his proof to the court, and never complained of the exercise of the jurisdiction so invoked until the decision adverse to him was rendered. The court took him at his word, and proceeded to adjudicate his rights to the property in question, and this must end the matter so far as jurisdiction is concerned; and, as there is no other serious question in the case, I concur in the affirmance of the decree.

TOOTHMAN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 22, 1912.)

No. 1,100.

CRIMINAL LAW (§§ 376, 1169*)—EVIDENCE—COMPETENCY.

On the trial of a defendant charged with sending obscene letters through the mails, testimony of a witness as to statements made by him admitting improper relations with a married woman, having no connection with the offense charged, was incompetent, and its admission prejudicial error, especially where defendant was a witness, and his testimony conflicted with that of another witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843, 3088, 3120, 3137-3143; Dec. Dig. §§ 376, 1169.*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Criminal prosecution by the United States against M. E. Toothman. Judgment of conviction, and defendant brings error. Reversed.

This is a criminal action, tried at the June term, 1910, of the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg. The plaintiff in error, M. E. Toothman (hereinafter referred to as the defendant), was charged with the violation of section 3893, Revised Statutes (U. S. Comp. St. 1901, p. 2658), in two counts, as follows: " * * * That M. E. Toothman on the ——— day of May, 1908, in the said division of said District Court, and within the jurisdiction of said court, did then and there unlawfully, feloniously, willfully, and knowingly deposit and cause to be deposited in a post office of the United States, to wit, the Grafton and Wheeling Railway Post Office, in the state of West Virginia, and in the circuit and district aforesaid, for mailing and delivery certain nonmailable matter, to wit, a letter inclosed in an envelope and which said letter was obscene, lewd, and lascivious and is unfit to be set forth in this instrument and to be spread upon the records of this honorable court, and which said envelope containing the letter as aforesaid was then and there directed to 'Mrs. Odie Mercer, Fairmont, Marion County, W. Va.,' he, the said M. E. Toothman, knowing the said letter to be obscene, lewd, and lascivious, and the mailing by him as aforesaid being then and there contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. * * * That the said M. E. Toothman on the ——— day of June, in the year 1908, in the said district and within the jurisdiction of said court, did then and there unlawfully, feloniously, knowingly, and willfully deposit and cause to be deposited in a post office of the United States, to wit, the Grafton and Wheeling Railway Post Office, in the state of West Virginia, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the circuit and district aforesaid, for mailing and delivery, certain non-mailable matter, to wit, a letter inclosed in an envelope, and which said letter was obscene, lewd, and lascivious, and is unfit to be set forth in this instrument and to be spread upon the records of this honorable court, and which said envelope containing the letter as aforesaid was then and there directed to 'Mrs. Odie Mercer, Fairmont, W. Va.,' he, the said M. E. Toothman, knowing the said letter to be obscene, lewd, and lascivious, and the mailing by him as aforesaid being then and there contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The trial resulted in a verdict of "guilty," and the defendant was sentenced to be imprisoned and confined to hard labor in the penitentiary at Leavenworth, Kan., for a period of four years from the date of the judgment, from which judgment a writ of error was sued out to this court.

Harry Shaw and E. M. Showalter, both of Fairmont, W. Va., for plaintiff in error.

H. Roy Waugh, U. S. Atty., of Parkersburg, W. Va. (H. J. Wilcox, Asst. U. S. Atty., of Parkersburg, W. Va., on the brief).

Before PRITCHARD, Circuit Judge, and WADDILL and SMITH, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). We have carefully considered the various assignments of error, and are of the opinion that with the exception of the third assignment they are without merit, there being no objection or exception upon which to base them. This assignment is in the following language:

"The court erred in permitting the witness Odie Nuzum to testify with reference to conversations had between her and the defendant about the defendant's relations with one Lulu Hamilton."

It is alleged in the indictment that the letters were addressed and transmitted through the mails to Mrs. Odie Mercer, but it appears from the evidence that Mrs. Mercer, subsequent to the finding of the indictment, married a man named Nuzum. Therefore, in referring to her testimony, she will be spoken of as Mrs. Nuzum.

The record discloses the fact that one of the letters alleged to have been addressed to the witness Mrs. Nuzum contained a reference to a woman by the name of Lulu Hamilton. While Mrs. Nuzum was on the witness stand for the purpose of identifying the letters referred to in the indictment, counsel for the government, among other things, asked the following questions, to which answers were made as follows:

"Q. Reference is made here in these letters, one or the other of them, the second one, I believe, to Lulu, whom you say is Lulu Hamilton, going to Wheeling or his securing work for Lulu Hamilton in Wheeling—

"A. Yes, sir.

"Q. Do you know anything about that from him personally?

"A. Yes, sir.

"Q. Did he ever discuss that with you and tell you about securing work for Lulu Hamilton?

"A. Yes, sir.

"Q. What did he tell you about securing employment there for Lulu Hamilton?

"Mr. Shaw: Objected to, which objection is overruled by the court and exception taken to the ruling of the court.

"A. He said he had taken her there. In the first place he said he didn't want her and her husband to live together, and they shouldn't live together if he could help it; and he said he had taken her to Wheeling and intended to get her a nice place to stay up there, and didn't intend to let her husband know where she was.

"Mr. Shaw: I move to exclude that answer. Motion overruled by the court and exception taken to the ruling of the court."

The defendant is charged in the indictment, as appears from the statement of facts, with sending two letters inclosed in envelopes through the mails, said letters being obscene, lewd, and lascivious, and that the transmission of the same through the mails was in violation of section 3893, Revised Statutes. The witness, Mrs. Nuzum, among other things, testified as follows:

"Q. I will ask you whether or not any time you ever received any letters from Mr. Toothman?

"A. Yes, sir.

"Q. I hand you a letter here under the headline, 'Farmington, W. Va., July —, 1908,' addressed to 'My Sweet Girl Odie,' not signed and containing about five pages, and will ask you whether or not you have seen that letter before, and, if so, when did you first see it?

"A. Yes, sir, I saw it before. I saw it when I got it, when I received it.

"Q. Where did you receive it?

"A. I didn't read the letter. I must have received it in the Fairmont post office.

"Q. Look at that particular letter, and say whether or not you received that particular one at Fairmont?

"A. Yes, sir; I received it at the post office at Fairmont.

"Q. At the post office, what do you mean by that?

"A. I mean they didn't deliver it.

"Q. You mean when it was delivered that it wasn't delivered by a mail carrier, but you received it at the post office?

"A. Yes, sir."

Any evidence which tended to prove that these letters were written by the defendant and transmitted through the mails was competent, but we cannot understand upon what theory evidence as to the defendant's improper relations with another man's wife could have been material in the trial of the case in the lower court, inasmuch as such evidence was purely collateral, and could in no wise affect the guilt or innocence of the defendant.

In the enactment of section 3893 of the Revised Statutes (U. S. Comp. St. 1901, p. 2658) it was the purpose of Congress to prevent evil-minded persons from corrupting the morals of the people by providing that it should be unlawful to send obscene, lewd, and lascivious letters through the mails. The object sought to be attained is of the highest importance, affecting as it does the welfare of the people. Nevertheless, when one is arraigned for trial in a case wherein his liberty is involved and the punishment is infamous, it is of the highest importance that his rights should be safeguarded by rejecting any incompetent evidence that is calculated to improperly influence the jury against him. In this instance the witness was permitted to testify as to relations between the defendant and a third party in which, among other things, it was stated that the defendant had declared his purpose to separate Lulu Hamilton from her husband and thus break up their home

relations. This within itself was a serious charge, and, if believed, was calculated to affect the credibility of the defendant as a witness. It appears from the testimony of Mrs. Nuzum that the letters were received through the mails. Her testimony as respects this point was flatly contradicted by the defendant. Thus it will be seen that there was a well-defined issue as to whether the letters in question had been actually transmitted through the mails. Whilst testimony of this character to affect the credibility of a witness may be drawn out of him on cross-examination on the stand, yet it is a collateral matter which cannot be testified to by a third party, as was done in this case; and, although the admission of testimony that may not be strictly competent under the issues is not necessarily ground for a new trial, yet this testimony as so given was calculated to influence the jury in determining the weight to be given the testimony of the defendant upon the issue of fact involved, viz., whether or not the letters had been transmitted through the mails.

It matters not what may be the charge against a defendant, he is entitled to the presumption of innocence until the same is overcome by competent evidence. And where it appears, as in this instance, that evidence as to the commission of other offenses by the defendant in no wise related to or connected with the offense for which he is being tried, not elicited by cross-examination of the defendant, but testified to by a third party, is permitted to go to the jury, it is but reasonable to assume that such evidence created a prejudice in the minds of the jury against the defendant.

We are therefore of the opinion that the ruling of the lower court in refusing to exclude this testimony was prejudicial error. For the reasons herein stated, the judgment of the lower court is reversed, and the case is remanded, with directions to set aside the verdict and grant a new trial.

Reversed.

PITTSBURGH COAL CO. v. MYERS.

(Circuit Court of Appeals, Third Circuit. February 25, 1913. Rehearing
Denied April 11, 1913.)

No. 1,635.

1. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—NEGLIGENCE—PRESUMPTION—PROXIMATE CAUSE.

A servant's death raises no presumption of his master's negligence, but such negligence, to be actionable, must be affirmatively shown, and must also be shown to have been the proximate cause of the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 129*)—DEATH OF SERVANT—PROXIMATE CAUSE—NEGLIGENCE.

Decedent was killed while working as a brakeman in the underground operations in defendant's mine. A train of cars had been drawn into the mine by an electric motor, and as the train approached a junction a flying switch was made to run the cars upon a sidetrack to the point

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

where they were to be loaded. When the cars left the junction, decedent was alive, and on or inside the rear car. In the immediate neighborhood of a second switch which it would have been his duty to turn, the trolley wire crossed the gallery at a height of five feet eight inches above the rails, which might have shocked him or thrown him off. There was no stationary light at the second switch, and the headlight on the motor was ineffective. As the motor overtook the cars, it ran over something on the rail, which was afterwards discovered to be decedent's body. Decedent was accustomed to the work, had passed along the gallery 10 times a day for several months, and had helped put up the traction system. *Held*, that the cause of decedent's death was uncertain, and that the facts did not warrant a conclusion that defendant's negligence was the proximate cause thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Annie Myers against the Pittsburgh Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles M. Johnson, Don Rose, Obed K. Price, and John H. Scott, all of Pittsburgh, Pa., for plaintiff in error.

Frank H. Kennedy and C. K. Robinson, both of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] In this action the plaintiff, Annie Myers, seeks to recover damages from the Pittsburgh Coal Company for the death of her husband. For several months at least he had been employed as a "snapper," or brakeman, in underground operations, and at the time of his death he was taking part in the movement of empty cars from one point to another in a mine belonging to the defendant. The fact of a servant's death raises no presumption of his master's negligence. Such negligence must be shown affirmatively, and must be shown also to be the proximate cause of the death. In our opinion the present case is fatally defective in both these essentials, and for this reason the verdict in the plaintiff's favor cannot be sustained.

[2] What is known about the accident will appear in the following summary: On September 20, 1910, a train of more than 30 empty coal-cars, each of two tons' capacity, was drawn into the mine upon the main track by an electric motor. As the train approached a junction from which a sidetrack led off into one of the galleries or traveling-ways, the motor executed the maneuver known as a "flying switch"; that is, the motor increased its speed, separated from the cars, and continued to run upon the main track past the junction, while the switch at that point was quickly opened and the cars left the main track and ran into the siding by their own momentum at a diminishing rate of speed—on this occasion, not much, if any, faster than a walk. While they were thus moving the motor ran back, followed the cars into the siding, and finally overtook them several hundred yards beyond

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the mouth of the mine. But, a short distance before it overtook them, the motor ran over something on the rail, and this was afterwards found to be the body of the deceased. When the cars left the junction and started down the siding, he was alive, on, or inside, the rear car, and a driver's lamp (giving more light than a miner's lamp) was burning in his cap. The cap, with the lamp upright and still burning, was found upon the floor of the gallery by the side of the track near the point where the body lay. In the immediate neighborhood was a second switch leading to No. 9 face, one of the mine workings where some of the cars were to be placed, and in aid of this movement it would have been his duty to turn the switch. Here also the trolley wire crossed the gallery from the left side to the right at a height of about five feet eight inches above the rails. A man standing on a passing car would not clear it. The wire was copper and of ordinary construction. Whether it was carrying a current depended on the position of an automatic device situated about 150 feet down the siding from the main track. After the motor (running alone) had entered the siding and had passed this device, the motorman found that the current had ceased, and thereupon he stopped, descended, went back, and adjusted the device, so that the current began again to flow. The strength of the current was about 500 volts, and this will certainly produce a severe shock, although in a given instance it may or may not be strong enough to kill. There was no stationary light at the second switch leading into No. 9 face, and the headlight of the motor, owing to ineffective carbons, was not burning except by intermittent flashes. The motorman had a lamp in his cap, but he was on the rear of the motor, and the lamp did not light the track in front. It was too dark to see ahead, and the body on the track was not observed until after it had been crushed by the front end of the motor. The deceased was a young man in good health, was accustomed to the work of a brakeman, had helped to put up the wires for the electric traction system, and had passed along this gallery perhaps 10 times a day for several months. He had often got off at the second switch, and turned it so that cars could pass through. On this occasion he was in the rear car, or on the bumper, as the train moved into the siding, and his waving light was seen by the motorman after the motor had passed the automatic device, and just before the motorman went back to adjust it. The waving light was the proper signal for the motor to advance and overtake the cars. The delay at the automatic device was probably two or three minutes. The motor—a heavy machine weighing 13 tons—was moving slowly, and could have been stopped within its own length, if the need to stop it had been known.

These are the facts, and we think it must be evident that they are consistent with more than one explanation of the deplorable event, with so many, indeed, that in our opinion the cause of death can only be conjectured. For example, the deceased was well acquainted with the gallery and its equipment, and knew the dangers to which he would be exposed. What brought him from the car to the ground? Had he forgotten the wire, or miscalculated its position, and did he therefore continue too long in the dangerous attitude of standing on or in the

car, instead of sitting or stooping? And did he thereby expose himself to the risk of encountering the wire where it crossed the gallery? If so, was the current flowing when he reached the wire, or was it still shut off by the automatic device? Did the current kill him, or only render him helpless? Or was he swept off the car by the mechanical force of the contact? If alive when he fell, was he killed by the fall, or only injured, perhaps stunned, so as to be unable to move? Was he seized with vertigo, or other sudden sickness, as even healthy men sometimes are, and did he fall from the car for that reason? Or did he lose his footing by some unexpected movement of the train? Did he voluntarily get off the car in order to be ready at the switch leading into No. 9 face, and afterwards stumble and fall upon the track? Or did he become bewildered in the dark, and mistakenly suppose himself to be in a place of safety? Evidently, these situations are all more or less probable, and without some evidence that will indicate with reasonable accuracy to which of them his death is to be attributed we are in no position to consider the questions on which the case was made to turn at the trial, namely, what bearing, if any, the position of the wire, or the absence of a fixed light at the second switch, or the ineffective headlight on the motor, may have had on the event. And, of course, the still more distant question does not arise—upon whom the liability for the death should properly rest, whether upon the company itself or upon the foreman in charge of the underground operations in the mine. Careful and repeated examination of the testimony has forced us to the conclusion that sufficient evidence was not offered to establish the company's negligence, and that the jury should not have been permitted to guess, for it could be little more than a guess, what was the proximate cause of the death.

Authorities are scarcely needed to support the propositions that except in rare cases (of which this is not one) negligence cannot be inferred from the mere happening of an accident, and cannot be conjectured but must be proved. We may refer, however, to the following decisions: *Patton v. Railway Co.*, 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; *Oil Co. v. Van Elderen*, 137 Fed. 571, 70 C. C. A. 255; *Clare v. Railroad*, 167 Mass. 39, 44 N. E. 1054; *Leary v. Railroad*, 173 Mass. 373, 53 N. E. 817; *Warner v. Railroad*, 178 Mo. 125, 77 S. W. 67; and the cases cited in 29 Cyc. 631, par. 2, note 52. In *Patton v. Railway Co.*, the Supreme Court said:

"The fact of accident (to an employé) carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * In the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of

an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

And the Supreme Court of Pennsylvania is in full accord with these views. *Alexander v. Water Co.*, 201 Pa. 256, 257, 50 Atl. 991; *Marsh v. Railroad*, 206 Pa. 560, 56 Atl. 52; *Zeigler v. Simplex Co.*, 228 Pa. 67, 77 Atl. 239.

The judgment is reversed.

HAINES v. FIRST NAT. BANK OF MIDDLETOWN, OHIO.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,242.

1. APPEAL AND ERROR (§ 1019*)—FINDINGS OF MASTER—REVIEW.

Where a case was referred to a master to hear and determine all matters in controversy, the master's findings on conflicting evidence, while not conclusive, will be sustained unless manifestly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.*]

2. TRUSTS (§ 105*)—CONSTRUCTIVE TRUSTS—MISAPPROPRIATION OF FUNDS.

Where it did not appear that a corporation was insolvent and that it had ceased to prosecute the objects for which it was created when certain of its funds were used to pay notes to a bank, executed by its president to cover an alleged loss by the failure of the former corporation, the money so paid was not impressed with a trust so as to be recoverable for the benefit of the estate of the new company in bankruptcy.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 156; Dec. Dig. § 105.*]

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Intervention by the First National Bank of Middletown, Ohio, against H. H. Haines, receiver of the New Decatur Buggy Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kramer & Bettman, of Cincinnati, Ohio (Gilbert Bettman, of Cincinnati, Ohio, of counsel), for appellant.

B. F. Harwitz, of Middletown, Ohio, and Joseph W. O'Hara, of Cincinnati, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

PER CURIAM. This was a case begun by appellee in another cause pending in the court below, by filing therein its intervening petition against Haines, as receiver of the New Decatur Buggy Company, alleging that the receiver had been authorized by the court to borrow money to carry on the business of the buggy company; that under such authority the receiver borrowed from the bank three sums of money and gave to the bank his three promissory notes payable to

its order and dated, respectively, May 30, June 3, and June 19, 1908, the first two for \$1,500 each with interest at 6 per cent. per annum, and the third for \$1,000—each note being in substance described in a separate count, with copy attached as an exhibit—and alleging refusal of payment, with the ordinary prayer. The answer admits these allegations. Avoidance is sought by averment that the bank is indebted to the receiver in excess of the amount of the notes, for the reasons: That prior to the existence of the New Decatur Buggy Company there was a corporation known as the Decatur Buggy Company, which, on May 11, 1904, was adjudged bankrupt in the court below, and among its debts was one of \$14,227.75 owing to the intervening bank; that on January 23, 1905, the New Decatur Buggy Company (of which appellant is receiver) was organized as a corporation under the laws of Ohio, and in the following July, Harry H. Elwood, one of the defendants, executed and delivered to the bank 81 promissory notes, each for \$50, payable on Monday of each week beginning February 20, 1905, and ending September 3, 1906; that these notes were payable to the order of the new buggy company, were indorsed by it, and paid out of its assets; that no consideration was given for the notes but that they were given to reimburse the bank in part for a loss it suffered as a creditor of the old buggy company; that such payment by the new company was a diversion and misappropriation of its money and was "unlawfully and fraudulently received by said intervener"; and that the bank is indebted to the receiver for the sum of said notes, to wit, \$4,050, with interest from September 3, 1906, as "for moneys had and received to the use and benefit of" the new buggy company. The prayer is that the intervening petition be dismissed and that the notes sued on be canceled.

The bank's reply denies such alleged diversion and misappropriation; avers that if the 81 Elwood notes were paid by the new buggy company the bank had no knowledge of such facts and believed the notes were paid by Elwood; denies the right of set-off, because the alleged transactions were between other persons and are not connected with and do not arise out of the matters set up in the intervening petition, and because the new company is indebted to the bank in a sum (distinct from that represented by the notes sued on) in excess of the amount claimed by the receiver and that if any right of set-off exists it ought to be made against the sum so due and owing by the new buggy company to the bank.

By consent of parties a reference was made by the court to a special master "to hear and determine all matters in controversy" under the pleadings; and the special master was "directed to report all the evidence adduced before him, with his findings of fact and conclusions of law separately."

The case was tried and submitted to the special master upon written evidence and the testimony of a number of witnesses produced before him. His findings, among others, were that the bank's loan to the receiver upon his notes amounted to \$4,000, with certain interest; that Elwood was president and general manager of the old company and later of the new company; that Elwood executed his 81 notes to

settle a loss of the bank through the failure of the old buggy company, for which loss "Elwood considered himself personally liable"; that the diversion of assets in fact occurred, but as to whether the bank received the moneys "with the knowledge that they were wrongfully diverted" the master found:

"This question must be answered in the negative. There is absolutely no evidence to show that the First National Bank or any person connected therewith had any knowledge of the fact that there was a diversion of the assets of the New Decatur Buggy Company by any of its officers by reason of which the First National Bank was deriving any benefit."

Among his conclusions of law, the master held in favor of the bank upon its notes, unless the receiver had shown that the assets of the new buggy company (\$4,050) were "unlawfully and fraudulently received by the bank." He held as a matter of law that the receiver could offset his claim for such diverted assets against the notes of the bank, but that the bank could not offset its claim for money loaned otherwise than upon such notes to the new buggy company, against such claim for diverted assets. However, the master allowed recovery by the bank upon the three promissory notes sued on with interest. This result was manifestly reached through the finding that the bank had no knowledge of such fact of diversion of the new company's assets.

[1] In the court below the action of the special master was confirmed. In the decree it is stated:

"Upon consideration whereof the court finds that said master was appointed by consent of the parties to hear and determine all matters in controversy, and report his findings and conclusions to the court, and that there was some testimony to support the master's findings herein, and that his findings and conclusions depended upon conflicting testimony and upon the credibility of witnesses. The court therefore finds the master's findings of fact unassailable."

However, the learned trial judge believed the finding as to the bank's want of knowledge touching the diversion of assets was erroneous, and was constrained to confirm that finding only in obedience to the decision in *Davis v. Schwartz*, 155 U. S. 631, 638, 15 Sup. Ct. 237, 239 (39 L. Ed. 289), where, respecting a finding reported under a reference made by consent of parties to a master "to hear said causes and report to this court his findings of facts and conclusions of law" (155 U. S. 636, 15 Sup. Ct. 239, 39 L. Ed. 289), it was said by Justice Brown:

"* * * So far as it (the finding) depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

It is forcefully contended by learned counsel that it was not necessary to the decision in that case to hold that the finding should be treated as "unassailable," and that this was inconsistent with the settled rule of the Supreme Court in that behalf. We are not called upon to pass upon this feature of the argument; for, in addition to

what is before pointed out in the decree, when alluding to the master and his findings the court below stated at the close of the opinion:

"The testimony before him was conflicting. He had to pass and did pass on the credibility of witnesses and there was testimony consistent with the master's finding. * * *

The reference in this case was very broad; it was not only made by consent of the parties, but it empowered the special master "to hear and *determine* all matters in controversy." In view of such consent and power, and also of the findings of the decree and statement in the opinion, before pointed out, and clearly justified by the record, we think the case falls within the acknowledged rule of the Supreme Court touching the effect of a master's findings under a state of evidence such as that described by the court below. *Kimberly v. Arms*, 129 U. S. 512, 524, 9 Sup. Ct. 355, 359 (32 L. Ed. 764).¹ In that case the special master was appointed by consent and request of the parties and given power "to hear the evidence and decide all the issues." It is true that the right is there declared to reside in the court to set aside the findings of the master "where there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." The weight thus given to such findings is due to the fact that the reference is—

"* * * by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law."

Now, recognizing the right to set aside the master's findings, it does not seem to us that the evidence as a whole is *manifestly* inconsistent with the claim in substance urged that the bank believed either that the moneys applied in payment of the notes belonged to Elwood or that his obligation upon the notes was rightly assumed by the new company.

[2] The point made, that independently of the findings the money paid in discharge of the 81 notes of Elwood was impressed with the character of a trust and can be recovered for that reason, is not tenable. It does not appear that the corporation was insolvent and that it "ceased to prosecute the objects for which it was created" within that period, and consequently the case of *Rouse, Trustee, v. Merchants' National Bank*, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644, relied on by appellant, is not applicable. It would seem rather that cases like *Graham v. Railroad Co.*, 102 U. S. 153, 154, 26 L. Ed. 106, are in point. This is strengthened by the fact that moneys and negotiable instruments only were used in the transactions resulting in the diversion. *Spaulding v. Kendrick*, 172 Mass. 71, 72, 51 N. E. 453; *Stephens v. Board of Education*, 79 N. Y. 183, 187, 35 Am. Rep. 511; *Holly v. Missionary Society*, 180

¹ That case, as well as *Davis v. Schwartz*, was followed by this court, the present Mr. Justice Lurton announcing the opinion, in *Singleton v. Felton*, 101 Fed. 527, 42 C. C. A. 57.

U. S. 284, 290, 293, 21 Sup. Ct. 395, 45 L. Ed. 531; State Bank v. United States, 114 U. S. 401, 410, 5 Sup. Ct. 888, 29 L. Ed. 149; Gay v. Hudson River Electric Power Co. (C. C.) 190 Fed. 773, 804; Kimmel v. Bean, 68 Kan. 598, 75 Pac. 1118, 64 L. R. A. 785, 104 Am. St. Rep. 415. It is not necessary to determine the other questions presented.

The decree below must be affirmed, with costs.

In re HOLDEN.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,275.

1. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT PROCEEDINGS—FINDINGS—REVIEW.

Where, in proceedings to compel a bankrupt to pay over alleged withheld assets, the referee's finding that property had been withheld did not purport to be based solely on book entries or other controlling data, but upon an account stated by him showing a net balance due of \$4,000, the referee, however, expressly refraining from finding whether the bankrupt's failure to keep books of account or records of any kind from which the true status of his affairs could be determined was willful or intentional, such finding was not conclusive on the court either by way of estoppel or otherwise, but the court was entitled to make an independent examination of the facts, and determine whether the bankrupt had in his possession money or property which he willfully and intentionally withheld.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT PROCEEDINGS—INABILITY.

In the absence of a finding that the bankrupt is in possession or control of assets found to be withheld by him, a showing that he is unable to pay to his trustee money ordered by the referee to be paid as such withheld assets is a sufficient answer to a proceeding to punish him for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 444*)—PROCEEDINGS—PETITION FOR REVIEW—SCOPE.

A petition for review in bankruptcy proceedings presents for review only questions of law arising out of the facts found by the trial court or admitted by the parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. § 444.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

In Bankruptcy. Petition by William B. Holden, trustee of Jay A. Haring, bankrupt, to revise an order of the District Court (193 Fed. 168) dismissing the proceeding to punish the bankrupt for contempt in failing to pay over \$4,000 alleged to have been unlawfully retained by the bankrupt from his trustee. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B. M. Corwin and C. V. Hilding, both of Grand Rapids, Mich., for petitioner.

Dunham & Dunham, of Grand Rapids, Mich., for respondent.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This case comes here on a petition to revise in matter of law an order of the court below dismissing the petition in a contempt proceeding. April 6, 1911, basing his action upon testimony of the bankrupt, the trustee presented a petition to the referee, alleging that the bankrupt had "fraudulently appropriated to his own use, secreted, concealed and transferred property or money, or both, which your petitioner, as trustee in bankruptcy in this matter, is entitled to receive, to the amount of \$6,676.21," and also certain profits on merchandise sold by the bankrupt, the amount of which petitioner was unable to state because the bankrupt had kept no proper books of account; and praying for an order directing the bankrupt to account for such sum and profits. Answer was made consisting in substance of denials, and also an averment that the trustee had taken possession of the stock, papers, and books of the bankrupt, and so had prevented him from further accounting. The assets of the bankrupt consisted of a stock of merchandise. He had been in business at Grant, Mich., from February 10, 1910, to January 26, 1911, and also at Sand Lake and Kent City, Mich., goods having been taken to these latter places from his stock at Grant. He was adjudged bankrupt on the date last mentioned. The matter of accounting was heard upon evidence offered by the trustee, but none was offered by the bankrupt, although he was present and represented by counsel. The referee stated an account, and found that respondent had failed to turn over \$4,000, and ordered him to pay that sum to the trustee within 30 days. November 20, 1911, the trustee filed a petition in the court below setting out the proceedings mentioned, alleging that service of the referee's order had been made upon respondent, that he had failed to pay any part of the sum covered by the order, and praying for an order directing respondent to appear and show cause why an attachment for contempt should not issue against him for disobedience of the referee's order. On the same date an order was entered in the court below, reciting that a hearing was necessary, and directing that respondent file answer and show cause why the prayer of the petition should not be granted. The bankrupt's answer to the petition was in the form of an affidavit, distinctly denying that he had at any time secreted or concealed any of his property, or in any manner disposed of any with intent either to cheat or defraud his creditors; that at the time he was declared a bankrupt all of his property, except his wearing apparel, was delivered to the trustee; that the only reason he had disobeyed the order of the referee was his "absolute inability to obey the same"; that for several months prior to the bankruptcy "he had to leave his business almost entirely in charge of clerks, whom at that time he believed to be honest"; that his health was such that he had to get out of doors and away from business, but that he honestly

believed every dollar received by his clerks would be properly accounted for and turned over; that until the hearing before the referee he believed this had been done, stating, also, that he was unable to give any further explanation of his business than that given before the referee. No additional proofs were taken in the court below, and no steps were taken to have the referee's order reviewed. One of the questions considered below was:

"Under these circumstances, is the finding and order of the referee conclusive upon both the bankrupt and this court, and is the duty of this court in the premises merely formal and ministerial, or is it the duty of this court to make an independent investigation of the facts disclosed by the evidence and to reach an independent conclusion based upon such investigation?"

The evidence taken before the referee was certified to the court below. The learned trial judge examined the whole record with a view of reaching an independent conclusion "at least as to the ability or inability of the bankrupt to comply with the order of the referee," and he also very fully considered the law of the case ([D. C.] 193 Fed. 168). The opinion of the court is part of the record and in practical effect treated by the parties as a finding of facts; and, unless we so treat the opinion, the petitioner has nothing here for review. It is important to compare the findings of the referee with the conclusion of fact reached by the trial judge, for both are based upon the same evidence. The ultimate finding of the referee is:

"I therefore find that the respondent bankrupt has failed to account for property, or money, or both, of the value of \$4,000, and that such amount belongs to this estate, and is withheld from the trustee thereof."

In the recitals of the order entered by the referee this appears:

"The said respondent has failed to account for the sum of \$4,000, and that such amount belongs to this estate and is concealed and withheld from the trustee thereof."

In the course of the opinion the court reached this conclusion:

"However, if it be conceded that the burden and duty of explaining the disposition and disappearance of property or money recently in his possession rest upon the bankrupt, yet the proofs in this case fall short of establishing respondent's guilt. * * * Here no money which has not been accounted for has been directly and reliably traced to the possession of the bankrupt and the order of the referee required him to pay to the trustee the sum of \$4,000 in money. There is no positive testimony that he had in his possession at the time of his failure any part of the stock of goods except those located in the store and turned over to the trustee. Indeed, the theory of the trustee is not that the bankrupt has goods in his possession, but rather that he has converted goods into cash, and has the money in his possession. The proof is wholly circumstantial, and rests upon a foundation of inference and presumption which may be very much at variance with the actual facts. At best, the case made against this bankrupt is a doubtful one. * * * In this case the evidence is sufficient to establish an indebtedness of the bankrupt to his estate in the sum of \$4,000, and thus to justify the order of the referee requiring him to pay that sum to the trustee, but it is not sufficient to establish conclusively his present ability to pay that sum of money."

[1] It is to be observed that the referee did not find that \$4,000 in property or money or both were in the possession or control of the

respondent; nor did he find that such sum was concealed or withheld by respondent. Indeed, he expressly found that the account as stated by him showed a net balance due of \$4,000, and from that he deduced the finding before shown. He distinctly refrained from finding whether the bankrupt's failure to keep books of account or records of any kind "from which the true status of his affairs could be determined" was "willful or intentional," and this tends to negative bad faith in respondent. It appears both by the referee's findings and the court's opinion that the referee's statement of the account was in several material respects but an approximation. The findings do not purport to be based solely upon book entries or other controlling data. Surely it was quite as open to the judge, as it was to the referee, to draw inferences and deduce a conclusion from such a source as this. It was not even a case of conflicting evidence, depending upon the credibility of witnesses who were before the referee and not the court. *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184 (C. C. A. 6th Cir.); *In re Swift* (D. C.) 118 Fed. 348, 349; 1 *Loveland on Bankruptcy* (4th Ed.) pp. 225, 226. The court, not the referee, was charged with the responsibility of exercising the power of commitment for contempt (*Smith v. Belford*, 106 Fed. 658, 661, 45 C. C. A. 526 [C. C. A. 6th Cir.]); and it will not do to say that findings like these operate (if indeed findings of the referee can ever operate) as an estoppel upon the bankruptcy court or otherwise to conclude it. Judge Severens said, when speaking of an order of a referee and the power of the trial judge in *Re Leech*, 171 Fed. at page 625, 96 C. C. A., at page 427:

"The judge might have taken new evidence, if it had been offered, or he might have examined the evidence reported by the referee and determine for himself what the facts were."

The present Mr. Justice Lurton said in *Ohio Valley Bank Co. v. Mack*, *supra*, 163 Fed. 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184:

"No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report."

In the unreported case, *Re Contempt Proceedings against Goldman*, not for publication, which was cited in the argument, Judge Denison said:

"In the proceedings before the referee, the question was whether the respondents had accounted for the receipts. In this proceeding, the question is whether Goldman now has, in his possession or under his control, a certain sum of money, or perhaps whether he did have such sum of money in his control on the date of the referee's order, so that he was then able or is now able to comply with the order. Upon the facts, in many cases, these questions would be the same, but upon the facts in other cases, these questions might be distinctly different, so that I think there is no general and invariable rule of estoppel by the previous finding. Under the circumstances of this case, I do not think the absolute rule of estoppel should be adopted."

It is true that the court there discredited the story of the respondent and committed him, but it did not regard itself as bound by the referee's order, and, on the contrary, modified the order by concluding that a sum less than that contained in the finding and order of the referee was in possession of the respondent, and thereupon ordered that the opinion should be filed as a finding of facts. It is further to be observed of that case that possession of the balance not accounted for was found to be in the respondent. Two facts thus concurred to validate the order and require its execution—title to the money in the bankrupt's estate and possession of the money in the bankrupt. *Muel-ler v. Nugent*, 184 U. S. 13, 14, 22 Sup. Ct. 269, 46 L. Ed. 405. The converse of this must be true in the instant case.

[2] The court was not satisfied either that the findings of the referee or the evidence showed the respondent to be in possession or control of the \$4,000; and it would be a harsh rule to attempt to control the action of that tribunal upon any theory of estoppel. If the court was right in its belief, it is manifest that an order of commitment would have been a fruitless proceeding. Besides, as Judge Severens said in *Sinsheimer v. Simonson*, 107 Fed. 898, 907, 47 C. C. A. 51, 60 (affirmed in *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 23, 22 Sup. Ct. 293, 46 L. Ed. 413), concerning facts differing from those involved here though not differing in principle:

"But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is sufficient answer. It matters not, for the purpose of such a proceeding, that the inability to do the thing required may be in consequence of his own fault, arising from a mere misconception of his rights, or committed before the court took jurisdiction of the matter. The court cannot compel an impossibility."

It is not necessary either to cite or comment on the decisions relied on by the court below, for our review of the present case is restricted to the questions presented by the petition for revision.

[3] It is settled that in such a proceeding only questions of law can be determined; and such questions must arise out of the facts found by the court below or admitted by the parties. *In re Stewart*, 179 Fed. 222, 228, 102 C. C. A. 348 (C. C. A. 6th Cir.); *In re Taft*, 133 Fed. 511, 513, 66 C. C. A. 385 (C. C. A. 6th Cir.); *In re Leech*, *supra*, 171 Fed. 625, 626, 96 C. C. A. 424. As Mr. Justice Holmes said in *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 302, 31 Sup. Ct. 25, 26 (54 L. Ed. 1047): "A petition for revision opens only questions of law."

After all, the finding of the referee was practically supplanted by the finding of the bankruptcy court; and, since we are bound in this proceeding to accept the latter finding, it is plain that the order of the court below dismissing the petition of the trustee must be affirmed, with costs.

BODEN & HAAC et al. v. LOVELL.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1913.)

No. 2,303.

1. BANKRUPTCY (§ 311*)—PREFERENCES—APPROPRIATION OF GOODS.

Bankrupts, who were cotton merchants, having procured claimants to pay drafts on the faith of forged bills of lading for cotton, shipped cotton to the claimants, to be delivered under the forged bills. Bankruptcy having intervened, claimants procured the cotton pursuant to foreign attachments, the foreign court not recognizing the bankruptcy proceedings in the United States. *Held*, that it having been determined that claimants were the owners of such cotton, and that they, by paying the forged drafts, had paid for the cotton prior to the bankruptcy proceedings, their appropriation thereof did not constitute an unlawful preference so as to preclude the allowance of their other claims in bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

2. BANKRUPTCY (§ 312*)—ATTACHMENT PROCEEDINGS—ESTOPPEL.

Claimants having paid drafts attached to forged bills of lading for cotton alleged to have been shipped by the bankrupts, cotton was actually shipped under genuine bills, which the bankrupts destroyed, and subsequent to the intervention of bankruptcy was secured by claimants under foreign attachments. The bankrupts' trustee procured certain English creditors also to attach the cotton, but their attachments were subsequent to those of claimants, who subsequently were permitted to retain the cotton under an agreement based on a large consideration paid to the trustee, which recognized claimants' ownership of all the cotton attached. *Held*, that such litigation could not operate to estop claimants from asserting other claims not involved therein in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496-500; Dec. Dig. § 312.*]

Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

In the matter of bankruptcy proceedings of Knight, Yancey & Co. From a decree (190 Fed. 893) rejecting proofs of debt of Boden & Haac and others, foreign creditors of the bankrupt, on objection of W. S. Lovell, trustee, the creditors appeal. Reversed and remanded, with instructions.

Wm. D. Thomson, of Atlanta, Ga., for appellants.

Walker Percy, A. Benners, and Borden Burr, all of Birmingham, Ala., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PARDEE, Circuit Judge. This is an appeal from a decree rejecting proofs of debt in the bankruptcy of Knight, Yancey & Co. The appellants were creditors of the bankrupt, and proved their claims in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

regular form. Objections were filed by the trustee to the allowance of each of the said claims as follows:

"First. That said alleged creditor has not a provable claim against the estate.

"Second. That said creditor has received preferences voidable under section 60, subd. B, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and said creditor has not surrendered such preferences.

"Third. That there has been made to said creditor conveyances or transfers of property void or voidable under section 67, subd. E, and such creditor has not surrendered such conveyances or transfers.

"Fourth. That at the time of the adjudication in bankruptcy of said bankrupt firm there was in the possession of carriers for the purpose of being transported to Bremen, Germany, a large amount of cotton, to wit, 10,000 bales, as to which said bankrupt estate claimed to have an interest in and the title to. That the bankruptcy laws of the United States are not recognized in the country of Germany. That said creditor, with knowledge or notice of the claim of said estate in and to said cotton, sued out process under the German law similar to what is known under our law as a general attachment, and had such process levied upon such cotton in the possession of said carrier, and by means of said process obtained a large sum of money, to wit, a sum larger than the amount which said creditor now seeks to prove as an indebtedness against said estate. Your petitioner avers that such attachment was sued out by said creditor and levied upon said property as belonging to and being the property of Knight, Yancey & Co., a partnership, and, inasmuch as the German law does not recognize the title of your petitioner or the court proceedings under which he is acting, said property was enabled to be seized by said creditor and applied in a large part to the satisfaction of all his debts except the amount which it now seeks to prove against said estate."

This objection of the trustee was sustained by the referee, who held that the cotton received by the appellants in Germany after the adjudication in bankruptcy was, under the facts shown in the record, a portion of the bankrupt's estate, and that, therefore, the appropriation of said cotton by appellants was in effect a payment to them out of the funds of the estate of Knight, Yancey & Co.; and, while he allowed the claims to be filed, he further ordered that the appellants should not receive any dividends thereon until other creditors had received dividends in the proportion above stated. This order of the referee, refusing participation in dividends, was on petition for review affirmed by the District Court.

The case was tried upon an agreed statement of facts, which shows, among other matters not material to recite, that the appellants resided in Germany, and had been purchasers of cotton from the bankrupt. This cotton was sold to them in 100-bale lots, and it was customary, upon shipping to the appellants each 100 bales of cotton, to draw a draft with bill of lading attached for the purchase price of said 100 bales. Each of the appellants had bought several separate lots of cotton in this way, and held several separate and independent drafts, each of said drafts being for the purchase price of a certain 100 bales of cotton, and to each of said separate drafts had been attached a bill of lading calling for the particular 100 bales of cotton described and referred to in the draft attached thereto. When the appellants paid the drafts in question, and got the bills of lading, they believed the bills of lading to be genuine, and that they thereby became purchasers of cot-

ton described in the bills of lading. Upon the failure of Knight, Yancey & Co. and their adjudication as bankrupts, it became apparent to the receiver of the bankrupts that the bills of lading attached to the drafts were forged, and that no cotton had been shipped at the time the drafts were paid. It further appeared, however, that subsequent to the issuance of the forged bills of lading and the payment of the drafts attached thereto cotton had been shipped on genuine bills of lading bearing similar marks of identification to that described in certain of the bills of lading held by the appellants, and that such cotton was then on board vessels bound for Germany; and that, as to certain other drafts held by said appellants for separate and distinct lots of cotton, no shipments whatsoever had been made. Immediately upon discovering these facts, the receiver of the bankrupt notified the German creditors that the bills of lading held by them were spurious, and that they had no title to any cotton under said bills of lading. In this state of affairs, and without definite information as to all of the facts in the case, or as to their rights, the appellants took out attachment suits on those drafts to which had been attached bills of lading calling for cotton bearing the same marks as were borne by the actual cotton on board the two steamships in question. Those drafts held by the appellants which represented the purchase price of cotton not bearing marks similar to those on these two vessels, were not included in the attachment suits, and are the drafts which the appellants have proven in the bankruptcy court. The receiver of the bankrupt never had possession of the original bills of lading for the cotton on these two steamships, as they had been taken from the files of Knight, Yancey & Co. by John W. Knight and concealed by him prior to the adjudication. It afterwards developed that as a matter of fact it had been the custom of John W. Knight for some time prior to his failure to attach forged bills of lading to drafts, and in this manner collect from customers who thought at the time of paying the drafts that the bills of lading were genuine. It had further been his custom to subsequently ship, under genuine bills of lading similar in form, real cotton to the parties who had previously paid drafts with forged bills of lading attached. In such cases Knight would conceal or destroy the genuine bills of lading, and allow the carriers to make delivery on forged bills of lading; and prior to the adjudication in bankruptcy this had been done, and parties holding forged bills of lading had received cotton marked as was the cotton in their forged bills, and had never known the fact that the bills under which the cotton had been delivered were not genuine bills of lading.

The receiver employed counsel in Germany to try to get this cotton for the bankrupt estate. The counsel so employed informed the receiver that the laws of Germany would not recognize any title claimed by the receivers to have vested in them by operation of the bankruptcy law of the United States. The receiver, therefore, not having the original bills of lading so as to be able to claim title as holders of the original bills of lading, made no direct effort to get said cotton by legal process, but made a secret agreement with other general creditors of Knight, Yancey & Co. residing in Liverpool, who,

however, had no special claim to the particular cotton on board the two steamships in question, under which these Liverpool creditors took out in Germany attachments against Knight, Yancey & Co., and sought to levy the same on the cotton then approaching the German ports, it being understood that the receiver of Knight, Yancey & Co. would bear the expense of this attachment proceeding, and should, as between the receiver and the Liverpool creditors, get the benefit of any profit that might be obtained by the Liverpool creditors from this proceeding. These attachment proceedings by both the Liverpool creditors and the appellants were taken out before the vessels arrived in port, and an effort was made to levy both attachments on the cotton in these ships when they arrived in port. The appellants succeeded in getting their attachment levied first, which, under the law, gave them a preference as against the Liverpool creditors whose attachment was levied subsequently. No subsequent proceedings were taken in either of the attachment cases after the levy thereof, but an agreement was effected by which the cotton on these ships and other ships not yet arrived or attached was turned over to the appellants as owners thereof, upon their paying to the Liverpool creditors, for the benefit of the trustee, a certain amount of money per bale.

The referee in certifying the matter to the District Court states that the question to be considered on review is:

"Whether or not the cotton received by the petitioners in Germany under the circumstances set out in said agreed statement of facts was a part of the bankrupt estate of Knight, Yancey & Co. at the time of its receipt by said creditors, so that the receipt thereof by said creditors was in effect, a partial payment of their claims against said bankrupt estate."

The decision of the judge of the District Court is based upon the theory that the appellants were estopped by the receipt of the cotton in Germany from claiming a right to share in any dividend which might be declared. He expressly declined to go into the question as a matter of fact and law as to whether the cotton received by the appellants in Germany was property of the bankrupt estate of Knight, Yancey & Co. at the time of its receipt by the appellants, or whether it was the property of the appellants themselves, title to which had passed to them prior to the date of the adjudication in bankruptcy, holding that, by reason of the estoppel which he found to exist against appellants, the decision of the question as to the ownership of the cotton at the date of the adjudication was rendered unnecessary.

Appellants contend that this decision of the District Judge was not warranted by the pleadings and record in the case, and that the judge should have considered and decided the question as to the legal and equitable ownership of the cotton at the date of the adjudication in bankruptcy, as certified to him by the referee, and should have held that said cotton was the property of appellants. When this case was decided in the District Court, there was then pending in this court two other cases in which the custom of business of Knight, Yancey & Co. in handling foreign cotton on forged bills of lading was under consideration, and in both this court, after a thorough consideration of all of the authorities bearing on the question as to whether the title of the

cotton under such circumstances passed to the foreign purchaser or whether it remained in the bankrupt estate, subsequently decided in favor of the foreign purchasers. *Lovell v. Newman*, 192 Fed. 753, 113 C. C. A. 39; *Hentz v. Lovell*, 192 Fed. 762, 113 C. C. A. 48.

[1] These decisions are controlling, and require the holding that the cotton received by appellants under the forged bills of lading was cotton which they had purchased and paid for prior to the bankruptcy of Knight, Yancey & Co. This being the case, the possession and appropriation of the same cannot be held to be an unlawful preference void under the bankruptcy law.

[2] The attachment litigation started in Germany, which resulted in the agreement based on a large consideration paid to the trustee which recognizes the ownership of the appellants of all the cotton attached, seems to have been instituted under a general misapprehension of the law and facts, and we find nothing therein on which to predicate an estoppel preventing the appellants from asserting in the bankruptcy of Knight, Yancey & Co. their claims not in any wise involved in the litigation aforesaid.

The decree of the District Court is reversed, and the cause is remanded, with instructions to overrule the objections of the trustee, and allow the claims presented by the appellants as ordinary debts in the bankruptcy of Knight, Yancey & Co.

KERN v. COFFIN.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1913. Rehearing Denied March 25, 1913.)

No. 2,441.

1. PARTIES (§ 83*)—NONJOINDER OF PARTIES DEFENDANT—PARTIES ENTITLED TO OBJECT.

A defendant cannot object to the nonjoinder of other defendants when his own rights are not affected thereby.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 133; Dec. Dig. § 83.*]

2. VENDOR AND PURCHASER (§ 275*)—LIEN RESERVED IN DEED—ASSIGNMENT OF PURCHASE-MONEY NOTES.

A purchaser of land for the price of which he executes notes secured by a vendor's lien reserved in the deed acquires no title except subject to such lien which may be foreclosed by the holder of any of the notes which are due and unpaid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 772; Dec. Dig. § 275.*]

In Error to the District Court of the United States for the Western District of Texas; Thos. S. Maxey, Judge.

Action at law by P. E. Kern against C. O. Coffin, and cross-action by Coffin against Kern. Judgment for Coffin in the cross-action, and Kern brings error. Affirmed.

F. G. Morris and C. L. Galloway, both of El Paso, Tex., for plaintiff in error.

Millard Patterson and J. A. Buckler, both of El Paso, Tex., for defendant in error.

Before SHELBY, Circuit Judge, and NEWMAN and GRUBB, District Judges.

NEWMAN, District Judge. This cause comes before the court on a writ of error to the action of the District Court directing a verdict against P. E. Kern, plaintiff in the District Court, and in favor of Coffin, upon his cross-action for the undivided 150 acres of land in controversy. Kern brought trespass to try title to the land in controversy against Coffin, who filed a cross-action or plea in reconvention against Kern, and it was on the trial of this suit and cross-action in the District Court that a verdict was directed as stated.

It appears from the evidence in the case that M. J. McKelligon was the patentee of a 640-acre tract of land in El Paso county of which the undivided 150 acres in controversy was a part. It further appears that McKelligon and his wife, Katie M. McKelligon, conveyed the undivided land in controversy to P. E. Kern, the plaintiff in the District Court, taking therefor 15 notes aggregating \$4,500, of \$300 each, the first note of \$300 being due six months after date, and the other notes of \$300 each being due every four months thereafter until the purchase price should be paid.

The deed from McKelligon and wife to Kern contained this stipulation:

"But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property, premises and improvements until the above-described notes and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute."

This deed was properly executed by McKelligon and wife in compliance with the Texas law. Other conveyances were made by McKelligon and wife to Kern which are not material here.

After the purchase of this land, Kern became pecuniarily embarrassed, and made a deed to certain parties in trust of various properties for the benefit of his creditors; a part of such property being the land in controversy. Various transactions occurred in connection with these deeds which we consider wholly immaterial to the decision of the main question involved here.

Three of the notes given by Kern to McKelligon were purchased by William Coffin, who died without having collected them. C. O. Coffin, the executor and sole devisee of William Coffin, brought suit against P. E. Kern, M. W. Stanton, and Park W. Pitman, the latter one of the trustees to whom Kern had conveyed the land, all residents of El Paso county, Tex., and McKelligon and wife, nonresidents of the state, R. E. Beckham, receiver of the El Paso National Bank, alleged to be a resident of El Paso county, Tex., and Oppenheimer Bros. & Veith, a copartnership, residents of Kings county, N. Y., the State

Bank of Holton, Kan., and C. Hanrahan. The prayer of the suit was that Coffin, as executor, have judgment against Kern and McKelligon and wife for the amount of the three notes owned by him. He prayed for judgment foreclosing the lien upon the real estate in question for the satisfaction of the indebtedness claimed by him, and he prayed for a judgment and order directing a sale of such real estate so as to shut off and extinguish any lien that may be claimed by any holder of either of the other of said 15 promissory notes, and prayed for an order directing the sale of said real estate in order that all the claims held by any one or by the various defendants might be paid off and satisfied out of whatever might be realized through the sale of the property, and for judgment declaring that the holders of any of said notes which by their terms might not be due should, after the sale, look to the fund which might be realized by the same for their payment.

Citation issued in due form, and Kern was served and appeared, and a number of others made parties appeared. Some of them were served out of the state, and some question is raised as to the sufficiency of the service. We deem this immaterial from the fact that Kern was served, appeared, and defended.

The suit of Coffin against Kern came on to be tried, and the judgment of the court recited that the plaintiff appeared by his attorney and M. W. Stanton in person, and P. E. Kern and Park W. Pitman, and R. E. Beckham, receiver of the El Paso National Bank, and Oppenheimer Bros. & Veith, a copartnership, and C. Hanrahan, all appeared by their attorneys, and announced ready for trial. The judgment further recites that M. J. McKelligon, his wife, Kate McKelligon, and the State Bank of Holton, Kansas, "were all duly served with process (notice as provided in article 1230 of the Revised Statutes of Texas) to appear and answer in this case at this January term, 1896, of this court, and at the request of plaintiff judgment by default was rendered by the court as hereinafter shown against said defendants, notified as aforesaid, under the provisions of article 1230 of the Revised Statutes of the state of Texas. Neither party demanded a jury, and the matters of fact in issue were submitted to the court, and the court, after hearing the evidence, finds as follows." The court then found that Coffin was the holder of three of the notes referred to, and that he is entitled to recover against Kern \$1,228, being the amount due upon said three notes, including attorney's fees. It is then adjudged that Stanton is another holder of certain notes, and that Beckham, as receiver of the El Paso National Bank, is the holder of certain notes, but that these have heretofore been merged in a judgment, and that no interest in the real estate is claimed as to them, that Hanrahan is the holder of certain notes, and disposes of certain rights in the State National Bank of Holton, Kan.

It is then adjudged that the notes held by Coffin and others are secured by a lien upon the real estate described in the plaintiff's petition by virtue of the retention of the vendor's lien therein mentioned. It is also adjudged that Coffin, as executor, do have and recover of the defendant Kern the sum of \$1,228, with interest on the same from

date of the judgment at the rate of 8 per cent. per annum and all costs, etc., and that he have execution against Kern, and that the plaintiff recover the same amount from M. J. McKelligon to be satisfied through the sale of the real estate. Order of sale is then directed commanding the sheriff of El Paso county to seize and sell the real estate described under execution, and satisfy the judgment in favor of the plaintiff and others. Certain other matters contained in the judgment are immaterial. Execution was issued and the land in question sold, and the same was purchased by W. W. Turney, who subsequently conveyed it to Coffin. Turney, it is conceded, bought it for Coffin. After Coffin had thus acquired title to the land by conveyance to him by Turney, the purchaser at sheriff's sale, the present suit was brought by Kern.

[1] It is contended by counsel for plaintiff in error Kern that certain creditors of Kern were not made parties, and other questions are made as to the sufficiency of the service in the suit by Coffin against Kern. We think these contentions are without merit, because it is clear that Kern was served, appeared, and defended, and judgment was rendered against him. He cannot complain that other parties were not made defendants unless his rights are in some way affected, and we are wholly unable to see how they are.

[2] Kern's interest in the land in question, and his right and title thereto, were inferior always to the rights of the holders of the notes attached to which was the vendor's lien reserved by McKelligon at the time of the sale. Any rights which Kern had at any time were necessarily subordinate to those obtained by the holders of the notes accompanied by the vendor's lien; and this superior right in the holders of the notes was recognized and reduced to judgment, and declared by the judgment to exist as against Kern and the land in controversy. During the progress of the present case tender was made by Kern to Coffin, but this tender came too late, as the title to the land in question had already passed into Coffin. There can be no question whatever that Kern's right and title to the land in question was extinguished, and ended by the judgment of the court in the suit instituted by Coffin against Kern and others, and the sale made by the sheriff.

We think the court below properly directed the verdict against Kern and in favor of Coffin.

The judgment of the court below is affirmed.

PAINE v STANDARD PLUNGER ELEVATOR CO.

(Circuit Court of Appeals, Third Circuit. February 8, 1913.)

No. 1,636.

1. PRINCIPAL AND AGENT (§ 89*)—ACTION BY AGENT FOR COMMISSIONS—EVIDENCE CONSIDERED.

Findings of a referee to whom by agreement an action at law was referred under Pa. Act 1874 (P. L. 166), affirmed by the court, that plaintiff did not as agent make a contract for the furnishing and installation of machinery by defendant, so as to entitle him to a commission thereon under his contract of agency, *held* supported by the evidence.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216, 229-239; Dec. Dig. § 89.*]

2. APPEAL AND ERROR (§ 1017*)—REVIEW OF FINDINGS OF REFEREE.

The findings of a referee, whether the submission is by mere consent or made in conformity to statutory authority, are not reviewable by the court, unless there is such manifest error in the same as would justify a court in setting aside, under like circumstances, the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911, 3961, 3996-4005; Dec. Dig. § 1017.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

Action at law by Leonard G. Paine against the Standard Plunger Elevator Company. Judgment (192 Fed. 75) for defendant, and plaintiff brings error. Affirmed.

Henry Spalding and Joseph A. Slattery, both of Philadelphia, Pa., for plaintiff in error.

James E. Hood and John G. Johnson, both of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

GRAY, Circuit Judge. The plaintiff below, plaintiff in error, is a citizen of Pennsylvania, and the defendant below, defendant in error, is a New Jersey corporation engaged in the manufacture and sale of elevators, having its factory at Worcester, Mass., and its principal office in the city of New York. On September 24, 1902, plaintiff and defendant entered into a contract by which plaintiff became a sales agent of the defendant, a brief memorandum being signed, stating that the plaintiff was to receive a commission of 10 per cent. "on all gross sales." On November 24, 1902, the plaintiff, at the request of one Jones, manager of the defendant company, addressed a letter to the company, defining the terms of the agency. It was agreed that the plaintiff should "act as agent of the company in Philadelphia and vicinity, using his best efforts to secure work and also to give whatever time possible to construction work in general," to maintain a suitable office, with telephone, etc., free of charge to defendant. Plaintiff was to receive 10 per cent. commission on the face of all contracts secured in his territory, payable when the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracts were signed, and defendant was to advance to him, on account of commissions, the sum of \$5,000 per annum, to be deducted from plaintiff's commission when and if earned.

This contract, at the request of plaintiff, was modified in January, 1903, the advance or guaranty being raised to \$7,000 per year, so as to permit him to employ one Shafto as an assistant, "whom he considered a valuable man because of his acquaintance with architects and builders." A letter from Jones, manager of the defendant company, dated January 8, 1903, sets forth this modification in the contract and provides that the company "will allow you and your friend Shafto 10 per cent. commission on all sales made by you in Philadelphia, Washington, Baltimore, and such other territory as we may agree upon that you can properly handle. I will further guarantee to you the sum of \$7,000 per year, payable in equal monthly payments. You are to pay all expenses, and at the end of the year we are to deduct from your commission the \$7,000. The writer will see you within a short time, and we will determine what territory you will be able to handle." The important modification of the first contract is, that the commission is to be *on all sales made by plaintiff* in the territory assigned, instead of a commission "on the face of all contracts from my territory, payable when the contracts are signed."

On March 31, 1904, the defendant entered into two contracts for the erection and installation of its elevators in the Philadelphia and New York stores, respectively, of John Wanamaker. These two contracts aggregated the sum of \$1,067,107.

On October 16, 1908, suit was brought by the plaintiff in the court below, for 10 per cent. commission upon this amount, with interest from March 31, 1904. Commissions on other sales were also claimed in the same suit, but this appeal raises only the question of the right to recover on the Wanamaker contract. When the case was at issue, it was by agreement referred to a referee, under the act of Assembly of the state of Pennsylvania, of May 14, 1874 (P. L. 166), and its supplements (Act 1889 [P. L. 80]). Subsequent proceedings can be best stated in the language of the court below in its brief opinion overruling the exceptions to the report of the referee, and rendering judgment in favor of the defendant in accordance therewith:

"This controversy was referred by the parties under the Pennsylvania Act of 1874 and its supplements. The first report of the referee contained a careful and extended discussion of the evidence; but, for the reasons given in (C. C.) 186 Fed. 605, it seemed desirable to return the case for further proceedings—especially that the findings of fact and conclusions of law might be stated separately and specifically. This has now been done in the supplemental report, which leaves nothing to be desired in the qualities of clearness and precision. The parties submitted numerous requests for findings of fact—the plaintiff 96, and the defendant 14—and numerous requests also for conclusions of law, 39 on behalf of the plaintiff, and 15 on behalf of the defendant. These requests were all answered specifically, and the answers are clear and unambiguous. It would be superfluous to go again over a ground that has already been so carefully traversed, for the result would only be to repeat in different language what the referee has already said so well. To the first report the plaintiff filed 88 exceptions; and to the supplemental report he has filed 90, and the defendant has filed 11. They have all been considered, but I think they need not be discussed in detail.

It seems enough to say that the controversy depends almost wholly upon questions of fact, and that upon these questions I agree with the referee's findings. His first report discussed the evidence very fully, and should be read in connection with the specific findings contained in the supplemental report. In my opinion the following conclusions are satisfactorily established:

"1. The plaintiff did not make the Wanamaker sale. He did not originally discover the business or bring it to the defendant's attention; and, while he helped afterwards to conduct the negotiations to a successful conclusion, he was no more prominent or influential than were others, and his work cannot possibly be disentangled and credited with a controlling influence. No doubt, he expected to be paid something for his services, and he deserved some remuneration; but he has no legal right to the 10 per cent. for which this suit is brought.

* * * * *

"The two reports of the referee are adopted as the opinion of the court. All the exceptions of both parties thereto are hereby overruled; and, in accordance with the recommendation of the learned referee, it is now ordered that the clerk enter judgment in favor of the defendant."

To this judgment a writ of error has been sued out by the plaintiff. The assignments of error, 33 in number, deal with the findings of fact of the referee, his refusal to find as requested by plaintiff, and his conclusions of law and the exceptions thereto, overruled by the court below. As a number of them are merely repetitions in different form of the substance of a single exception, it will be unnecessary to consider them in detail.

The gravamen of plaintiff's case, as presented in these assignments of error and in the record accompanying the same, may be stated in his contentions that, after his first employment, in September, 1902, he was instructed by Jones (manager of defendant company), that in any difficult or important negotiations in the making of sales, he should notify Jones, and that Jones would at any time help and assist him, and if they, working together, made a sale, the credit would go to plaintiff, and he would be paid commission on such sale. That a certain letter from plaintiff, dated March 12, 1903, inclosing a newspaper clipping to that effect, gave to the defendant its first definite information that John Wanamaker was about to go forward with the project of building his new stores in Philadelphia and New York, and the possibility of securing contracts for elevators to be installed in said stores. That thereafter, during the negotiations preceding the signing of contracts between the defendant and John Wanamaker, the plaintiff was active, as a go-between between the parties, in introducing the architects and engineers who had charge of Wanamaker's work, to the officers of the defendant, and that the correspondence between the parties was largely conducted through the plaintiff's office in Philadelphia; in other words, that the contracts were secured through his initiative, in first suggesting to defendant the idea and possibility of obtaining them, followed up by his active personal services in the negotiations which followed. The evidence adduced by the plaintiff in support of these main contentions, raises various subsidiary questions of fact that were submitted to the referee for determination in the light of all the testimony.

These contentions of the plaintiff were controverted by the defendant and evidence was adduced tending to show that defendant had never given to Jones the instruction and promise that if they were working together to make a sale, the credit would go to plaintiff, and that he would be paid a commission on such sale. Evidence was also adduced by defendant, tending to show that plaintiff's letter of March 12, 1903, was not the first information conveyed to defendant that Wanamaker was about to commence the erection of stores in Philadelphia and New York; that on the contrary, it was a matter of general information throughout the trade long prior to that date, and that elevator builders throughout the country, including the defendant, were on the lookout for opportunity to secure elevator contracts on such buildings, and that the specific information conveyed by the newspaper clipping in the letter of March 12, 1903, was obtained by one of their own directors prior to that date, who opened the subject with one of the Wanamaker firm, and solicited the contract for the defendant company. Defendant also contended, and adduced evidence tending to show, that the services performed by plaintiff, after negotiations for the contracts were commenced, were such as he was expected to perform through his office maintained by defendant company in Philadelphia, and in consideration of the salary or guaranteed commission of \$7,000, given him by the defendant; that the office maintained by plaintiff out of his salary or guaranteed commission was practically defendant's office in Philadelphia, and that it naturally and properly availed itself of the convenience offered thereby for conducting its correspondence with the Wanamaker firm. Further, it finally contended that, though the contracts were signed March 31, 1904, when commissions, if any, would have been due to the plaintiff, and that, though he continued as agent until July, 1908, a period of more than four years, during which time his accounts as to commissions on one or more occasions were taken up with the officers of the defendant company and adjusted between them, no suggestion or claim of commission on account of these Wanamaker contracts was made by the plaintiff; that this commission was only brought up by him in July, 1908, when he was discharged, and the final adjustment was being made of his account with the defendant company.

In explanation of this important and significant fact, plaintiff adduced his own testimony and that of Jones, the former manager of the defendant company, but at that time out of its employ, as to a conversation alleged to have occurred between the plaintiff and the president of the company soon after the signing of the contracts, in March, 1904. This conversation, as variously stated, was to the effect that the plaintiff asked the president of the defendant company what he, the plaintiff, was to get out of the Wanamaker contract, and that the reply was made that they could not tell at that time, because the contract was a close one, and it could not with certainty be predicted how it would come out, and that the question of what he should receive should be deferred, with the hope that he might be treated liberally. Such a conversation was positively denied by the testimony of Woodin, the president. There was also evidence tending to show

that a letter had some time thereafter been addressed by the plaintiff to the president, Woodin, in which he admitted that he was not entitled to and did not claim a commission on the Wanamaker contracts. That letter, Woodin swore to having received, that he had searched for it, others had searched for it, but they were unable to find it. There was, however, testimony tending to show that such an admission had been made by the plaintiff.

[1] This and many other subsidiary questions of fact bearing on one side or the other of the controversy, between the parties, were all submitted to and passed upon by the referee, who, in a careful report and a subsequent one supplementary thereto, reviewed all the evidence and made specific findings of fact and law thereon. All these findings, as we have seen, have been passed upon by the court below and approved. We have carefully examined all the evidence contained in the record in this case, bearing upon the disputed questions of fact, and cannot find that in any of them the referee or the court was in error. At least, we can say we find no such gross error in any of them as to justify this court in substituting its judgment for that of the referee and the court below. Especially have we examined the evidence in the record bearing upon the finding of the referee and of the court below, that the letter from plaintiff of March 12, 1903, did not convey to the defendant the first information in regard to the proposed erection of the Wanamaker buildings in Philadelphia and New York. The testimony on this question was carefully weighed by the referee and the conclusion arrived at by him in favor of the defendant seems to us to have been in accord with the preponderating weight of that testimony.

While not acceding to the proposition that the case absolutely turns on the question, whether or not plaintiff had given the first information in regard to the intention of Wanamaker to erect new stores in Philadelphia and New York, and the possibility of securing contracts for the elevators therein, we are of opinion that the finding of the fact that such information was not first given by the plaintiff, taken in connection with all the other testimony in the case, justified the general conclusion that the plaintiff did not make the sale of the defendant's elevators, or so contribute thereto as to entitle him to the commission of 10 per cent. under his contract of January 8, 1903.

The conclusions of law made by the referee and affirmed by the court were such as naturally arose from the findings of fact. The questions were mixed questions of law and fact, and were correctly passed upon by the referee.

[2] The general rule applicable to the findings of a referee, whether the submission is by the mere consent of the parties or made in conformity to such statutory authority as exists in this case, is well settled; and such rulings are not reviewable by the court to which they are returned, unless there is such manifest error in the same as would justify a court in setting aside, under like circumstances, the verdict of a jury. The reviewing court will not weigh the evidence in support of the findings, but will only consider whether there is any substantial evidence to support the same. *U. S. Projectile Co. v.*

Sharpless (C. C.) 115 Fed. 996; Campbell v. Equitable Life Assur. Soc. (C. C.) 130 Fed. 786; Boatman's Bank v. Trower Bros. Co., 181 Fed. 804, 104 C. C. A. 314; United States v. Ramsay (C. C.) 158 Fed. 488; Kilduff v. Roebbling (C. C.) 150 Fed. 240; Ansley v. City of Scranton, 218 Pa. 131, 67 Atl. 51.

Whatever might have been recovered by the plaintiff on a quantum meruit, for services undoubtedly meritorious, from what we have already said, it is hardly necessary to add that this court can find no ground upon which it would feel justified in disturbing in this suit the judgment below. The same is therefore affirmed.

MOSS et al. v. CITY OF PITTSBURGH.

(Circuit Court of Appeals, Third Circuit. January 15, 1913. Rehearing Denied March 6, 1913.)

No. 1,649.

MUNICIPAL CORPORATIONS (§ 225*)—PROPERTY—CONDITIONS SUBSEQUENT IN DEED—UNAUTHORIZED ACTS OF OFFICERS.

The city of Pittsburgh, which, under the law of Pennsylvania governing cities of the second class (Act March 7, 1901; P. L. 20), can lease or sell and convey real estate only by action of the mayor and councils, cannot be deprived of the title to valuable property donated to it for market purposes, on condition that title should revert if it was used for any other purpose, by the unauthorized action of administrative officers in permitting a part of the property to be used in certain seasons as a playground, and in paying a part of the expense of maintaining such playground from general appropriations made by councils for such purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 626-641, 643; Dec. Dig. § 225.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by Frank H. Moss and others against the City of Pittsburgh. Judgment for defendant, and plaintiffs bring error. Affirmed.

For opinion below, see 178 Fed. 605.

Asa Leroy Carter, of New York City, for plaintiffs in error.

Charles H. Burr, of Philadelphia, Pa., and Charles A. O'Brien, C. Elmer Bown, and Lee C. Beatty, all of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This is an action of ejectment brought by certain heirs of James Adams to recover possession of real estate from the city of Pittsburgh. Their ancestor conveyed the land in fee nearly 80 years ago to the Northern Liberties of Pittsburgh, a borough that is now united to the city; but the deed contains a condi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion subsequent, and the plaintiffs aver that the city has recently broken the condition:

"Provided always nevertheless, and it is expressly covenanted and agreed by the said parties of the second part [the borough] for themselves and their successors to and with the said parties of the first part [James Adams and his wife], their heirs, executors and administrators, and it is hereby declared to be one of the express provisions and conditions of this grant that they, the said parties of the second part, and their successors, shall and will hold, occupy, use, possess and enjoy the said described lots and pieces of ground hereby granted or intended so to be, with the appurtenances, as a market place and for the purposes of a public market for the use of the citizens of the borough aforesaid, and the same is hereby appropriated solely and exclusively for that purpose, and for no other purpose whatever: Provided, that the said parties of the second part are hereby permitted to dig and excavate cellars under and for the use of stalls in the said market, and build, put up and erect, over part of the market house hereinafter mentioned to be built and erected on the lots aforesaid, a suitable and convenient council chamber for the meetings and use of the burgess and council aforesaid, and for no other purpose whatever, the said chamber to be constructed so as not to obstruct the free use and enjoyment of the market place aforesaid; and it is hereby covenanted and agreed by the said parties of the second part, for themselves and their successors, to and with the said parties of the first part, their heirs, executors and administrators, and it is hereby expressly declared to be a further provision and condition of this grant, that the said parties of the second part will and shall immediately build and erect a suitable and convenient market house on the lots aforesaid, to be used as a public market house, as aforesaid, and that they, the said parties of the second part, or their successors, shall and will not bargain, sell, convey, lease, dispose of, or appropriate any of the said described lots hereby granted or any part thereof to or for any other purpose than that of a public market and the purposes specified, as aforesaid; and it is hereby covenanted and agreed, and it is hereby expressly declared to be another condition of this grant, that if the said parties of the second part or their successors shall at any time hereafter bargain, sell, convey, lease, dispose of or appropriate the said described lots hereby granted or any part thereof, or the buildings thereon erected or intended so to be, to any person whatsoever or for any other purpose than that specified, as aforesaid, then and in such event this indenture and the estate hereby granted shall cease and become null and void and of no effect, and the said estate and lots and pieces of ground hereby granted, with the appurtenances, shall instantly revert to the donor and his heirs. * * *

The trial ended in a compulsory nonsuit, and the only question that needs attention now is whether the learned judge should have set the nonsuit aside. The following facts are undisputed: The land in controversy is a tract 65 feet wide by 200 feet deep, and extends north and south from Penn avenue to Liberty street. A public thoroughfare, Spring alley, which parallels the two streets just mentioned, has always divided it nearly in half. A market house stands on the part fronting Penn avenue, but the part fronting Liberty street has always been vacant and unimproved, and its only use in connection with the market has been to afford convenient standing room for the horses and wagons of persons in attendance. In the years 1907, 1908, 1909, 1910, the director of public works permitted the Pittsburgh Playgrounds Association, a private corporation not connected with the city, to use the open square between Spring alley and Liberty street as a childrens' playground; and the expenses of the association for equipping the square, employing a watchman, and providing the services of

two or three teachers were paid out of the treasury of the city, with the sanction of the comptroller. Moreover, certain preliminary work in preparing the square for a playground was ordered by the director, was performed by employes of the city, and was also paid for out of the treasury. These acts and payments are said to furnish sufficient evidence to justify a jury in finding that the city had appropriated part of the tract to another purpose than a public market; the result being, so the plaintiffs argue, that the title has reverted to the heirs of James Adams. The use of the market house was not interfered with, and the playground was given up in 1910.

After a thorough examination of the record, we regard the evidence as insufficient. The plaintiffs' case is well enough as far as it goes, but it falls short in a material matter. There is no proof that the councils of the city authorized the acts referred to, either directly or by delegation of power; and we think it cannot be successfully contended that the unauthorized conduct of administrative officers can operate to divest the city's title to valuable property. No ordinance directed that the use of the property should be changed, and, so far as appears, no money was specifically appropriated for the purposes referred to in the preceding paragraph. All that councils did was this: When appropriations were made for the respective years in question, each ordinance contained a general item setting aside in advance, as required by law, a lump sum for recreation purposes; but there was no appropriation to the Playgrounds Association, even if the Pennsylvania Constitution would have allowed it, and, except in 1907, there was no specific designation of any ground. The ordinance for 1907 appropriated \$36,000 for "recreation grounds, including all balances from prior years, as per following schedule." In this schedule item 9 was:

"For maintenance of small playgrounds in various sections of the city, including West End, Hazelwood, and Soho Playgrounds opened in 1906, \$5,200."

But the grounds named are in a different quarter of the city, and it did not appear where these "small playgrounds" were situated. The ordinance for 1908 merely appropriated \$33,100 for "recreation grounds"; the ordinance for 1909 appropriated an amount not specified in this record for "recreation purposes"; and the ordinance for 1910 appropriated \$65,610 for "recreation grounds." There is nothing in evidence to show that councils ever intended that any part of these appropriations should go to the square in question, and nothing to show that their attention was ever directed to the fact that some of the city's money was being spent for this particular object. No doubt the director of public works and the city comptroller lent their authority to the payment of money out of these several items for the maintenance of the square as a playground; but we need not point out that their acts can impose no estoppel upon councils, at least in the absence of evidence that would bring home to the municipal legislature notice of what these officers were doing. For all that appears, councils may have scrupulously refrained from including this square among the objects to be benefited by the appropriations in question; certainly it is nowhere shown affirmatively that such inclusion was intended.

Nevertheless, if, as is now argued, the work done by order of the director and the payments made under the sanction of the city comptroller are sufficient to burden the city with every inference that can possibly be drawn from these acts, the result may be that a mere mistake, or even the willful misconduct, of these subordinate officials has committed the city to the very position that councils had carefully tried to avoid.

It was not within the statutory or the accustomed powers of such an official as the comptroller or the director of public works to transform a public market into a playground. The Pennsylvania act of 1901 (P. L. 20), regulating government in cities of the second class (to which Pittsburgh belongs), will be searched in vain for such power, express or implied. On the contrary, the power "to purchase and own grounds for, and to erect and establish, market houses and market places" is expressly given to councils, and is to be exercised by ordinance (article 19, § 3, par. 28); and if the previous "laws relating to parks and condemnation of land for park purposes" (which article 4, § 1, declares shall "remain in full force") are believed to remove this subject from the control of councils, to whom it would ordinarily be intrusted, we can only say that such laws were not referred to at the trial and have not been quoted at this hearing. Apparently, article 19, in sections 2 and 3, shows clearly where the power to alienate the city's property is lodged, and how it is to be exercised. The power—

"To purchase and hold real and personal property for the use of the city;
"To lease and sell and convey any real or personal property owned by the city, and to make such order respecting the same as may be conducive to the interests of the city"

—is given to the mayor and councils, and (as might be antecedently supposed) is to be exercised by ordinance. No doubt an executive officer in charge of a department represents a city for many purposes, and his acts may make the city liable; but, in order that such a result may follow, he must be acting within the scope, or at least within the apparent scope, of his office. In the present case councils alone could sell, or lease, or appropriate, or dispose of, the property in question. They might take action either directly or by a proper delegation of power; but no administrative officer could bind the city in this regard unless his act had the authority of councils behind it. Of course, councils might ratify an official's unauthorized act; but the ratification must proceed from councils, and not from some other executive officer.

It is, perhaps, worth noting, also, that section 12 of the act of 1874 (P. L. 234) refers to cities generally, and expressly enacts that no part of their property shall be sold or disposed of in any manner by any official, agent, or employé without the consent of councils. It is not unlikely that this provision may be still in force; for the repealing clause of the act of 1901 (article 20, § 4) does not refer to it specifically, but only repeals generally such laws as may be inconsistent with, or may be supplied by, the later act. If section 12 be in force, it is evidently of much importance.

It should also be borne in mind that, since the plaintiffs are seeking to enforce a forfeiture, they must offer clear evidence before they can succeed. This they were unable to do, and we do not feel bound to help them out, either by supposition or by presumption.

The judgment is affirmed.

LINDSEY v. PASCO POWER & WATER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1913.)

No. 2,133.

1. CORPORATIONS (§ 308*)—OFFICERS—RIGHT TO COMPENSATION.

A promoter of a corporation, who was also a stockholder and director, cannot recover from the corporation for personal services rendered to it, in the absence of any contract therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 189*)—STOCKHOLDERS—CLAIMS AGAINST CORPORATION—SET-OFF.

An assessment made on the stock of a corporation, for which the stockholders are not personally liable, cannot be set off by the corporation against a debt due from it to a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

3. CORPORATIONS (§ 99*)—ISSUE OF STOCK—CONSIDERATION.

The ownership of stock by a stockholder, to whom it was issued by the corporation in part consideration for a loan made to it, cannot be questioned for want of consideration by a third person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; C. H. Hanford, Judge.

Suit in equity by F. T. Blunck against the Pasco Power & Water Company and others; James Lindsey, intervener. From a decree against the intervener, he appeals. Reversed.

James A. Haight, of Seattle, Wash., and Martin L. Pipes, of Portland, Or., for appellant.

Bausman & Kelleher, of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The question in this case is whether the intervener is entitled to judgment against the Pasco Power & Water Company (the transfer to its successor, the Burbank Power & Water Company, being subject to that contingency) for three certain items of charge, to wit: \$4,822.67, the alleged balance due on two certain loans alleged to have been made by the intervener to a certain corporation called the Continental Construction Company; \$2,250, alleged to have been due by that company to the intervener for nine months' salary at \$250 a month for his personal services; and \$2,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

812.50, the alleged value of 450 shares of the stock of a certain other corporation called the Snake River Irrigation Company.

The record shows that in or about the year 1904 the intervener and one Frame entered into a scheme for the purpose of appropriating a portion of the waters of Snake river, and applying them to the irrigation of arid land in the vicinity of its junction with the Columbia river. It was an extensive scheme, and would necessarily require a large amount of money to carry it out successfully, very little of which either of the promoters appears to have had.

The first thing that seems to have been done in pursuance of the project was the procurement of an individual named Terry to file a notice of appropriation of the desired waters, shortly after which Terry conveyed whatever right accrued to him under such notice of appropriation to Frame. The next thing that appears to have been done was the incorporation of the construction company mentioned, the capital stock of which was fixed at \$1,500,000, divided into 15,000 shares of the par value of \$100 each, one share of which was issued to Frame, one to James P. Stapleton, the attorney who prepared the organization papers, and one to E. S. Jackson, none of whom paid any money for his stock. The remaining 14,997 shares were subscribed for by the intervener, Lindsey, who paid no money therefor, but, by agreement between Frame and himself, the right to the water secured by the appropriation, whatever it was, was to be conveyed to the construction company by Frame in payment for the stock issued to them. The next step in the proceeding, and as a part of the scheme, was the incorporation of the Snake River Irrigation Company and the procurement by Frame of certain contracts with certain locators of certain desert lands to which, in part, it was proposed to supply the appropriated waters. The irrigation company also entered into a contract with the Northern Pacific Railroad Company, under which certain of its lands covered thereby were contracted to be sold by Frame for the irrigation company and similarly supplied, and the moneys received under such contracts were paid in by him to it, which moneys seem to have been the only funds ever put into the enterprise by Frame. The record shows that Lindsey did, however, advance to the construction company \$5,500 in two sums, both of which were paid by him into a bank in Portland, Or., to its credit, \$649.19 of which, however, he subsequently drew out for his own use, charging himself therewith on the books of the company. As an inducement to Lindsey to make those loans and as part consideration therefor, there were issued to him 450 shares of the stock of the irrigation company.

[1] The record further shows that for nine months Lindsey had personal charge of the construction of the irrigating works carried on by the corporations, which will and should be regarded as one for the purposes of this case; but neither of the corporations engaged in the scheme, of both of which Lindsey was a director, ever authorized the payment to him of any salary or other compensation; nor does it appear that at any time during his connection with the project did he ever expect to receive any salary for his personal serv-

ices, but, on the contrary, there are a number of circumstances disclosed by the evidence tending to show that his services, as well as those of Frame in selling the lands referred to, were understood by all parties then in interest to be without any other compensation than the benefit that they might derive by reason of their interest in the undertaking. Only after it failed in the hands of the promoters, and the two corporations procured to be organized by them became insolvent, and all of their property rights had passed to the Pasco Power & Water Company, did Lindsey assert any claim for his personal services rendered in behalf of the building of the irrigation works. Under such circumstances we regard it as clear that his claim for salary is without merit, and nothing further need be said about it. See *Montana-Tonapah Mining Co. v. Dunlap*, 196 Fed. 612, 116 C. C. A. 286, decided by this court October term, 1912, and cases there cited.

The record shows, and it is undisputed, that both the construction company and the irrigation company became insolvent and wholly unable to carry on the undertaking; the indebtedness being estimated at about \$50,000. In that condition of affairs, at a meeting of the directors of the irrigation company, it was proposed to levy an assessment on the stock. The good faith of that proposal is questioned in the evidence, as well as in the brief of the appellant; but that matter is unimportant here. The motion to levy such assessment for the purpose of paying the debts was rejected, and instead the proposition that had theretofore been made by one Parry to take over the entire property of both companies, in consideration of the payment by the vendee of all of the valid indebtedness of both companies, was adopted and carried into effect; the conveyance, by Parry's direction, being made to the appellant Pasco Power & Water Company, which he was instrumental in bringing into existence, and which, according to the record, subsequently paid all of the indebtedness of both companies, except the claim of the appellant, Lindsey.

[2] The refusal to pay the amount remaining due for the advances made by him to the construction company is based mainly upon the fact that a year or more before the conveyance to the Pasco Company an assessment was levied upon the stock of the construction company, the amount of which upon the stock thereof then held by Lindsey amounted to \$10,800, for the nonpayment of which by him all of his said stock was sold by the construction company, from all of which it is contended by the appellees that the Pasco Company is entitled to offset the amount of his said assessment against the amount due him by the construction company for his advances to it.

A conclusive answer to the contention is that the levy of the assessment was upon the stock, which, under the law (if the assessment was valid), was bound for it, and which, as has been said was undertaken to be sold by the company in payment of the assessment. Manifestly, the assessment imposed no personal liability upon Lindsey; and therefore he was under no personal obligation to pay it. It is therefore unnecessary to consider the claim made by the appellant that the evidence shows that the assessment, as well as the sale of his stock in the construction company, was not only unauthorized, but

fraudulent and void; nor is it necessary to consider the contention on his part that the appellees are in no position to avail themselves of any rights the construction company may have had in respect to that assessment.

There remains to consider only the stock held by the appellant, Lindsey, in the irrigation company, to wit, 450 shares.

[3] It is contended on the part of the appellees, first, that Lindsey got the stock without consideration; and, second, that it was of no value.

To the first objection it is sufficient to say that it appears from the evidence that it was issued to him as a part consideration for the money he loaned to the construction company; and it is not for the appellees to question the sufficiency of the consideration.

The answer to the suggestion that the stock was without any value is that the appellee Pasco Power & Water Company, according to the evidence, agreed to pay, and did pay, about \$50,000 for the property in which the irrigation company was at least a part owner; and the evidence further shows that a portion of the stock of the irrigation company was actually sold to Parry for \$6.25 per share—its par value being \$100. We think this fact, no contradiction of which we find in the record, sufficient to warrant the allowance of a like sum per share to the appellant for his 450 shares.

It results from what has been said that the judgment dismissing the action must be and is reversed, and the cause remanded to the court below, with directions to render judgment for the appellant as hereinabove indicated.

MILLS NOVELTY CO. v. DUPOUY.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,905.

PRINCIPAL AND AGENT (§ 77*)—FINES IMPOSED ON AGENT FOR VIOLATION OF LAW—RECOVERY FROM PRINCIPAL.

Defendant shipped a number of coin-operating machines to Venezuela, consigned to itself in care of plaintiff, who was a commission merchant in that country. The invoices were sent to plaintiff, and by him presented to the customs office, where the machines were refused admission as gambling devices, and the case referred to the fiscal court, by which they were confiscated, and the duty and a fine adjudged against plaintiff, who paid the same and brought suit in this country to recover the amount from defendant. *Held*, that on the facts stated, in the absence of any contract by defendant to reimburse plaintiff for expenditures made in the matter, he was not entitled to recover, since defendant, not being within the country, could not have been subjected to personal liability on account of the importation, and to permit a recovery on account of fines imposed on plaintiff for a violation of law would be contrary to public policy.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 77.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Action at law by Adolpho Dupouy, trading as A. Dupouy & Co., against the Mills Novelty Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error, Adolpho Dupouy, as plaintiff below, sued the Mills Novelty Company, as defendant, and recovered judgment (at law) for moneys expended by the plaintiff, which he alleges were incurred for fines imposed upon him, through a prosecution by the Venezuela government, for transactions in the business and at the instance of the defendant; and reversal of such judgment is sought under this writ, upon various assignments of error. The issues were submitted for trial by the court, on waiver of a jury, and the facts involved were stipulated in writing, except that a deposition of the plaintiff was received in evidence over the defendant's objections. As the trial court made "special findings of fact," and error is assigned only for conclusions of law, either made or refused, the facts so found present the reviewable issue of law. In substance the findings of fact are:

(1) The plaintiff is a citizen of Venezuela and during the year 1904 was conducting a business of commission merchant at Caracas and at La Guaira, Venezuela, and the Mills Novelty Company, defendant, was and is a corporation organized under the laws of Illinois, "conducting a business for the purpose of manufacturing and selling various coin-operating devices."

(2) The defendant, on or about February 3, 1904, "shipped 20 boxes of coin-operating machines to Venezuela under bills of lading addressed as follows: 'Established in 1890. Mills Novelty Company, Makers of the Original and Genuine Mills Coin Operating Machines, 11-23 South Jefferson Street. Telephone No. 2017 Monroe, Chicago, U. S. A. February 3, 1904. Consigned to the Mills Novelty Company, Caracas, Venezuela. Shipped to the Mills Novelty Company, consigned care of Messrs. A. Dupouy & Company, Commission Merchants, La Guaira, Venezuela'"—and all of the machines were shipped under similar bills of lading.

(3) On or about February 22, 1904, "the plaintiff received invoices for the same machines, with the same superscription as was contained on the bills of lading hereinabove set forth. These invoices were presented to the customs officials at La Guaira," and contained the following statements typewritten thereon: "Freight to New York at our expense, shipped via M. C., consigned to Blue Line, New York, care of Red D. Line Steamship Company, New York, 28 Frank Street. The above-mentioned goods are property of the Mills Novelty Company, and are consigned only to the above-indicated parties. Upon receipt of goods please accept same and return copy of this invoice immediately."

(4) "The custom house officials of the Venezuela government declared that these machines were improperly invoiced, because they came invoiced as automatic selling machines, and that they were roulette, or machines of games of chance, or gambling machines, and because they were roulettes, or gambling machines, the customs officials declared them as falling under the penalty of seizure and confiscation, and passed the case to the fiscal court. That court found against Dupouy Co., the plaintiff herein, and in the sentence declared the goods confiscated, and adjudged that Dupouy pay the duty fixed by law and an additional amount equal thereto, which the law adjudged to employees of the government discovering such matter, and in addition the costs of the process. This judgment was appealed by Dupouy to the court of last resort, and the judgment as against Dupouy and as against the goods was affirmed. Dupouy, by virtue of said judgment was fined 5,618.75 bolivares, the sum equal to the duty, and the costs, which resulted in customs court, were in addition 1,171.33 bolivares."

(5) The plaintiff "employed two attorneys to defend him in actions brought against him by the Venezuelan government" (as named) "and paid said attorneys for their services the sum of 1,000 bolivares" and the plaintiff "was

compelled to pay an additional 5,618.75 bolivares for custom dues and some 44 additional bolivares for manifest and appraisers' fee."

(6) "The plaintiff received 2,900 bolivares from a man by the name of Edwards, who was an agent of the Mills Novelty Company, and A. Dupouy applied this 2,900 bolivares, without the consent of Edwards or the Mills Novelty Company, on his claim against the Mills Novelty Company, so that the principal sum which the plaintiff had expended, after making all deductions, was the sum of 11,190.83 bolivares."

(7) "All of said sums of money were paid by the plaintiff on or about the 21st day of May, 1904."

(8) At the date of such payment "the value of a bolivar in American money was 19.33 cents."

(9) "The legal rate of interest as allowed by law at Venezuela prevailing at that time and ever since then is 8 per cent. per annum."

(10) "Repeated demands have been made by the plaintiff upon the defendant," but no payment made, except the above-mentioned sum of 2,900 bolivares.

(11) "The defendant never requested or authorized the plaintiff to pay any of said sum, or to contract any obligation for it."

(12) "The defendant shipped these goods originally under bills of lading correctly specifying the contents of the boxes, but that the agent of the express company consulted with the representative of the Venezuelan government in New York, and the representative of the Venezuelan government advised how the goods should be shipped, and they were shipped in accordance with such advice."

(13) "A man by the name of J. Edwards accompanied the shipment of said goods to Venezuela on behalf of the defendant."

(14) The amount so paid out by the plaintiff, after deducting the 2,900 bolivares received from Edwards, was 11,190.83 bolivares, equal to \$2,151.99, American money.

(15) "All of said sums of money that were paid out by the plaintiff in the above matters he was compelled to pay because he was acting on behalf of the defendant."

(16) Interest on the sum so paid at 8 per cent. from the date of payment amounts to \$1,347, making a total of principal and interest of \$3,498.99.

The conclusions of law thereupon are thus stated: "The court concludes from the foregoing findings of fact that the plaintiff was acting as agent for the defendant in each and every one of said transactions, that the plaintiff paid all of said sums as agent for the defendant, and is entitled to receive the sum from the defendant, together with interest thereupon at 8 per cent. per annum from May 21, 1904, to March 19, 1912; wherefore judgment will be entered by the clerk in favor of the plaintiff and against the defendant for \$3,498.99."

The defendant requested an entry of a conclusion of law that the plaintiff is not entitled to recover, and a further conclusion that the plaintiff is not entitled to recover the amount paid for attorney's fees, nor for interest as allowed, and filed exceptions both to the conclusion as entered and to the denial of its request. Judgment was entered in conformity with the above-mentioned conclusion of law.

Francis A. Harper, of Chicago, Ill. (Charles S. Williams, of counsel), for plaintiff in error.

Herbert Friedman, Sigmund Zeisler, and Leonard B. Zeisler, all of Chicago, Ill., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). Adolpho Dupouy, a citizen and resident of Venezuela, as plaintiff in the suit below, recovered judgment against the Mills Novelty Company, an Illinois company, as defendant, and the parties are referred to in this

opinion as plaintiff and defendant, respectively, in conformity with their arrangement below. The issues were submitted for trial by the court, without a jury, and special findings of fact were filed, with no assignment of error thereupon; but the issues of law are well preserved for the review sought by the defendant's writ of error.

The facts thus settled—mainly, if not entirely, embodied in stipulations of fact between the parties—may be summarized as follows: In February, 1904, the defendant was manufacturing at Chicago machines designated as "coin-operating machines," and made a shipment of 20 boxes of these machines, consigned to the defendant, at Caracas, Venezuela, in care of the plaintiff, addressed as "A. Dupouy & Company, Commission Merchants, La Guaira, Venezuela," under bills of lading and invoices which properly described the goods as above mentioned. On arrival of the consignment in New York, a person mentioned as "the agent of the express company" consulted with "the representative of the Venezuelan government in New York," who "advised how the goods should be shipped," and "they were shipped in accordance with such advice." The plaintiff received the invoices, which were forwarded by the defendant (with correct description as above mentioned), at La Guaira, February 22d, and presented them to "the customs officials." But the officials "of the Venezuelan government declared that these machines were improperly invoiced, because they came invoiced as automatic selling machines, and that they were roulette, or machines of games of chance, or gambling machines, and because they were roulettes, or gambling machines, the customs officials declared them as falling under the penalty of seizure and confiscation, and passed the case to the fiscal court. That court found against Dupouy & Co., the plaintiff herein, and in the sentence declared the goods confiscated, and adjudged that Dupouy pay the duty fixed by law and an additional amount equal thereto, which the law adjudged to employés of the government discovering such matter, and in addition the costs of the process. This judgment was appealed by Dupouy to the court of last resort, and the judgment as against Dupouy and as against the goods was affirmed. Dupouy, by virtue of said judgment was fined 5,618.75 bolivares, the sum equal to the duty, and the costs, which resulted in customs court, were in addition 1,171.33 bolivares." On May 21, 1904, the plaintiff paid the above-mentioned judgment; and he paid further sums (stated in the findings) for attorney's services and other fees. He had received "2,900 bolivares" from one "Edwards, who was an agent of the" defendant, and "without consent" thereof applied that amount "on his claim against" the defendant, but otherwise had received no indemnity from the defendant, although he had frequently demanded reimbursement. "The defendant never requested or authorized the plaintiff to pay any of said sums or to contract any obligation for it." One "J. Edwards accompanied the shipment of goods to Venezuela on behalf of the defendant." The "net amount paid out by the plaintiff" is stated to be "\$2,151.99, American money," and interest is computed at 8 per cent. from May 21, 1904, making the total claim (as allowed in the judgment) \$3,498.99.

It is further stated, under the heading of "findings of fact" (No. 15), "that all the said sums of money that were paid out by the plain-

tiff in the above matters he was compelled to pay because he was acting on behalf of the defendant." This recital, however, plainly intends and amounts only to a deduction of law from the facts stated, and cannot be considered as a finding of ultimate fact, nor otherwise have effect for the purposes of review. Not only is it expressly found by the trial court, as above stated, that the defendant neither requested nor authorized such expenditures, nor the contracting of any obligation therefor, but there is no pretense of evidence that the defendant took part in, or had in contemplation, either any change at New York of the form of consignment or any controversy with the Venezuela customs officials over entry of the goods in that country.

The conclusion of law and judgment accordingly against the defendant (plaintiff in error) rest entirely on the foregoing state of facts, as both stipulated for submission of the issues below and stated in the findings of fact. In reference to the transactions, both in New York and in Venezuela, on which liability appears to be predicated, the record is either silent or indefinite upon matters which must be inferred as entering therein. Thus, while it is stated, in effect, that the defendant shipped the goods "correctly specifying the contents of the boxes," but that the "agent of the express company" at New York interposed therein, to ship them in conformity with advice obtained by him from "the representative of the Venezuelan government," it is neither stated how such intervention came about, nor what change was made thereby. The terms of the findings do not appear to raise any inference of defendant's authorization or knowledge of such intervention, if material in any view of the issues; but support may be assumed for the contention that the goods were shipped from New York "as automatic selling machines," through their mention in the fourth finding "as declared by the customs officials to be improperly invoiced under that name." Upon arrival of the consignment in Venezuela, the course of procedure is stated (fourth finding) as recited in the foregoing summary, but neither of these circumstances appear: (a) The provision of Venezuelan law alleged to be violated by the entry; (b) wherefore and in what manner the plaintiff intervened to incur the fines and expenses adjudged against him (for which recovery is sought against the defendant), aside from the confiscation of the goods. Furthermore, while it is stated (thirteenth finding) that one "J. Edwards accompanied the shipment of said goods to Venezuela in behalf of the defendant," it is neither found nor indicated that Edwards participated in any manner in the above-mentioned transactions at New York, or in the entry of the goods or controversy with the Venezuelan officials.

The issue of law, therefore, is narrowed, as we believe, to this inquiry: Do the ultimate facts so established of consignment and entry of the defendant's goods—namely, that they were shipped by and consigned to the defendant in care of the plaintiff, under notice to the plaintiff, for entry at a Venezuelan port, and that they were thus entered in violation (for any cause) of the law of that country, resulting in confiscation of the goods—create liability in personam against the defendant to reimburse the plaintiff for the amounts of fine and expenses incurred by the plaintiff in such unlawful transaction? Undoubtedly, violation of Venezuelan law in the entry of the goods must

be presumed from the recitals, and we believe it must further be presumed therefrom that entry of the goods was thus prohibited as "gambling machines" or devices, so that the issue of law does not require solution of the proposition urged in support of the judgment, that the fines and expenses "fell upon Dupouy because the invoices improperly and incorrectly described the goods." Whatever may have been the transactions of the plaintiff in the matter, or the cause assigned for his prosecution, it is expressly found (as before mentioned) that the goods were seized and confiscated "because they were roulettes, or gambling machines," thus determining violation of the law, for such cause, by the parties engaged in the importation; and the contention—if assumed to be tenable under the findings—that the defendant was chargeable for the alleged fact that the goods came "improperly invoiced" as "automatic selling machines," and thereby committed a further breach of Venezuelan law, cannot strengthen the plaintiff's claim against the defendant for recovery of the fines and expenses which were incurred by the plaintiff in such unlawful importation. In either phase of the transaction, both parties were presumptively engaged in violation of the law of that country, and it matters not that one or both proceeded therein without actual knowledge that the importation was illegal. So the further circumstances discussed in the arguments of counsel—in reference to the good faith of one and the other party, together with the undisputed fact that the plaintiff suffered the loss (in fines and expenses), without other interest in the importation than an attempted protection of the defendant from loss—cannot affect the question of legal liability between those parties. The unlawful entry could not subject the consignor, who was not present, to personal liability therefor, its utmost liability being in rem (as imposed) for forfeiture of the goods; and however the procedure against the plaintiff was either caused or intended, the ensuing fines and charges cannot be enforceable per se against the defendant in this country and jurisdiction. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 286, 8 Sup. Ct. 1370, 32 L. Ed. 239. Thus the judgment rests solely on the issue above stated, whether the fact that the plaintiff was serving as an agent or representative of the defendant in such violation of the law authorizes recovery for his expenditures incurred therein.

In the absence of any undertaking by the defendant for such reimbursement, entirely apart from the employment of the plaintiff to serve and his service accordingly in the unlawful entry, we are of opinion that the authorities are uniform and conclusive against the recovery, as opposed to public policy. In the early and leading case of *Armstrong v. Toler*, 11 Wheat. 258, 267, 6 L. Ed. 468, the opinion by Chief Justice Marshall aptly defines the above-mentioned distinction between the contract growing "immediately out of an illegal act," which "a court of justice will not enforce," and a promise made which is "unconnected with the illegal act, and is founded on a new consideration," and "not tainted by the act," whereof enforcement may be granted; and the expressions of the opinion in reference to the independent and untainted promise which was there enforced, cited in support of the present judgment, are plainly without force to that end, under the facts here stipulated and found. The doctrine which bars this recov-

ery, epitomized in the above quotation, is applied in *Trist v. Child*, 21 Wall. 441, 448 [22 L. Ed. 623], and well explained as "a rule of the common law of universal application, that when a contract, express or implied, is tainted with the vice" of violation of law "as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice." Claims for reimbursement or compensation through performance of such contract by an agent for the principal are uniformly subjected to the rule referred to (see *Story on Agency*, § 346; *Mechem on Agency*, § 654), and pertinent precedents for its application appear in *Monnet v. Merz*, 127 N. Y. 151, 154, 27 N. E. 827, *Buck v. Albee*, 26 Vt. 184, 190, 62 Am. Dec. 564, and *Harvey v. Merrill*, 150 Mass. 1, 5, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. No authorities for departure from such rule are called to our attention, and we believe further citations thereupon to be unnecessary.

The judgment of the District Court is reversed, and the cause is remanded, with direction to enter judgment upon the findings of fact in favor of the plaintiff in error, defendant below.

THE INDIANAPOLIS.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,183.

COLLISION (§ 85*)—STEAM VESSELS IN FOG—EXCESSIVE SPEED.

The finding of a trial court, based on conflicting evidence, that a collision between two steam vessels on converging courses in Puget Sound was due to the fault of both vessels in running at excessive speed in a fog, held sustained by the evidence.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 166, 169; Dec. Dig. § 85.*

[Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; C. H. Hanford, Judge.

Suit in admiralty for collision by the Kitsap County Transportation Company, owner of the steamer Kitsap, against the steamship Indianapolis, the International Steamship Company, claimant, and cross-libel against the Kitsap. Decree dividing damages.

The Kitsap County Transportation Company, owner of the steamer Kitsap, libeled the steamship Indianapolis, her engines, boilers, tackle, apparel, and furniture, for damages growing out of a collision in the waters of Puget Sound between the Kitsap and the Indianapolis, and praying, among other things, that the latter be condemned to pay the damages alleged to have been sustained by the Kitsap and the costs of the libel. Process having been issued and served upon the steamship, the International Steamship Company as owner and claimant of the Indianapolis filed an answer to the libel and also a cross-libel against the steamer Kitsap, in which answer and cross-libel the claimant and cross-libelant asked that the original libel be dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

missed with costs, and that the steamer Kitsap, her engines, boilers, tackle, apparel, and furniture be condemned to pay the demands of the cross-libelant, with costs. Proofs having been taken on behalf of the respective parties and submitted to the trial court, the judge thereof found and decreed that the collision mentioned in the pleadings was caused by the mutual fault of the steamer and steamship, and accordingly adjudged a division of the damages resulting from such collision, that the damages sustained by the Kitsap amounted to \$32,666.87, and that the damages sustained by the Indianapolis amounted to \$5,451.50, and, dividing the damages, that the claimant and cross-libelant pay to the libelant the sum of \$13,607.68, but that neither party to the action should recover costs against the other, and that no interest should be allowed to either. The trial court further found and adjudged that the libelant was entitled to damages in the nature of demurrage for a period of 139 days, consumed in making temporary and permanent repairs to the Kitsap, which damages the court in its decree fixed at the rate of \$50 a day. Both the libelant and the cross-libelant appealed from the decree.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellant.

Ira Bronson, of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The cause was referred by the court below to the court commissioner, before whom all of the testimony and other evidence was taken, none being given before the trial court. Upon the record so made the court below found, among other things, as follows:

"The Kitsap is a wooden passenger steamboat 135 feet in length, and at the time of the collision was starting on her regular run from pier 4 in Seattle harbor to Paulsbo on the west side of Puget Sound. At 4:35 p. m. she backed away from the south side of pier 4 under a slow bell, the general direction of her backward movement being northwest. After backing sufficiently to clear the face of the docks, she reversed and went ahead, curving to starboard until she came around on her regular course headed for four-mile rock on the north shore of the harbor. The Indianapolis is a much larger vessel than the Kitsap, and has a steel hull, and was employed as a carrier of passengers on a regular run between Tacoma and Seattle. At 4:33 p. m. she was coming from Tacoma, and near the bell buoy off Duwamish Head on the west side of Seattle harbor and was running at reduced speed, but she then increased to full speed, which was 15 knots per hour or approximately 1,500 feet per minute. From the time the Kitsap started both vessels were giving fog signals by blasts of their whistles at intervals of from 10 to 20 seconds. The time of the collision was 4:40 p. m. The facts of the case as thus far recited are clearly proved by uncontradicted evidence. The evidence is conflicting as to the exact place where the collision occurred, but from a preponderance of the evidence the court finds as a fact that the place where the two vessels came in contact with each other was opposite the slip between the Grand Trunk and Colman docks, and distant from the outward ends of the docks about 1,500 feet, and from the bell buoy off Duwamish Head, by measurement on the government chart of the harbor, nearly 10,500 feet, and to make that distance in 7 minutes required the Indianapolis to run her maximum speed. No attempt was made on either vessel to avoid the collision by operating the helm to change her course so that, when the vessels came together, they were on converging lines—the Kitsap headed obliquely across the bow of the Indianapolis. The Indianapolis rammed the Kitsap on her port side in the vicinity of her pilot house, and cut into her hull to a depth of about seven feet. The court finds as a fact that at the moment of the impact both vessels were moving ahead with con-

siderable momentum, and rejects as untrue all evidence to the contrary, because the force of the collision corroborates the positive testimony on each side, respectively, that the other vessel was seen to be coming with good speed, and the conclusion is unavoidable that the collision was caused by navigating both vessels at a high rate of speed in a dense fog, and both are equally in fault."

Both parties to the present appeal complain of the findings of the trial judge; the owner of the Kitsap contending that the court erred in finding any fault on its part, and in failing to award it the full amount of damages claimed both for injury sustained by that vessel as also for the failure of the court to award it the full amount of demurrage and interest claimed, and the claimant insisting that the trial court erred in finding the Indianapolis guilty of any fault and in failing to award it the full amount of damage alleged to have been sustained by her owner by reason of the collision.

We have given the voluminous record very careful consideration, and have come to the conclusion therefrom, in view of the very substantial conflict in the evidence, that we would not be justified in holding that the court below was in error in its findings of fact. Still less do we think the trial court should have awarded the owner of the Kitsap a larger amount either by way of interest, increased demurrage, or other damages.

The judgment is affirmed.

WRIGHT, BLODGETT & CO., Limited, et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1913. Rehearing Denied March 6, 1913.)

No. 2,406.

PUBLIC LANDS (§ 120*)—CANCELLATION OF PATENT—BRINGING IN NEW PARTIES—NECESSITY.

Where, pending a suit by the United States to cancel a land patent, the patentee died intestate, an heir, who succeeded to his interest under the laws of the state, became an indispensable party defendant, without whose presence the court could not proceed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit in equity by the United States against Wright, Blodgett & Co., Limited, and others. Decree for complainant, and defendants appeal. Reversed.

J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for appellants.

E. H. Randolph, U. S. Atty., of Shreveport, La.

Before PARDEE, Circuit Judge, and NEWMAN and GRUBB, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. This is a suit, brought September 1, 1906, by the United States against Nat Wasey and Wright, Blodgett & Co., to set aside a patent for land entered and patented under the homestead act. Process was never served upon Nat Wasey. Pending the suit Wasey died, and on December 22, 1908, the complainant filed a bill of revivor against Bertha Wasey, the widow, and Eben F. Wasey and John L. Wasey, sons of said Nat Wasey. Process having been served, Eben F. Wasey and John L. Wasey both appeared February 13, 1909, and filed an answer disclaiming all right, title, and interest in the land, or any portion thereof, or in the succession of Nat Wasey.

Under the law of Louisiana the said parties had a right to renounce the succession of Wasey, and thereupon Nat Wasey's only half-brother, one Frank B. Clingo, shown to be living, became the only heir of the said Nat Wasey, and seised as such from said Nat Wasey's death (Rev. C. C. La. art. 942), and thus a necessary party to the suit. An objection to taking evidence on the ground that indispensable and proper parties were not before the court was made in the court below; but the case proceeded to judgment regardless of the same, and, of course, the objection is now urged on this appeal.

The decisions on this subject are all one way, and to the effect that, where an essentially necessary party to the proceedings is not before the court, the court cannot proceed to adjudicate upon his rights. 16 Cyc. 189. Other important questions are presented in this case; but we do not consider it necessary to pass upon them, further than to say that, on the evidence submitted in the case, we think the ends of justice require that the complainant should be given opportunity to make the necessary parties, and thereafter try the case on the merits.

The decree is reversed, and the cause is remanded to the lower court, with leave to the United States to make necessary parties, and thereafter the case to be proceeded with as equity may require.

WRIGHT, BLODGETT & CO., Limited, et al. v. UNITED STATES
(five cases).

(Circuit Court of Appeals, Fifth Circuit. February 18, 1913. Rehearing
Denied March 6, 1913.)

Nos. 2,407-2,411.

PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENTS—FRAUD.

Evidence *held* to support decrees canceling land patents for fraud as against vendees of the original patentees.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

Appeals from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Five suits in equity by the United States against Wright, Blodgett & Co., Limited, and others. Decrees for complainant, and defendant corporation appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. Blanc Monroe and Monte M. Lemann, both of New Orleans, La., for appellant.

E. H. Randolph, U. S. Atty., of Shreveport, La.

Before PARDEE, Circuit Judge, and NEWMAN and GRUBB, District Judges.

PER CURIAM. The above-entitled and numbered cases are separate appeals from separate decisions of the United States District Court for the Western District of Louisiana, and in each of them we find that fraud in the homestead entry is proved, and that Wright, Blodgett & Co., vendee of the alleged homesteaders, is charged through its active agents on the ground with knowledge of the fraud.

The decree in each of the above-mentioned cases is affirmed.

HOUSER et al. v. STARR.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,233.

1. PATENTS (§ 328*)—INFRINGEMENT—DRAWING INSTRUMENT.

The Starr patent, No. 533,095, for a drawing instrument for drawing ellipses, claim 3, the main feature of which, and that which distinguishes it from the prior art, is the guide bar shown, *held* not infringed by an instrument which does not use such guide bar but the old substitute therefor.

2. PATENTS (§ 165*)—CLAIMS.

That the patentee may have been entitled to a claim he did not make is immaterial. Courts cannot make claims for him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

3. PATENTS (§ 167*)—CONSTRUCTION—USE OF TERM "SUBSTANTIALLY AS DESCRIBED."

The specification, claim, and drawings of a patent are a unit. Whatever parts of the device are named in a claim are of necessity intended to be named with reference to the specification and drawings, and the reference cannot be made narrower by saying "as described" nor broader by saying "substantially."

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6741, 6742.]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CUTTING INSTRUMENT.

The Starr patent, No. 683,809, for a cutting instrument, especially adapted to cutting beveled picture mats in curved forms, claims 1-10, are void for lack of invention. Claims 11, 19, and 20 *held* valid and infringed, and claims 16 and 17 not infringed.

5. PATENTS (§ 27*)—DOUBLE USE.

Where the thought of adapting a machine to a new use is not new, the mere use of common expedients for the adaptation is not invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. PATENTS (§ 25*)—AGGREGATION.

Where the action of one part modifies the action of the other part, there is more than a mere aggregation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-29; Dec. Dig. § 25.*]

7. PATENTS (§ 17*)—INVENTION—ADJUSTABILITY.

There usually can be no invention in making a tool adjustable on its carrier in four directions, instead of two.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

8. PATENTS (§ 328*)—VALIDITY—MACHINE FOR CUTTING CURVES.

The Starr patent, No. 766,158, for a machine for cutting curves, claims 9, 10, 12, and 13, *held* void for lack of invention over a prior patent to the same patentee.

9. PATENTS (§ 153*)—DISCLAIMER—COSTS.

Where some claims are invalid, they must be disclaimed before a decree is entered on the valid claims. No costs can be allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 226; Dec. Dig. § 153.*]

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by Ferdinand W. Starr against Charles C. Houser and the Historical Publishing Company. Decree for complainant, and defendants appeal. Modified.

For opinion below, see 194 Fed. 730.

Wood & Wood, of Cincinnati, Ohio (A. F. Nathan, of Cincinnati, Ohio, of counsel), for appellants.

O. C. Billman, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

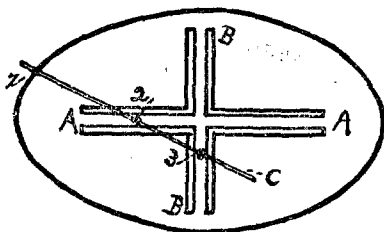
DENISON, Circuit Judge. The defendants appealed from an interlocutory decree for an injunction and accounting in the usual form, entered in an infringement suit brought by Ferdinand W. Starr upon three patents issued to him: The first being No. 533,095, dated January 29, 1895, for a drawing instrument; the second, No. 683,809, dated October 1, 1901, for a cutting instrument; and the third, No. 766,158, dated July 26, 1904, for a machine for cutting curves. All three instruments were either specially intended for, or have found their chief utility in, marking or cutting ellipses, and complainant's commercial machines have their main application in cutting mats or glass for framing photographs. The suit involved claim 3 of the first patent, all of the 21 claims of the second patent, except claims 13 and 15, and claims 1, 2, 8, 9, 10, 11, 12, 13, 14, and 15 of the third patent. Some of these last claims were withdrawn so that as to this patent, the case was left to rest on claims 9, 10, 12, and 13. The patents must be considered separately.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The First Patent.

[1] The particular merit of the commercial devices of each party lies in their adaptability to describe either a circle or any desired ellipse within the size capacity of the instrument. It is characteristic of an ellipse, in process of making, that its center is constantly moving along the line of its major axis, and that this path of motion is at right angles to the minor axis; and it follows that, if the ellipse is to be described by a point at the moving end of a revolving arm, a point at the inner end of this arm and an intermediate point must be constantly moving in paths at right angles to each other. The elementary instrument for mechanically producing an ellipse was called a "trammel." It is illustrated by the following sketch taken from the Century Dictionary:

AA and *BB* are slotted bars at right angles to each other, and represent, one, the major, and one, the minor, axis of an ellipse. *C* is a revolving bar carrying, at its outer extremity, a pencil, as at *1*. *2* and *3* are pins fixed in the bar *C* and passing through into, and traveling in, respectively, the grooves in *AA* and *BB*. Obviously, if the bar *C*



revolves upon pin *2* while that pin is stationary, pencil *1* will describe a circle, while, if during the revolution, pin *2* travels longitudinally in *AA*, the described curve will be irregular, becoming a perfect ellipse, if the revolving and the longitudinal motions are maintained in proper, constant relation. This maintenance is compelled by the pin *3*, traveling in the groove of *BB*. The pin *2* stands for longitudinal motion of the center and pin *3* stands for revolving motion of the arm. Any movement by either pin compels a corresponding movement by the other. Obviously, also, by making these pins *2* and *3* adjustable on the revolving bar and changing their relative positions with reference to the scribing point *1*, any desired degree of elliptical curve can be obtained. Speaking in general terms, these two pins, *2* and *3*, are two shafts, eccentric to each other, co-operating in their revolution to produce the described curve. The resulting diameter will be varied as the distance between point *2* and the pencil *1* is increased or diminished; the resulting degree of curve is controlled by changing the distance between pins *2* and *3*; in other words, varying the mutual eccentricity of the two shafts. The longer axis can be changed at will, from vertical to horizontal, by changing the position of the pencil so that the order of the points *1*, *2*, *3* will be *3*, *2*, *1*. If the two pins are superimposed, i. e., if the two shafts are made concentric, the revolution of the bar will produce a circle.

The utility of a mechanical device for drawing ellipses was well understood long before Starr's first application. Williams & Joslin, in 1859, by patent No. 22,910, showed a device which the Patent Office called an ellipsograph, and by which they said "curves and figures approximating in form to ovals may be drawn with great facility and in

a perfect manner." Their device had two co-operating, revolving shafts eccentric to each other. One of these was reciprocated in a slideway corresponding to one trammel bar, but they dispensed with a right-angled slideway and attempted to give to the other shaft its requisite right-angular motion by carrying it on the free end of a bar pivoted at the other end to the stationary frame. The resulting curve would not be a true ellipse, although a close approximation.

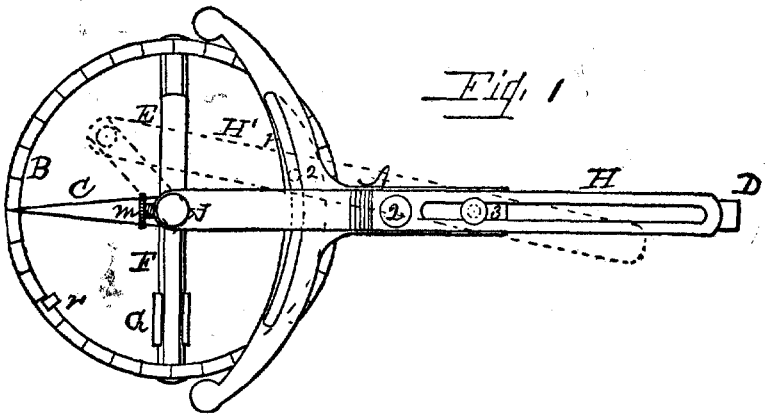
On July 6, 1875, by patent No. 165,385, Toulmin illustrated and described an ellipsograph. He provided for the right-angled motion by carrying one of the shafts upon longitudinal guides and carrying the other upon the free end of a lever pivoted to the frame; but he observed, as perhaps Williams & Joslin did not, that a simple, swinging arm would carry this center, not on a right line, but on the arc of a circle, and therefore, as Toulmin says, "this does not give a true ellipse." Accordingly, he provided two oppositely extending arms pivoted at their outer ends to the frame and at their inner ends to the opposite ends of a crossbar, the central point of which stands for the other shaft, and so, although the opposite ends of this crossbar move in arcs, the central point moves in a right line, perpendicular to the longitudinal guides, and the desired result is reached.

In 1876, Root took out a patent, No. 181,725, on what he called a "trammel" and the Patent Office called an "ellipsograph." He departed from the pivoted, vibrating arm scheme employed by Williams & Joslin and by Toulmin, and returned, typically, to the trammel of the above sketch. He has two fixed, right-angled slideways carrying longitudinal sliding bars. On the inner end of each bar is pivoted one of the revolving shafts. The two slideways are in different vertical planes, and between these planes a horizontal bar connects the two shafts, being fixed to one and sliding through the other. At the top of the upper shaft, a crank is attached whereby there is a co-operating revolution of the two shafts, and, when the two shafts are not concentric, any point in the connecting bar will describe an ellipse. As the lower guideway would prevent the revolution of a pencil depending from this bar, a similar bar is attached to the lower shaft below the guideway, and this lower bar carries the adjustable pencil holder.

Again, in 1883, Hottinger, by patent No. 288,810, described a machine for marking ellipses. He used a stationary knife and caused the table to turn so that the contact point described an ellipse. He produced this motion in the table by a typical trammel bar and sliding pin arrangement on the bottom of the table. Rawson also patented an ellipsograph, in 1890, patent No. 422,252. His machine is essentially that of Root; but, for insuring longitudinal motion in one direction, he uses a collar sliding on a rod, and in the other direction, a pin sliding in a guideway. He also provides peculiar mechanism in connection with a supplemental pencil-carrying arm.

Into this state of the art, Starr came by his application filed in 1893. He calls his invention a "drawing instrument." He discards the two right-angled, sliding guideways of Root, Rawson, and the others, and returns to the pivoted arm idea of Williams & Joslin and of Toulmin. He changes and apparently improves this idea and calls

this vibrating arm the "guide bar *H*." At its outer end, instead of being merely pivoted to the frame, the pivot passes through a longitudinal slot in the bar, so that the bar may not only swing but may also move lengthways upon the pivot. The inner end of the bar carries one of the eccentric shafts. At an intermediate point where the bar swings over the surface of the frame, the bar is provided with a depending stud, and the upper surface of the frame is provided with a curved slot in which this stud must travel. This curved slot is not an arc of a circle, but is parabolic, and the net result of the guiding by this slot and the permitted longitudinal slip at the pivoted end is that the shaft carried at the inner end moves back and forth exactly at right angles to the longitudinal slideway which carries the other shaft. This construction is shown in figure 1 of his drawing here reproduced:



It follows from this history and description that Starr's meritorious invention is found in the peculiar construction and movement of this guide bar *H*. Starr himself, in his testimony in this case, points out that:

"The friction generated by carrying the shaft along a straight bar [as Root and Rawson had done] was so great that it was found to be impractical, * * * and this deficiency in a drawing instrument of that character led to the useful and effective modification set forth in this claim 3 * * * almost entirely eliminating the friction incident to moving said shaft along a straight bar at right-angles to the lower shaft."

The defendants are said to make a device in which the right-angled travel of the two shafts is compelled by two right-angled rods upon each of which a sliding collar reciprocates, and each of these collars carries one of the eccentric shafts. There is no pivoted bar of any kind. There is no vibrating arm. The same ultimate result—the right-angled travel—is accomplished; but the device is distinctly of the Root-Rawson, rather than of the Toulmin-Starr, class.

The question of infringement arises under Starr's third claim, which reads thus:

"3. The combination of the sliding bar *D*, the shaft *L*, with its integral guide arms, the sliding shaft *I*, the arm *H*, the spiral spring *S* to elevate the

several parts, the operating and depressing arm *K*, and the pencil holder, to produce continuous or broken lines, substantially as described."

Defendants employ this complete combination, except the "arm *H*"; but, in order to make out infringement, the "arm *H*" of the claim must be interpreted as covering *any means* for producing right-angled, transverse motion in the second shaft. This would be carrying the doctrine of equivalents very far. We are not prepared to say that under the principle of *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713, *McSherry v. Dowagiac* (C. C. A. 6) 101 Fed. 716, 41 C. C. A. 627, and *Metallic Extraction Co. v. Brown* (C. C. A. 8) 104 Fed. 345, 353, 43 C. C. A. 568, it might not be carried even to that extent, if Starr's substantial invention had been in some other feature of the machine, and if the "arm *H*" had been one of two or more previously well-known methods of accomplishing one part of the operation; but whether or not such extreme liberality of construction could be permitted in the supposed case, it cannot be allowed where the patentee has deliberately confined himself, by his claim, to a structure containing the peculiar element which was the main feature of his invention, and where the alleged infringing structure contains, not that peculiar element, but the old substitute therefor which the inventor had discarded. To permit the claim, under such circumstances, to be so liberally interpreted, would be to make it of even more flexibility than indicated by Justice Bradley's familiar figure of the "nose of wax" (*White v. Dunbar*, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303) and would be violating the settled rule (*Cimiotti v. American Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Coupe v. Royer*, 155 U. S. 565, 576, 15 Sup. Ct. 199, 39 L. Ed. 263; *Brown v. Stillwell* [C. C. A. 6] 57 Fed. 731, 739, 6 C. C. A. 528).

[2] So far as this record shows, Starr was the first to make a construction whereby the pencil could be depressed by the hand of the operator turning the crank, and perhaps he was entitled to a claim protecting broadly the capacity for vertical motion in the shafts, whereby the tool would vertically follow the operator's hand, and in combination with any curve-directing means; but he made no such claim; that issue was not presented to the Patent Office, and is not raised by this record. Patentees "cannot expect the courts to wade through the history of the art and spell out what they might have claimed, but did not claim." *Keystone v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Macomber's Fixed Law of Patents*, § 226.

We do not doubt the validity of Starr's first patent, but we cannot find infringement.

[3] In reaching this result, we give no force to the use of the reference letter *H*, or to the presence in the claim of the phrase "substantially as described." The specification, claim, and drawing are a unit. When the claim refers to "the arm," it means the arm shown in the drawing and described by the specification, or the equivalent, and "the arm *H*" can mean no more and no less. Whatever parts are named in the claim are of necessity intended to be named with reference to the specification and drawings. The reference cannot be made narrower by saying "as described" nor broader by saying "substantially."

The words "substantially as described" do not create this necessity for construction by the entire patent; they are only a formula of recognition of the rule, and the cases, like *Pope v. Gormully*, 144 U. S. 248, 253, 12 Sup. Ct. 641, 36 L. Ed. 423, and *Fox v. Perkins* (C. C. A. 6) 52 Fed. 205, 214, 3 C. C. A. 32, which make reference to the phrase, cannot mean anything more. See sections 214, 221, 234, Macomber. The meaning of "equivalent" is a question of fact to be determined by the language of a claim, in connection with the specification, the drawing, the state of the art, and the history of the application. Attempts to make arbitrary rules, as of law, for determining questions of fact lead to artificiality and seldom help.

The Second Patent.

[4] In his second patent, applied for in May, 1900, Starr illustrates and describes over again the instrument of his first patent, but with some comparatively slight additions and changes which adapted the device to cutting out, as well as drawing, curved forms, saying of his invention that it was "especially adapted for cutting mats for pictures and similar outline work." In the place of a pencil-holding socket carried on the lower revolving arm, he substituted a socket holding the swiveling stem of a cutting tool, and he provided such a tool which had its knife carried at the lower end of the stem on a lateral arm or bend so that the knife would trail behind the axis of the stem, and which had its knife laterally inclined so as to cut a bevel, and its cutting edge inclined rearwardly so as to give a draw cut. These features, in various combinations, either as constituting by themselves a bevel-cutting tool or as constituting, in combination with curve-directing mechanism like the first patent, a bevel cutter for curved shapes, are the subject of the first ten claims.

We are unable to find any invention in these features, alone or in combination. Commercial success apparently followed the thought that a cutting tool could be substituted for the pencil of Starr's first patent, and in this thought only is the substantial merit of these changes. This thought, in an environment consisting only of these features of the ellipsograph art which we have so far recited, might or might not have been sufficient to support invention; but the thought was not new with Starr; it had occurred to others and had been applied by others repeatedly. McAdams, by patent No. 179,039, in 1876, showed a device for marking or cutting out ovals, having a tool-head "containing a pencil or knife," and he repeatedly refers to "marking or cutting." Breach, in 1879, in patent No. 219,615, described how patterns could be either "cut out from, or marked on, a sheet of leather," and he constantly refers to his carrier or tool-head as a "marker or cutter." Hottinger, in his above-mentioned patent of 1883, named his machine as one for "describing or cutting ellipses," said that "in cutting or marking an ellipse, as the case may be, the point of the tool or marker is set," etc., and made further reference to "the tool or marker" and "the cutting or marking tool." Cote, in patent No. 469,775, described a device for "outlining and proportioning boot and shoe patterns, and drawing the same on paper or cutting the

same from paper or other suitable material," and he said "in one of the sockets is placed a pencil or knife-holding spindle." He continually refers to the "pencil or knife." King patented an ellipsograph, in 1894, No. 517,522. This was of the typical trammel type, like the Century Dictionary cut, and the drawing showed a pencil. King said:

"In some cases, it is desirable to form ellipses from stiff paper, pasteboard, and the like, and to this end, I contemplate providing the instrument with a suitable cutter which may be carried by the block, *i*, in the same manner as the pencil."

The record shows other instances, but these are enough to demonstrate that, in 1900, it was familiar knowledge that, in such association, marker and knife were interchangeable, and that there was no inventive novelty in substituting a cutter for the pencil of Starr's ellipsograph.

His next provision was that the tool carrier should have a socket, and that the cutting tool should have a stem so adapted that the stem would swivel in the socket; in other words, he saw that his cutter must swivel, and he provided means therefor. This idea of swiveling would seem rather obvious, as a trailing cutter could not otherwise follow the curve; but the cutter with its swivel stem and the tool-holding socket to receive the stem had been shown by McAdams, Breach, and Cote, above described, as well as by several others in the record not necessary to mention.

If, then, in our search for novelty, we fall back on the idea that the knife or cutter of such a tool should be carried on a lateral arm or bend of the stem so that, as the tool swivels, the cutting edge will trail behind the axis of the stem, we find this indicated in Hartford, No. 207,866, of 1878, who invented a tool for cutting out patterns, and specified that the "cutting edge of the knife lay on one side and not across the axis of the swivel," and fully disclosed in Heidenhain, No. 365,129, of 1887 (which was a marker and not a cutter); also, in Cote, above mentioned, who specially described the construction and said that the purpose was to have the knife "automatically maintain a position with its cutting edge to the front in whatever direction it may be moved." The provision that the cutting edge of the knife shall be inclined rearwardly is the universal provision for insuring a draw cut, whether the operation is by hand or by machine. It is shown in many of the references.

Nothing remains as an independent element of supposed novelty, excepting that the knife is set laterally so as to give a bevel cut. This again approaches, if it does not touch, the obvious expedient; but it is shown by the record to have been common. Hottinger provided for his cutting tool such adjustability that it "may be set vertically or at any desired inclination." Stuparich, by patent No. 572,320, in 1896, and for the express purpose of forming oval, beveled openings in photograph mats, provided for setting his knife laterally so as to cut any desired bevel. So, Durkel, in patent No. 660,211, on application filed in February, 1900, had shown "a device for cutting out the centers of picture mats, so as to leave the opening in the mat of circular or elliptical form, the inside edge of the mat being cut beveled," and had

provided therefor a knife inclined laterally as well as trailing and inclined to the rear. So, also, Gooding, No. 593,537, of 1897, had a device for cutting boot or shoe soles "and other articles of curvilinear outline from sheet material," and provided a swivel cutting tool with knife inclined laterally and rearwardly. It follows that not even in this feature of the laterally inclined knife in such connection was there anything new.

[5] It must be admitted that no one structure shows all these features in combination, and, in our conclusion that these ten claims are invalid, we do not intend to impinge upon the well-understood rule that there may be patentable invention in selecting well-known elements in other machines, and uniting them in a new combination to get a new result. *Dowagiac v. Superior Drill Co.* (C. C. A. 6) 115 Fed. 886, 53 C. C. A. 36. We are considering not so much the question of anticipation as that of invention or of double use. The most that can be said in Starr's favor is that he took a previously existing combination and substituted, for its vertical cutting knife, the well-known bevel-cutting knife, or that he took another known combination and substituted, for its straight tool, the well-known curved or trailing cutting tool, or another existing combination and substituted the common swivel connection for a rigid connection. From no one of these points of view is it possible to say that Starr did anything more than would have been done by any skilled mechanic to whom the primary idea had occurred. The fact that no one had before combined all these features, which fact, while not controlling, is often persuasive to show invention, cannot prevail against a clear case of the mere adoption of common expedients in adapting an existing machine to a new use, and in a case where the thought of adaptation is not new. *Bullock v. Electric Co.* (C. C. A. 6) 149 Fed. 409, 420, 79 C. C. A. 229.

Claims 11, 19, and 20 involve the same point. They call for the machine of the first patent, described in broad and general terms, with the addition of means for holding or clamping the cardboard or other material from which the machine cuts out the selected forms. It is apparent that, when the only thing desired was to draw a mark on paper, the paper would be easily held in position; but, when thick and heavy paper or other material was to be cut, there would be strong tendency to push the material out of position, and this tendency must be suitably resisted. Such resistance or clamping, to be most effective, should be applied as closely as possible to the cutting point. Starr's machine, as commercially built, weighed perhaps 50 pounds, and his plan for holding the material consisted in hinging his machine at the rear to the supporting table, so that the machine, lifted by its front part, could be turned up, and in attaching to the front, supporting legs of the machine horizontally adjustable extensions or frames which, when the machine was lowered, would make contact with the material on the worktable, and carry from that contact point a part or all of the weight of the machine. These extensions could be adjusted so as to rest upon the material as closely as desired to the point of cut, and in this way the weight of the machine could be shifted to, and carried at, different positions on the material, and in the selected posi-

tion where it would be most efficient as a workholder. This combination is expressed in the eleventh claim as follows:

"11. In a cutting machine, the combination of a base, a frame pivotally connected at its rear end thereto, means carried by said frame for producing an oval or a circular outline, a horizontally adjustable workholder adjustably connected with the front legs of said frame and adapted to be raised simultaneously with the frame and lowered upon the work to hold it while cutting the same."

Claims 19 and 20 involve practically the same elements with immaterial additions. Whether there is any patentable distinction between any of the three is not now important.

The validity of claim 11 is attacked because it is said to be for an obvious expedient lacking invention, and because it is said to cover a mere aggregation rather than a combination. The subject-matter involved is simple, and it is not improbable that similar workholding devices were in use; but there is no evidence on this subject. The situation is the same as though these points were raised on demurrer. There is obvious utility in avoiding independent clamps and shifting the weight of the machine to the spot where its weight will be most efficient; and, in view of this utility and the adoption of the idea by defendant, we cannot say that the construction involves no invention.

[6] The defense of aggregation is plausible, but not good. It is true that the cutting mechanism operates just as it would if the work was held by any other kind of clamp, and that the clamping means holds the work whether or not the cutting mechanism is in operation, and with only the same ultimate result—immobility—as if it was held by any other means; but, while the machine is in operation, the same primary element, the force of gravity in the machine, enables the knife to be advanced against the resistance of the material, and causes the material at that very point to resist against the push of the knife. The action of one part of the entire structure modifies and affects the action of the other part, and there is, during the active period, more than that mere aggregation which defeats a patent.

Defendants infringe these claims. They have perhaps made improvements, but they have appropriated the idea and clearly have the pivotal rear frame connection and the workholder in horizontally adjustable connection with the front legs of the frame.

[7] Claims 12 and 14 differentiate from the first patent only by providing that the pencil or tool holding head shall not only be adjustable longitudinally on its carrying arm, as the pencil holder was, but shall also be adjustable laterally. No merit is pointed out in this additional adjustability, and, unless under exceptional conditions, there can be no invention in making a tool adjustable on its carrier in four directions instead of in two. *Smyth v. Sheridan* (C. C. A. 2) 149 Fed. 208, 211, 79 C. C. A. 166.

[1] Claims 16 and 17 depend for patentability upon the addition to the first patent of a centering rod located centrally in the rotating head, and for the purpose of indicating the center of the figure to be drawn. Whether this centering rod was capable, in May, 1900, of imparting patentable novelty to a claim otherwise barren thereof is doubtful on

this record; but both of these claims contain, as an element, and referring to the "arm *H*" of the first patent, a call for a "pivoted, oscillating member." This cannot be read upon defendant's structure, which had no pivoted, oscillating member, but has only the collar reciprocating on the rod. Our discussion of infringement under the first patent, referring to *Hoyt v. Horne*, is pertinent here. If the limitation, apparently imported into the claim by the choice of this language, could ever be neutralized by applying the doctrine of equivalents, it must be in aid of a clear invention dominating and characterizing the claim, rather than in case of small improvements upon an existing patent, which is the selected and designated basis on which the improvements must rest.

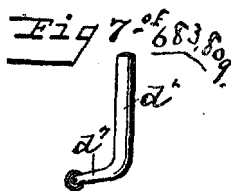
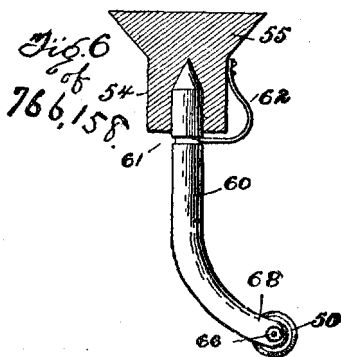
[4] Claims 18 and 21 seem to belong in the same group as the first ten. We see nothing in them to differentiate from the first patent, except, in one case, the provision that the tool be swiveled, and, in the other, the double adjustability of the tool and the trailing form of the cutter.

The Third Patent.

[8] By Starr's third patent, applied for March 31, 1902, he covered certain improvements in his device as applied to cutting material like glass or metal, where a knife would not be operative. He relies on claims 9, 10, 12, and 13. Claim 9, typical of the group, is as follows:

"9. The combination of the vertical tool-socket and means for impelling the same along predetermined curved lines, the vertical tool-stem swiveled and free to rotate in said socket, and the rotating cutter carried on a bent or offset extension of said swiveled tool-stem."

The part of the device to which these claims are directed is illustrated in figure 6, which is here reproduced:



In his second patent, No. 683,809, the drawing contained figure 7. also reproduced above, and in his specifications he says:

"Figure 7 shows the tool in which the shank and arm are formed integral, and a hardened steel wheel inserted in the latter, for which, if desired, a diamond may be substituted for glass cutting."

He further says:

"The machine described is particularly adapted for cutting oval and similar mats, and also for cutting similarly shaped glass for picture framing and other purposes."

The claims of the second patent are confined to an instrument having the cutting blade laterally inclined so as to make a beveled cut, and the device of the third patent lacks this inclination; hence, the device would not respond to the claims of the second patent, and the case is not, in the strictest sense, one of double patenting. However, not only would there be no invention in making the cutting disc vertical instead of inclined, but figure 7 of the second patent apparently shows this vertical position; indeed, the inclined position would seem inappropriate for glass cutting.

So far as concerns claims 9, 10, 12, and 13 of the third patent, the second patent contained full disclosure, and having been issued in October, 1901, without reservation of any kind which could preserve the subject for patenting on an application filed several months later, everything shown, and which might have been, but was not, claimed, was abandoned to the public; and these claims are invalid. *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710; *Ma-
comber*, § 12.¹

[9] The bill must be dismissed, as to the first and third patents. According to the practice indicated in *Herman v. Youngstown*, 191 Fed. 579, 588, 112 C. C. A. 185, Starr may have 30 days, after the filing of the mandate below, in which to show that he has duly abandoned the claims of the second patent held in this opinion to be invalid, and thereupon he may have the usual decree for injunction and accounting as to claims 11, 19, and 20. Appellants will recover the costs of this court, and one-half of their costs in the court below. The partial costs in the court below which Starr might have if he had prevailed upon one wholly valid patent, cannot be, in this case, allowed. *O'Reilly v. Morse*, 15 How. 62, 121, 14 L. Ed. 601. The matter of Houser's individual liability to injunction, damages, or costs, and the matter of any increase of damages, will be remitted to the District Court to be determined upon any accounting that may be had, or in such other manner as that court shall direct.

¹ We note that our conclusion drawn from the record, that there was no broad novelty in adapting the first machine to cutting paper or cutting glass, is confirmed by reference to Knight's *Mechanical Dictionary* (copyrighted in 1876) vol. 2, p. 2610. This illustrates and describes an ellipsograph accomplishing results approximately equivalent to those of Starr's first device, and says "one end of the scriber has a swiveled holder for a pen, pencil, cutting blade or glazier's diamond."

COMMERCIAL ACETYLENE CO. et al. v. SCHROEDER et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,950.

1. PATENTS (§ 328*)—TERM—EXPIRATION OF FOREIGN PATENT—ACETYLENE GAS TANK.

The Claude & Hess patent, No. 664,383, for an apparatus for storing and distributing acetylene gas, expired June 30, 1910, with the expiration of the British patent, No. 29,750 of 1896, to the same patentees for the same invention; also *held* not infringed.

2. PATENTS (§ 132*)—TERM—EFFECT OF INTERNATIONAL CONVENTION.

Article 4 bis, inserted in the International Convention for the Protection of Industrial Property of March 20, 1883, by the additional act of convention signed at Brussels December 14, 1900 (32 Stat. 1940), as controlled and construed by Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1911, p. 1453), "to effectuate the provisions" of such additional act of convention, was not retroactive, and did not extend the term of a United States patent, which under the law before the amendment was limited by the term of a prior foreign patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 188½-191; Dec. Dig. § 132.*]

Appeal from the District Court of the United States for the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by the Commercial Acetylene Company and the Prest-O-Lite Company against the Searchlight Gas Company, George F. Schroeder, and Oscar Bauer. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 197 Fed. 908.

John P. Bartlett, Clarence Winter, and Keyes Winter, all of New York City, and Charles H. Hamill, of Chicago, Ill., for appellants.

Robert H. Parkinson, of Chicago, Ill. (John S. Miller, Merritt Starr, and Wallace R. Lane, all of Chicago, Ill., of counsel), for appellees.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. A considerable volume of prior litigation on the patent in suit is to be found in the books, but this is the first case in which the defenses here presented appear to have had the consideration of the court.

The Court of Appeals of the Sixth Circuit, in 192 Fed. 321, held that it would not review the discretion of the court below in following the Milwaukee court on an application for a preliminary restraining order, but that the question of validity would be open on final hearing; and the Court of Appeals of the Eighth Circuit in Commercial Acetylene Company et al. v. Fireball, etc., Co., 198 Fed. 650, held that it was discretionary with the Circuit Court to grant the temporary order, that this discretion was for the Circuit Court, and not for the Court of Appeals, but that the question of validity was open for final hearing.

The patent in suit is described in claims 1, 2, and 5 as follows:

"1. A closed vessel containing a supersaturated solution of acetylene produced by forcing acetylene into a solvent under pressure; said vessel having

an outlet for the acetylene gas, which escapes from the solvent when the pressure is released or reduced, and means for controlling said outlet whereby the gas may escape therethrough at substantially uniform pressure, substantially as described.

"2. A prepared vessel consisting of a tight shell or vessel, a solvent of acetylene contained within said vessel, and acetylene dissolved in and held by said solvent under pressure and constituting therewith a supersaturated solution; the package being provided at a point above the solvent with a reducing valve, substantially as and for the purpose set forth."

"5. As a new article of manufacture, a gas package comprising a holder or tight vessel, a contained charge of acetone, a volume or body of gas dissolved by and compressed and contained within the solvent, and a reducing valve applied to an opening and extending to the interior of the holder above the level of the solvent, substantially as set forth."

The defense is, first, noninfringement; and, second, that the patent expired prior to the suit by reason of the expiration of the British patent substantially identical with the patent in suit.

The claims of the British patent are as follows:

"1. The utilization, for the purpose of storage in a small volume of large quantities of acetylene gas, of the solubility of said gas in certain liquids by the application of pressure, so as to increase the quantity of gas dissolved per unit of volume of liquid as specified."

"6. The employment of a receiver containing a liquid charged with acetylene under pressure and from which the acetylene is evolved when required for use as specified.

"7. The herein described method of storing acetylene gas in a small volume for lighting or other purposes, which consists in dissolving the acetylene gas under pressure in a suitable liquid solvent such as described, from which it can be evolved when required for use."

[1] The British patent and the patent in suit are for substantially the same invention. The claims and the specifications show this. Both are for storing acetylene. Both describe a receptacle therefor. Both are for the distribution of the acetylene and control of such distribution. All distinctions sought to be made are distinctions in terms, in modes of expression, mere descriptive words. The patented invention is the same in both. The British patent having expired, the patent in suit expired with it.

[2] Complainants contend that this patent is protected by the treaty of 1902 (32 Stat. 1940) and the act of Congress of 1903 in relation thereto. The purpose of the act of 1903 was to lengthen the time after a foreign application before an application at Washington would be barred. It is not conceivable that Congress intended to make this statute retroactive. Any such construction is unwarranted by the words of the statute. *Malignani v. Hill-Wright Elec. Co.* (C. C.) 177 Fed. 430; *Malignani v. Jasper Marsh Cons. Elec. Co.* (C. C.) 180 Fed. 442.

So elaborately have all these questions been considered and authorities cited by the trial court, no good purpose would be served by repeating them here. (D. C.) 197 Fed. 908.

Respecting infringement, we find that appellees use a needle valve, which is not the equivalent in structure or function of the reduction valve described and claimed in the patent as a material element of the combination.

The decree is affirmed.

EXCHANGE SCRIP BOOK CO. v. RAND, McNALLY & CO.

(Circuit Court of Appeals, Seventh Circuit. January 8, 1913.)

No. 1,910.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SCRIP BOOK OF RAILROAD MILEAGE TICKETS.

The Richardson & Langston patent, No. 669,489, for a scrip book containing an improved form of interchangeable railroad mileage tickets, as to its main idea of expressing the units in money, instead of miles, was anticipated. Its other features, if patentable, *held* not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaatt, Judge.

Suit in equity by the Exchange Scrip Book Company against Rand, McNally & Co. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 194 Fed. 444.

This appeal is from a decree dismissing for want of equity the appellant's bill filed against the appellees, averring infringement of letters patent No. 669,489. It arises under the same bill and charge of infringement which was upheld by decree of the trial court on a previous hearing, affirmed by this court on appeal therefrom. *Rand, McNally & Co. v. Exchange Scrip Book Co.*, 187 Fed. 984, 110 C. C. A. 322. On leave of this court, however, the cause was reopened for introduction of new evidence of an "alleged ticket as an anticipation of the patent in suit," and the hearing thereupon resulted in the present decree, pursuant to an opinion filed below. See 194 Fed. 444.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning and Walker Banning, both of Chicago, Ill., of counsel), for appellant.

James H. Peirce, of Chicago, Ill. (George P. Fisher, of Chicago, Ill., of counsel), for appellee.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

SEAMAN, Circuit Judge. The decision of this court, on appeal from the prior adjudication of infringement of the patent, rested affirmation of that decree, as stated at the outset of the opinion, upon this proposition:

"Apart from the main idea of the patentees, that the unit in their patented ticket should be expressed in money, instead of miles, we do not see anything in the patent that the defendants have infringed; for whether the physical differences, introduced by the patentees, are patentable invention or not, they are so narrow, and make the patent so limited, that the alleged infringing device (differing also in form) does not seem to us to be included."

Finding utility therein for interchangeable mileage tickets, and no evidence in the record of prior use of the patentees' conception thus stated, the opinion proceeds to the deductions that the claim involves patentable novelty and supports the charge of infringement.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendant (appellee here) thereupon petitioned this court for leave to reopen the cause in the trial court for introduction of proof of prior public use of this assumed conception, in a so-called "Burlington excess baggage ticket," exhibited with the petition and supported by affidavits tending to show prior use. Such petition was granted (on terms as to costs), with leave "to introduce as a defense the alleged ticket as an anticipation of the patent in suit," together with an order staying, meanwhile, "the injunction and accounting heretofore awarded." Pursuant to these rulings, the trial court reopened the cause for reception of the proposed evidence, and upon hearing thereof entered the decree from which the present appeal is brought, whereby the appellant's bill is dismissed for want of equity.

We believe, therefore, that this appeal raises a single question for review, namely: Whether the evidence so admitted proves anticipation, in the sense of the patent law, of the assumed conception of the patentees above defined. The mandate on the former appeal is conclusive upon all other issues raised by the record therein, and the case was opened up for the purpose alone of ascertaining the force of the additional evidence. This view was rightly recognized by Judge Kohlisaat at the hearing below, and his opinion (194 Fed. 444) sufficiently describes the "excess baggage ticket" and its prior public use, as established by the evidence, and we are satisfied with his definition thereof as proof of anticipation within the above inquiry.

The decree accordingly is affirmed.

ST. CLAIR FOUNDRY CO. v. UNION JACK CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

Nos. 1,578 and 1,871.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LIFTING JACK.

The Cox patent, No. 686,591, for a lifting jack, claims 2 to 5, inclusive, are void for anticipation in the prior art. Claim 1, if conceded validity, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the St. Clair Foundry Company against the Union Jack Company and John A. Phillips. Decree for defendants, and complainant appeals. Affirmed.

John C. Higdon, of St. Louis, Mo., for appellant.

V. H. Lockwood, of Indianapolis, Ind., for appellees.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. This is a bill averring infringement of six patents issued at various times to William H. Cox, and praying an injunction. The case was before this court at the October term,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1910, and was remanded for further proofs on the question of complainant's title. We are of opinion that as to all, except the fifth patent in suit, being No. 686,591, the further proofs do not show any legal title in complainant.

Patent No. 686,591, issued to W. H. Cox November 12, 1901, is for a lifting jack. The five claims are each for a combination of elements, all except the first of which we find to be fully anticipated in the prior art. Indeed, it is not necessary to look further than the prior Cox patents for such anticipation. The essential feature of claim 1 is the slot therein described.

"1. In a lifting jack, the combination with a standard, and a pair of runners loosely mounted thereon, and provided with clutching means, of a hand operating lever fulcrumed on one of the runners, said runner having a slot therein curved in the arc of a circle whose center is the pivotal point of the hand operating lever, and a pitman pivotally connected to the hand operating lever and one of the runners, the pitman extending up into the interior of the runner to which the hand operating lever is pivoted, and a wrist pin which connects the pitman with said lever extending through the curved slot in the side of the runner so that the ends of said slot constitute stops for the extreme movements of the hand operating lever."

The purpose of the slot is to "constitute stops for the extreme movement of the hand operating lever." Even if this claim be held valid, defendants' device is no infringement.

In defendants' structure, the movement of the lever is limited at one end by a crossbar and at the other end by a flange. At neither end does the slot perform the function of stopping the lever. As the patent is for a combination, every element of the combination must be used, or there is no infringement.

The decree of the Circuit Court is affirmed.

MINERALLAC ELECTRIC CO. v. CLEVELAND ELECTRIC ILLUMINATING CO. et al.

(District Court, N. D. Ohio, E. D. January 15, 1913.)

No. 8,247.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC METER.

The Merz patent, No. 722,030, for a combined electric measuring and indicating apparatus, was not anticipated, discloses patentable invention, and is entitled to a broad construction of its claims; also *held* infringed.

In Equity. Suit by the Minerallac Electric Company against the Cleveland Electric Illuminating Company and Mathias E. Turner. On final hearing. Decree for complainant.

Brown & Williams, of Chicago, Ill., for complainant.

Hull & Smith, of Cleveland, Ohio (Hubert Howson, of New York City, of counsel), for defendants.

DAY, District Judge. This is a suit for alleged infringement of the first four claims of patent No. 722,030 to Merz, assigned by the pat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entee to the complainant. A consideration of the record involves an inquiry into the validity of these four claims of the Merz patent; as it appears plainly that, if these claims are valid, the defendants' device is an infringement.

The patent in suit is designed to provide for an instrument, or meter, which will not only integrate and register the entire amount of current or energy used by a consumer of electricity, during the entire period charged for, as one month, but which will integrate and register the maximum amount of current or energy consumed in a definite, shorter interval of time, which should be one of a certain number of equal intervals of time into which the long or charged-for interval is divided.

In the development of the electrical art, it became apparent to central station engineers that all customers using the same amount of electricity were not equally desirable. Of two customers using the same number of kilowatt-hours per day, one might desire a continual, regular flow of current; the other might at intervals desire a very small amount of current, and again desire, for a short time, a very large amount of current, as in the case of a church lighted once or twice a week to its full lighting capacity. To take care of this maximum demand for current requires additional central station equipment, or, in other words, it calls for additional expense in the generation of the current desired. Accordingly, to thoroughly establish a basis of charging, the two elements of amount of electrical energy used and how used became important, depending upon the total number of kilowatt-hours supplied, and also upon the greatest demand which the customer makes upon the central station capacity, so far as his particular needs are concerned.

Inventors, realizing the need of measuring devices for electrical flow, which would perform the functions I have referred to, first devised indicators which would give an instantaneous record of the maximum flow demanded, as shown in patent No. 607,185 to Marks, patent No. 624,993 to Swoboda, 661,881 to Little, and 671,272 to Fish. These devices were unsatisfactory. By their use, in case of an accidental short circuit, the resulting heavy rush of current would be recorded and shown at a high figure. It then became apparent in the art that the recording instruments should be so designed as to be so sluggish in their response to the electrical forces upon which their operation depended as to ignore momentary rushes of current, and only record high rates of flow, continued for appreciable periods of time.

Prominent among these devices was patent No. 583,160 to Wright, based upon a thermometer-like contrivance by which the flow of electricity by heating coiled wire caused the liquid in this thermometer-like instrument to rise, and by being graded on a scale would indicate the maximum of electrical flow; also the Halsey patent, No. 642,424, designed to measure the flow of current by split spindles, one part pivoted within another, and the intervening portion between the spindle parts filled with a very viscous material, permitting the end of the spindle, geared so as to indicate the flow, to turn quite slowly.

These sluggish indicators, or meters, did not reliably measure the

flow of current for definite times—the Wright device, which seems to have been most extensively used, failing to register the maximum demand accurately, unless the demand lasted for a considerable period of time; and the Halsey device, by reason of its structure, failing to be a practical meter for the purpose for which designed.

Merz was then confronted with the problem to provide a meter which should not only integrate and register the entire amount of current or energy used by a consumer during the time charged for, but should also integrate and register the maximum amount of current or energy consumed in a definite shorter interval of time.

The Merz structure involves essentially: First, a quantity meter of some kind. It is an instrument measuring, not the rate at which electricity or energy is supplied, but the quantity of electricity or power which is supplied during a long period. Second, instead of associating with such an instrument a rate-measuring device, as was universally done in the prior structures, Merz provides means of indicating the record which the meter has made of the quantity of current or power delivered during some definite period of time significant with respect to the generating capacity of the station. He also provides means under a controllable clock for setting back this maximum demand integrator at the end of each significant period. To complete the apparatus, he provides a nonreturn indicating hand and dial, which retains the position in which it is placed by the maximum integration for any maximum demand period.

The Merz structure not only indicates a different quantity, but indicates it in a different way, than any of the other mechanisms in the prior art. This invention connects the maximum demand indicator to the integrating train or registering mechanism of a quantity measuring device, thus indicating a summation of all that has happened during an interval long enough to have a significant relation to the ability of the central station plant to supply current.

The introductory clause of claim 1 of the patent sets forth:

"Combined electric measuring and indicating apparatus capable of integrating the amounts of electricity that shall have passed through the apparatus during a number of equal intervals of time, and of indicating the greatest of these amounts."

Without quoting the entire claim, the claim goes on to describe the features of the device, and says:

"Said apparatus, comprising an integrating meter, a body adapted to be actuated during each interval of time to an extent dependent upon the total quantity of electricity that shall have passed through said apparatus during the interval, an indicator adapted to be moved in one direction by said body and to remain in the position into which it is moved, and means for returning said body to its original position at the end of each interval of time."

The second claim provides in part for:

"Apparatus for measuring and indicating an electrical supply; an integrating electricity meter, and an indicating device driven from said meter, and adapted to indicate the greatest amount of current integrated by said meter during any one of a number of intervals of time."

The third claim is in part similar to the second, and provides in part:

"A body arranged to be actuated from said meter to an extent dependent upon the quantity of electricity passing through the meter, an indicator adapted to be moved in one direction by said body and to remain in the position in which it is left, and means for restoring said body to its starting position at regular intervals of time."

The introductory clause of the fourth claim is like that of the third. The claim then sets forth:

"Gearing co-operating with said meter, an actuating device arranged to be moved in one direction by said gearing, an indicator arranged to be moved in one direction by said actuating device, and to remain in the position in which it is left, and means for setting back said actuating device at regular intervals of time."

By referring to the claims made for the defendants' structure, it is quite apparent that both the defendants' structure and the complainant's structure are alike in their mode of operation and their result.

Among the patents indicating the state of the prior art, cited by the defendants, was a patent of Petri, issued in 1880; patent to Little, No. 661,881; patent to Robinson & Badeau, No. 919,640. For the purposes of this memorandum, it is not necessary to discuss these patents at length. The significant intervals of time and the maximum indications characteristic of the Merz patent do not appear in the Petri patent. The Petri device was designed to count the number of revolutions of a shaft or machine, and did not comprehend an application or use such as is involved in the Merz patent. The Little patent does not show the maximum demand for a significant interval of time, but only registers instantaneous electrical impulses. The maximum demand for energy is never accurately indicated by the Little structure. The Robinson & Badeau structure was designed to show a curve drawing of fluctuations of the electrical flow, and would require mathematical computation, in order to arrive at the maximum amount of current used.

The complainant asks for a broad construction of the claims of the Merz patent, and from the view which I take of these claims I think that such construction should be given to them. It appears to me that Merz was the first to combine with a current-integrating meter an arrangement for integrating for shorter intervals the current or energy. And he was the pioneer in the conception of the realization of an invention which consists of the use of an integrating watt meter or current meter for the charged-for meter, together with the application thereto of an arrangement for integrating short or equal intervals of time as to current flow in the circuit—the further indication of the maximum of the integrations for the short time periods.

The invention may appear simple to a skilled electrical engineer, but it appears to me to have involved a comprehension of the problem of measuring electricity, combined with a practical arrangement of machinery in such a way as to plainly and accurately indicate the maximum amount of electric current used in a period as well as the current flow during an appreciable period.

An order may accordingly be entered to comply with the prayer of the complainant's bill. Exceptions may be granted to the defendants.

LAWSON v. METAL PRODUCTS CORPORATION.

(District Court, D. Rhode Island. February 28, 1913.)

No. 2753, C. C.

PATENTS (§ 328*)—INVENTION—GEM SETTING.

The Lawson patent No. 983,295, for a gem setting, having such ornamental extensions as may be made in box settings of the usual type constructed integrally with such setting, is void for lack of patentable invention.

In Equity. Suit by James W. Lawson against the Metal Products Corporation. On final hearing. Decree for defendant.

Howard A. Lamprey, of Providence, R. I., for complainant.

Alex. P. Browne, of Boston, Mass., and Cook & Brownell, of Providence, R. I., for defendant.

BROWN, District Judge. The bill charges infringement of letters patent to J. W. Lawson, No. 983,295, February 7, 1911, for gem setting.

The gem setting described consists of a box setting of an old type, with the addition of certain ornamental extensions made integral with the box setting. The box setting is substantially similar to that shown in a prior patent to Dover, No. 795,109, July 18, 1905.

The specification of the Lawson patent in suit states:

"Heretofore in the use of the form of box setting shown in the drawings whenever any ornamental structures, attachments or connections of any kind or nature have been used, such as correspond to the parts *d-d* as ornamental structures and *z-z* as rings, eyelets and other connections, they have been swaged or soldered to the form of box setting shown. The soldering anneals and weakens the adjacent metals so that by reason thereof and also through faulty swaging said ornamental structures, attachments and connections are often insecure and results in the loss of valuable ornaments and gems or in the article of jewelry being rendered useless and put away lest the valuable gem which the gem setting holds should be lost. And in the case of the cheaper lines of goods the cost of the time and labor necessary to assemble the said ornamental structures, attachments and connections and to solder them is so great that it is prohibitive for many articles. In my improved gem setting, said ornamental structures, attachments and connections or securing members are struck up integrally with said body portion from the same piece of stock and so can be made as strongly as desired and at the same time at a great saving of time and labor and dispensing entirely with said swaging and soldering. Moreover I strike up my improved gem setting together with said parts *d d* and *e e* at once in the oval, square, circular or any shape desired, whereas the box setting shown is made only in the round and so to get any other shape it must afterward be taken and swaged into the desired shape."

Complainant relies upon all claims of the patent.

The prior art shows box settings with ornamental extensions soldered thereto. It also shows gem settings in which the gem is secured by points as distinguished from a continuous flange to hold the gem in position. Such settings had ornamental extensions extending integrally from the base of the body portion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The prior art also shows rings having a box setting and ornamental extensions all integral; i. e., forged of one and the same piece of metal.

In the prior patent to Dover there is shown in figure 10 a lateral extension of the lower part of the tubular body portion, of which the patentee, Dover, says:

"This excess of diameter gives a richness and massiveness of effect which is very desirable even in the use of single settings, and which is greatly enhanced by grouping, * * * producing an appearance of embedding the gems."

In view of the prior patent to Dover and of the various exhibits, I am of the opinion that there was no patentable novelty in adding to the box setting of the prior art ornamental extensions which were integral with the box setting.

The complainant cites *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, but that case turns upon the character and novelty of the special device there shown, and cannot be taken as an authority for the broad proposition that to make in one piece what previously had been made in two pieces involves invention.

The bill will be dismissed.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. TRANSIT
DEVELOPMENT CO. et al.

(District Court, E. D. New York. February 18, 1913.)

1. JUDGMENT (§ 599*)—SUIT FOR INFRINGEMENT—PRIOR JUDGMENT AS BAR.

A judgment at law for infringement of a patent is not a bar to a subsequent suit in equity against the same defendant for other acts of infringement committed prior to the commencement of the law action, but not known to complainant at that time, and not included in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1114; Dec. Dig. § 599.*]

2. JUDGMENT (§ 720*)—SUIT FOR INFRINGEMENT—PRIOR JUDGMENT—RES JUDICATA.

A judgment for plaintiff in an action at law for infringement of a patent is conclusive of the questions of validity of the patent and infringement in a subsequent suit in equity against the same defendant for infringement by devices identical with those involved in the law action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SWITCHING DEVICE.

The Cheatham patents, No. 612,702 and No. 917,541, for switching devices, *held* valid and infringed.

In Equity. Suit by the Cheatham Electric Switching Device Company against the Transit Development Company, the Nassau Electric Railroad Company, and the American Automatic Switch Company. On final hearing. Decree for complainant.

See, also, 203 Fed. 289.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

O. Ellery Edwards, Jr., of New York City (Owens & Edwards, of New York City, of counsel), for complainant.

Kiddle & Wendell, of New York City (Alfred W. Kiddle and Wylie C. Margeson, both of New York City, of counsel), for defendants.

CHATFIELD, District Judge. The complainant filed a bill in equity on the 14th day of July, 1911, against the Transit Development Company and the Nassau Electric Railroad Company, which had previously been defendants in actions at law brought by the Cheatham Electric Switching Device Company, as plaintiff.

These actions at law were instituted upon the 4th day of January, 1910, and charged infringement (by 8 switching devices in the case of the Transit Development Company, and by 6 of the 8 in the case of the Nassau Electric Railroad Company) of two patents, Nos. 612,702 and 917,541, taken out by one Robert V. Cheatham. The American Automatic Switch Company has been removed from this case as party defendant by plea, and we have therefore the same parties as in the action at law. The patents sued on and the claims alleged to be infringed are the same. The devices alleged to infringe are exactly similar, and are of the sort identified in the evidence as "type 14."

The particular devices involved in the present action include the 8 devices proven in the actions at law, and 27 others, the existence and location of which were not discovered until after the actions at law had been instituted, but many of which were known at the time of trial and were specified in an exhibit used in that action. The bill in the present action, as amended, attempted to bring in the American Automatic Switch Company, and also asked for an accounting of all profits from the use of the devices recited, for a writ of injunction against further infringement, and for the delivery and destruction of the infringing devices. As has been said, the American Automatic Switch Company has been removed from the action, and an accounting as to the 8 devices in the previous suits has been had, in the sense that the court instructed the jury that the sum of \$68.93 represented, for each device, the profit of the user and the damage of the patentee. This amount was arrived at from the testimony of Mr. Cheatham as to the fixed market price for his device, and the expense of manufacturing and installation. Upon the trial of the present action, the complainant put in evidence the record in the action at law, so as to show that, as between the parties, the question of validity of the patents and infringement had been adjudicated. Substantially no other proof was offered.

The defendants have objected to the introduction of this record, have denied the validity of the patents and infringement, and have offered testimony to support their contention, upon the theory that the issue is not *res adjudicata* as to them. With respect, therefore, to the 8 devices covered by the judgment in the suit at law, the only difference between the action at law, up to the time of judgment, and the present action, would be that in the action at law a separate cause of action might have been numbered in the complaint for each one of the 8 devices, while in the present action a single cause of action

for infringement would be followed by an accounting and by injunction upon a decree for the complainant.

[1] The defendants allege as a defense that no equitable relief can be had in the form of a decree granting recovery for the profits of the wrongdoer—that is, for the gain of the infringer by the use of the infringing device—if the complainant has already elected to recover damages in an action at law for the same infringement. In *Horton v. New York Central & H. R. R. Co.* (C. C.) 63 Fed. 897, it was held that a plaintiff could not recover in equity for other acts of infringement committed during the same period, in which a previous equity action had resulted in a decree carrying with it an injunction and damages for the prior infringement. In *Panoulis v. National Equipment Co.* (D. C.) 198 Fed. 493, the court says that an action for the infringement of patent cannot be split into an action at law and a suit in equity, but that, if either be instituted, it must be made to include all causes of action which are accrued up to the time of beginning the action. In this case the court gave a decree in equity for an accounting and an injunction for acts subsequent to the time of beginning the action at law.

Aside from the question of surprise, there would seem to be no difficulty in including in the proof in such an action any acts from which damage flowed up to the time of trial, and, if that had been done, then the scope of an action in equity would be still further limited. But the principle upon which the case is decided seems to be one of public policy, merely disapproving of allowing two actions to stand with respect to a set of transactions covering the same period. And there would seem to be no more reason why causes of action, discovered subsequently to the institution of the first action, should not be included in the second (on the theory upon which a new trial may be asked upon newly discovered evidence) than there would be why all causes of action up to the time of trial should be disposed of in the first litigation. At the outset, therefore, the court is unwilling to hold that the complainant may not maintain the present action with respect to the 27 devices which were not mentioned in the first suit.

As to the other 8 devices, and even as to the 27 above referred to, the complainant relies upon the case of *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, in asking for an accounting of profits rather than a decree for a recovery of the specific amounts found as the measure of damage in the action at law. It would seem that the complainant, if it be entitled to any recovery, is entitled to an injunction with respect to all the devices referred to, and that, if necessary, an accounting may be ordered as to any item not covered by the former judgment. Whether the rule of damage found in the action at law can be shown to be inadequate, and whether any method of computation of the profits (from a single switch point in an intricate railroad system, or the saving of a switch tender, or the time of the motorman who would have to open the switch by hand) can be worked out, need not concern us at the present time. That is a matter for the special master if an accounting be ordered. The principal question and the only one as to which much difficulty is experienced is that of

the application of the doctrine of *res adjudicata* with respect to the complainant's right to recover as to the 27 devices referred to. As has been said, the patents and parties are the same, and the claims relied upon are exactly the same. The plaintiff has recovered upon a finding by the jury that infringement existed of at least one of the claims upon which the complainant is now asking recovery. The jury has determined as between the present parties, and with respect to the same claims of these patents, that a valid claim, for the purpose of recovery upon the charge of infringement by the device known as type No. 14, upon exactly the same issue, was shown.

[2] The defendants have cited such cases as *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956, *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738, *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214, with other cases of similar purport, to prove that estoppel can be invoked under the doctrine of *res adjudicata*, only where the point or question at issue has been actually litigated and determined, and where the record shows conclusively and definitely as to what was litigated and determined, as opposed to any attempt to enforce an estoppel as to everything which might have been adjudicated. But in such an instance as the present case the right to recover does not depend upon whether every issue might be determined in the complainant's favor. Nor does the right of the complainant to a decree depend upon a determination with respect to any particular claim of those contained in the suit. As was charged in the action at law, if any claim of those presented was found valid, and if there is infringement, the complainant is entitled to a decree. The action at law determined, as between these parties and with respect to these particular patents, that a cause of action did exist upon some claim of the patent; that is, that some claim was valid and infringed, and because of that adjudicated right to judgment the court of equity must conclude that the complainant's right to a judgment has been litigated on precisely the same questions presented and between precisely the same parties, and in such a way that the right to recovery is *res adjudicata*. The complainant, therefore, should have a decree carrying with it an injunction and an accounting if desired, with respect to the 27 devices not included in the former action. The injunction will include use of the 8 devices for which the judgment at law has already been recovered, but there can be no additional decree for profits as to these devices through the guise of an action in equity. The testimony shows no use not covered by the judgment at law, and the doctrine of election as set forth in the *Panoulis Case*, *supra*, will control.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. TRANSIT
DEVELOPMENT CO.

SAME v. NASSAU ELECTRIC R. CO.

(District Court, E. D. New York. February 18, 1913.)

TRIAL (§ 340*)—VERDICT—POWER TO AMEND.

A court is without power to change the record of a verdict after the discharge of the jury, to show special findings, where it was entered as a general verdict only.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 795-799; Dec. Dig. § 340.*]

At Law. Actions by the Cheatham Electric Switching Device Company against the Transit Development Company and against the Nassau Electric Railroad Company. On motions to amend record. Denied.

See, also, 197 Fed. 563; 203 Fed. 285.

O. Ellery Edwards, Jr., of New York City, for plaintiff.

Kiddle, Wendell & Margeson, of New York City, for defendants.

CHATFIELD, District Judge. The present motion is an attempt to have the clerk's minutes, as to the statement of the jury's verdict, changed in two cases tried at the May, 1911, common-law term of the court, resulting in a verdict for the plaintiff for infringement of eight separate switching devices.

The court had charged the jury that upon the evidence a license or royalty of \$68.93 for each device was the limit of recovery, if they found infringing use of any valid claim of either of the two patents sued on, and that their verdict should be for as many times that amount as they might find the number of such devices, provided infringement was found at all (see page 335 of the printed record on appeal). When the jury returned to court, the clerk took the verdict in the usual form, and the foreman of the jury, having stated that the jury had reached a verdict, and having been asked for whom the verdict was found and whether they had assessed the damages, in response made the statement, according to the court's recollection, that they found for the plaintiff on every issue. Thereupon, the question was asked by the court whether the amount was eight times \$68.93 or \$551.44 in one case, and six times \$68.93 or \$413.58 in the other. Upon an affirmative response, the clerk again asked the foreman if their verdict was for the amount of \$551.44 in the suit against the Transit Development Company, and for \$413.58 against the Nassau Electric Railroad Company, and the jury all responded that it was. The court thereupon made the direction that judgment be entered on the verdict against the Transit Development Company for the larger sum, and that, as previously charged, six-eighths of that amount be entered in the second action as the verdict against the Nassau Electric Railroad Company, and made a direction as to the issuance of execution in accordance therewith. Upon the settlement of the case on appeal this matter was raised by an amendment to the case, and it was finally agreed by the attor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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neys, in the presence of the court, that for the purpose of the appeal the form of the verdict did not affect the rights of the parties. The case was therefore settled by the court upon the assumption that the finding of a verdict for the full amount against both defendants—that is, upon eight devices in one case and six in the other—was sustainable, if the issue (which was alike in each case) was properly found in favor of the plaintiff; that is, if it was based upon a finding of validity and infringement of any of the claims which were left to the jury, with instructions that their verdict could be based upon such a finding.

The defendant has cited herein *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013, *Pressed Steel Car Co. v. Steel Car Forge Co.*, 149 Fed. 182, 79 C. C. A. 130, and *Chandler v. Andrews*, 192 Fed. 543, 113 C. C. A. 15, as authority for the proposition that, after the discharge of the jury, a mistake in a verdict cannot be corrected nor the verdict changed, and that, after the end of the term, the court has no further power over the case. The plaintiffs have cited authorities to show that a mistake in the record—that is, a clerical mistake—can always be corrected, and the present motion, in so far as it has to do only with an alleged mistake in the entry by the clerk in his minutes, subsequent to the taking of the verdict in the courtroom, and the statement thereof taken down by the stenographer, after the clerk had finished questioning the jury, might be corrected so as to conform to the truth. But the court does not feel that the present motion is one of that sort. If it had been requested by the plaintiff, upon the trial, that the jury be instructed to render a finding specifically upon each claim of the various patents, in addition to the rendering of a general verdict, it might now serve the purposes of one party or the other to refer to those findings. But the court was not attempting to anticipate the possibilities of further litigation and was having the issue of the case on trial disposed of by the jury. The plaintiff had seen fit to submit this case to a jury, and if it obtained a verdict upon any claim of the various patents, and that claim was sufficient to support the verdict, then the result of the action would be to give the plaintiff a complete judgment upon the cause of action alleged.

For the court to now recall the jury and to procure the rendering of special verdicts by having the minutes corrected in such a way as to make it appear that the jury made special findings would be beyond the power of the court at the present time. Assuming that the foreman stated that the jury found for the plaintiff upon every issue, it is evident that there was one issue between the plaintiff and the Transit Development Company, and a separate issue between the plaintiff and the Nassau Electric Railroad Company. As charged by the court, the issue was separable with respect to the use of each of the eight devices involved, and could be determined by a finding for the plaintiff upon any one of the separate "issues" raised as to the several claims. But in the way in which the jury was charged the issues left to them were not equivalent to a definite direction to return a verdict specifying such findings, and hence are not to be treated in that way.

If the plaintiff obtains any benefit from the determination of the

jury in an action at law by a general verdict on charges of infringement relating to several claims of the patents, then the plaintiff in this case is entitled to the benefit of such general verdict. But when the court did not leave to the jury a determination as to any issue except the one of infringement, as based upon any valid claim, then even the statement that every issue was found for the plaintiff carried with it nothing showing a mistake in the clerk's minutes, when entered in the record as a finding for the plaintiff for the full amount.

The motion to correct the clerk's minutes is therefore beyond the court's power, is also unnecessary, and will be denied.

MACUTIS v. CUDAHY PACKING CO. et al.

(District Court, D. Nebraska, Omaha Division. February 13, 1913.)

No. 115.

REMOVAL OF CAUSES (§ 36*)—DIVERSITY OF CITIZENSHIP—JOINDER OF RESIDENT DEFENDANT.

An allegation, in the petition in an action by a servant against his non-resident corporate employer and a resident foreman for a personal injury, that the injury resulted from the failure of the foreman to maintain the place where plaintiff was required to work and the appliances in a reasonably safe condition, does not state a cause of action against the foreman personally, and his joinder does not deprive the corporation defendant of the right to remove the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

At Law. Action by Tony Macutis against the Cudahy Packing Company and Daniel Enright. On motion to remand to state court. Motion denied.

Greene, Breckenridge, Gurley & Woodrough and D. A. Fitch, all of Omaha, Neb., for plaintiff.

J. C. Kinsler, of Omaha, Neb., for defendants.

T. C. MUNGER, District Judge. This cause was begun in the state court, and removed to this court on petition of the defendant Cudahy Packing Company, showing diversity of citizenship between plaintiff and itself. The case is now presented upon a motion to remand. The plaintiff was an employé of the Packing Company, engaged in work about carcasses of beeves, and was injured by the fall of a carcass upon him. He alleges that it was the duty of the Packing Company's foreman, who is the other defendant, to repair and maintain in safe condition the appliances from which the carcass was suspended, and that it was the duty of the defendants to furnish and maintain safe appliances, and that defendants negligently allowed the appliances to be worn, defective, and unsafe, and, as a result of such condition, his injuries occurred. In this there is no allegation of facts showing a neglected duty of the foreman to the plaintiff. At most, the allegation charges no more than nonfeasance—mere omission on the part of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

foreman to perform the master's duty as to inspection and repairs. For this the foreman is not liable to the plaintiff. *Mechem on Agency*, §§ 569, 572, 573; *Kelly v. Chicago & A. Ry. Co. et al.* (C. C.) 122 Fed. 286-289; *Floyd v. Shenango Furnace Co. et al.* (C. C.) 186 Fed. 539, 540; *Clark v. Chicago, R. I. & P. Ry. Co. et al.* (D. C.) 194 Fed. 505-514. The consensus of judicial opinion is such that this cannot be said to be a fairly debatable question, as is the joint liability of master and servant for the servant's misfeasance. As the plaintiff's petition discloses no cause of action against the defendant employé, nor any reasonable basis for joining him as a party defendant, it must be held that the controversy is wholly between the plaintiff and the removing defendant. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176-185, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757.

The motion to remand will be overruled.

UNITED STATES ex rel. SCHLEITER v. WILLIAMS, Com'r of
Immigration.

(District Court, S. D. New York, March 6, 1913.)

1. HABEAS CORPUS (§ 82*)—PRODUCTION OF PERSON—NECESSITY—ALIENS.

Under Immigration Act (Act Feb. 20, 1907, c. 1134, 34 Stat. 901 [U. S. Comp. St. Supp. 1911, p. 505]) § 10, providing that the decision of the board of special inquiry, based on the certificate of the medical officer that an alien applying to enter is feeble-minded, etc., is final, the court on habeas corpus being without authority to enter on a personal inquiry as to whether the alien is a proper subject to be excluded, it was not material that the alien was not personally produced in court in response to the writ.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 74; Dec. Dig. § 82.*]

2. HABEAS CORPUS (§ 76*)—EXCLUSION—CERTIFICATE—FORM.

In habeas corpus proceedings to review determination of the board of special inquiry directing the deportation of an alien because of feeble-mindedness, a return under oath stating that the board was duly constituted, and that the certificate of the examining medical officers was duly made, was not fatally defective for failure to show in detail the facts on which it was stated that the certificate was duly made, to wit, that the officers were of the United States public health and marine hospital service, that each had at least two years' experience in the practice of his profession, etc.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 67; Dec. Dig. § 76.*]

3. HABEAS CORPUS (§ 23*)—EXCLUSION—FEEBLE-MINDEDNESS—BOARD OF SPECIAL INQUIRY—CERTIFICATE—PHYSICIAN'S REPORT.

Under Immigration Act (Act Feb. 20, 1907, c. 1134, 34 Stat. 901 [U. S. Comp. St. Supp. 1911, p. 505]) § 10, providing that the decision of the board of special inquiry finding that an immigrant should be excluded for feeble-mindedness is final, the report of a physician that in his opinion the immigrant was not feeble-minded could not be considered on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Habeas corpus by the United States, on relation of Blume Schleiter, to obtain a release from custody of William Williams, Commissioner of Immigration, under a deportation warrant. Writ dismissed, and alien remanded.

This is a proceeding brought on behalf of an alien immigrant held for deportation as being within one of the excluded classes. She arrived at the port of New York on the steamship *America* on February 2, 1913. The return shows that upon arrival she was examined before a board of special inquiry, three sitting, and that there was also before the board a certificate of three examining medical officers, Drs. Grubb, Mullan, and Gwynn, which stated that she had been examined and found to be "feeble-minded." The act (Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 [U. S. Comp. St. Supp. 1911, p. 500]) excludes all aliens who are "idiots, imbeciles, feeble-minded," etc. She was therefore excluded.

Douglas A. Levien, of New York City, for relator.

John N. Boyle, Asst. U. S. Atty., of New York City, for Immigration Com'r.

LACOMBE, Circuit Judge. The points raised by relator's counsel are as follows:

[1] 1. That the body of the relator was not actually produced in court on the return day. It is not infrequent practice, originating in cases where the alien has some contagious disease, to dispense with his production in the court, unless some purpose might be served by his attendance, such as opportunity to converse with counsel. It is contended that in this case such attendance was necessary in order that "the court might have an opportunity to see and converse with the immigrant, and from personal inspection judge as to whether she is a proper subject to be excluded." Inasmuch as section 10 provides that in such cases as this the decision of the board of special inquiry, based upon the certificate of the medical officer, shall be final, the court is without authority to enter upon a personal inquiry as to whether the alien is a "proper subject to be excluded." Therefore there is no necessity for the court to see and converse with her.

[2] 2. That there is no proper certification of the certificate and examination. So far as can be made out from the papers, the ground of this objection seems to be that although the return states under oath that the board of special inquiry was duly constituted, and that the certificate of the examining medical officers was duly made, the return does not show in detail the facts upon which it is stated that the certificate was duly made, to wit, that they were officers of the United States public health and marine hospital service; that each of them has had at least two years' experience in the practice of his profession, etc. The point is not well taken.

[3] 3. A report of a physician stating that in his opinion the immigrant is not feeble-minded has been filed with the brief. Since the official certificate is final, it cannot be considered. *Re Neuwirth* (C. C.) 123 Fed. 347.

The writ is dismissed, and the alien is remanded.

PARKER v. BATES.

(District Court, S. D. Georgia, E. D. February 20, 1913.)

BANKRUPTCY (§ 188*)—LIENS—EFFECT OF FAILURE TO RECORD.

The mother of a bankrupt, who furnished the money with which he bought land and built a house thereon for a home, taking an agreement by which he pledged the property to her as security, *held* to have a right therein superior in equity to that of his creditors, although the contract was not recorded until he became insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-289, 291-295; Dec. Dig. § 188.*]

In Equity. Suit by Homer C. Parker, trustee of M. R. Gregory, bankrupt, against Mrs. Emma Bates. Decree for defendant.

Larsen & Larsen, of Dublin, Ga., and Fred T. Saussy, of Savannah, Ga., for complainant.

P. W. Meldrim, of Savannah, Ga., for defendant.

SPEER, District Judge. I do not think this is a case where it is altogether appropriate to intimate even in the gentlest or most deferential way in the world that the court is likely to be influenced by sympathy. It is true that I believe there is no holier relation than that between mother and son. I am inclined to think that when it comes to the distribution of property—in other words, to such matters as are involved here—there is more apt to be collusion between mother and wife than there is between mother and son. I do not think it necessary to go into the domain of emotional or sympathetic consideration, and the cardinal fact which controls me here is the perfect genuineness of this transaction. There is not the slightest doubt that this good woman has told the truth. Her son wanted to buy a lot and build a little house. He had a young wife, perhaps one or more children. He needed the home. He was crippled and lame. What is more natural than he should go to his mother for the money? His mother let him have the money. There was not any concealment about it. He went to the very banker who holds the principal claim here, who appeared as a witness for the trustee in this suit, and got that gentleman to prepare the instrument, crude it is true, but clear enough to show that but for the mother there would not have been any assets to quarrel over. Her money bought the land and her money built the house, and he pledged the house to her as security as early as 1907. Now that, as I say, was a perfectly genuine transaction. She does not need to rely upon the deed which she afterwards took when her son was in embarrassed circumstances, in order to protect her interest. Her money bought him the only property which is now before the court. This case stands upon an entirely different footing from that where a banker takes a mortgage from one of his customers, and locks that mortgage up in his vaults, and keeps it secreted so that the mortgagor can go on and purchase goods and obtain credit, and in that way defraud others. No court has gone further than this in the effort to protect business integrity against transactions of that sort.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

But this is simply an honest advancement on the part of the mother to the son, and I do not think upon any principles of equity that creditors have any right superior to her right. Her money bought the property and without her money there would have been no assets to controvert about. I think her equity superior and the value of her claim is over \$1,300. The value of the property is possibly some little in excess of that, but the difference belongs to that insignificant claim of values about which the maxim *de minimis non curat lex* is applicable. I therefore decree in this case for the defendant.

THE COURT: I will add that I would have acceded to the request of Mr. Saussy to furnish a supplemental brief, for the reason that this note of the defendant was not attached to the answer or set forth in the answer, but it being stated and not denied that a copy of it was given to Mr. Saussy's associate, indeed the leading counsel, and no additional delay seems proper.

Mr. Saussy: On behalf of Mr. Larsen, whose case this is, and mine by adoption, I wish to enter exceptions to your honor's decree until I can confer with Mr. Larsen.

UNITED STATES v. LAKE SHORE & M. S. RY. CO. et al.

(District Court, S. D. Ohio, E. D. December 28, 1912.)

No. 1,584.

1. MONOPOLIES (§ 16*)—ANTI-TRUST ACT—COMBINATION BETWEEN COAL CARRYING RAILROADS.

Coal carrying railroads extending into the same coal fields, although reaching different mines, or extending into different fields where competing coal is produced, which traverse generally parallel lines and reach either directly or through their connections the same markets in other states, must be regarded as natural competitors in interstate commerce, and any arbitrary methods between them or between them and the coal companies, by which such natural competition is eliminated, is in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

2. MONOPOLIES (§ 16*)—ANTI-TRUST ACT—COMBINATION BETWEEN COAL CARRYING RAILROADS.

The combination of a number of coal carrying railroads, which were natural competitors, and the acquiring by them of large coal mining interests tributary to their several lines, so that both railroad and mining interests were under a single controlling power, the result being a division of the traffic and the elimination of competition as to interstate as well as domestic shipments, and a discrimination against all new and independent mines, was one in restraint of interstate commerce, and created a monopoly of a part of such commerce in violation of Sherman Anti-Trust Act of July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MONOPOLIES (§ 21*)—PERSONS LIABLE—JOINDER AFTER CONSPIRACY IS FORMED.

One who learns of a conspiracy or unlawful combination after it is formed, and then joins it or knowingly aids in the execution of the scheme and shares in its profits, becomes from that time as much a co-conspirator as if he were one of those who originally designed it.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.*]

4. MONOPOLIES (§ 24*)—ANTI-TRUST ACT—SUIT TO RESTRAIN VIOLATION—EVIDENCE.

In considering the legality of a contract between railroad companies claimed to be in restraint of interstate commerce, and in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), evidence to show the relations between the parties and the previous conduct of the business affected is competent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

5. MONOPOLIES (§ 16*)—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF AND TO MONOPOLIZE INTERSTATE COMMERCE.

The Hocking Valley Railway Company and the Toledo & Ohio Central Railway Company each owns and operates a line of road in Ohio from Toledo into the Hocking coal fields in the southeastern part of the state, and from a connection with such lines the Kanawha & Michigan Railway Company owns and operates a line across the river into the Kanawha coal fields in West Virginia. The principal freight business of all the roads is the carriage of coal mined in such fields and destined for lake ports or points further to the north and west. About 1899 the Hocking Valley Company, through stock purchases and otherwise, acquired control of both the other roads, and also of a large number of coal companies owning land and mines tributary thereto. Five trunk lines, again, together purchased a controlling stock interest in the Hocking Valley Company, and the entire combination was practically managed and controlled by a committee appointed by them. In an action by the state against the Hocking Valley Company, which is an Ohio corporation, such combination was adjudged illegal, and the defendant was required to dispose of its controlling interest in the other roads and also in the mines. To meet this situation, a contract was entered into between two of the trunk line stockholders, viz., the Chesapeake & Ohio Railway Company, operating a line from the coast on the south side of the Ohio river to Cincinnati and a subsidiary line from there to Chicago, its main line touching that of the Kanawha & Michigan Company, and the Lake Shore & Michigan Southern Railway Company, operating a line from Buffalo, through Toledo, to Chicago, pursuant to which the Chesapeake & Ohio Company acquired the controlling interest in the Hocking Valley Company and the Lake Shore Company in the Toledo & Ohio Central Company, while the controlling interest in the Kanawha & Michigan Company and the coal companies was divided between them, the contract providing that each should have the right to use the road, and that its north-bound coal traffic should be fairly divided between the Hocking Valley Company and the Toledo & Ohio Central Company. *Held*, that such contract did not change the essential character of the previous arrangement, but was inconsistent with the established rule requiring freedom of competition in interstate commerce, and in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MONOPOLIES (§ 24*)—ANTI-TRUST ACT—SUIT TO ENJOIN VIOLATION.

There is a clear distinction between the power to grant relief respecting the past failure to construct one of two projected parallel lines of railroad and the power to prevent the elimination of one of two parallel roads in actual existence and operation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

Denison, Circuit Judge, dissenting in part.

In Equity. Suit by the United States against the Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, the Sunday Creek Company, the Continental Coal Company, and the Kanawha & Hocking Coal & Coke Company. Decree for complainant.

Sherman T. McPherson, U. S. Atty., of Cincinnati, Ohio, and O. E. Harrison, of Columbus, Ohio, and John L. Lott, of Tiffin, Ohio, Special Assts. to the Atty. Gen., for the United States.

Clyde Brown, Chas. T. Lewis, John H. Doyle, and Frank S. Lewis, all of Toledo, Ohio, for defendants Lake Shore & M. S. Ry. Co., Toledo & O. Cent. Ry. Co., and Zanesville & W. Ry. Co.

Lawrence Maxwell, of Cincinnati, Ohio, H. T. Wickham, of Richmond, Va., and A. C. Rearick, of New York City, for defendant Chesapeake & O. Ry. Co.

Talfourd P. Linn, of Columbus, Ohio, for defendant Kanawha & M. Ry. Co.

Lawrence Maxwell, of Cincinnati, Ohio, James H. Hoyt, of Cleveland, Ohio, and John F. Wilson, of Columbus, Ohio, for defendant Hocking Valley Ry. Co.

William O. Henderson, of Columbus, Ohio, for defendant Sunday Creek Co.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit was brought to enjoin further performance of certain agreements alleged to have been made in pursuance of combinations and conspiracies formed and carried out in restraint of trade among the several states, particularly trade in bituminous coal, in violation of Act Cong. July 2, 1890, commonly known as the Sherman Anti-Trust Act (July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); many of the acts alleged having been committed in whole and others in part within the Eastern Division of the Southern Judicial District of Ohio.

The defendants consist of six railroad companies and three coal companies, named in the margin.¹ The railroad companies are all

¹ The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, the Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ohio corporations, except the Chesapeake & Ohio, which was organized in Virginia and all are engaged in transporting interstate commerce. The coal companies named were created as follows: The Sunday Creek under the laws of New Jersey, and the other two under the laws of West Virginia.

The Railroads. It is important to understand the geographical relations of the railroads, and similarly their relations to the coal fields involved. The Lake Shore extends from Buffalo to Chicago, passing through Ohio near the southerly shore of Lake Erie to Toledo, and thence across the northerly portion of the state, and has a number of intermediate branches. A large majority of its capital stock is owned by the New York Central. The Chesapeake & Ohio extends from Old Point Comfort to Cincinnati, running generally along the south side of the Ohio River from a point east of Huntington, W. Va., to and through Kentucky to Cincinnati, and also has a number of intermediate branch lines. It owns a great majority of the stock of the Chesapeake & Ohio Railway of Indiana, and so reaches Chicago. Thus one of these east and west trunk lines passes through Ohio near its northerly boundary, and the other along the south shore of the Ohio river near the south boundary of Ohio. Two of the remaining defendant railroads are wholly within Ohio, running generally in a north and south direction, viz., the Hocking Valley from Toledo by way of Columbus, Lancaster, Logan, and Gallipolis to Pomeroy on the Ohio river (passing through Kanauga on the Ohio river opposite Point Pleasant, W. Va.), with a branch line running from Logan to Athens; and the Toledo & Ohio Central has two divisions running from Toledo, one by way of Fostoria, Bucyrus, and Thurston to Corning in Perry county, and the other by way of Findlay, Kenton, and Columbus to Thurston on the first division. The Kanawha & Michigan runs south from Corning to the Ohio river, crossing the river from Kanauga, Ohio, to Point Pleasant, W. Va., and continuing thence through Mason, Putnam, Kanawha, and Fayette counties by way of Charleston to Gauley Bridge, in that state, using the tracks of the Hocking Valley between Hobson and Gallipolis, by way of Kanauga; and the Zanesville & Western runs east and west from Thurston through the counties of Fairfield, Perry, and Muskingum to Zanesville, Ohio, although it seems to be part of an old road which formerly continued westwardly from Thurston to Columbus, parallel with the Hocking Valley.

The Coal Fields. The Ohio coal fields directly in question are situated in Athens, Perry, Hocking, and Muskingum counties, and known as the Hocking Valley coal fields; and those in West Virginia are situated in the Kanawha coal district. The four railroads last named are connected with portions of these coal fields of Ohio, and the Kanawha & Michigan with the Kanawha coal fields. The principal coal mines along the Hocking Valley are located in Athens, Perry, and Hocking counties, those along the Toledo & Ohio Central are in Fairfield, Perry, Hocking, Athens, and Muskingum, those along the Zanesville & Western are in Muskingum and Perry counties, and those along the Kanawha & Michigan are in Putnam, Kanawha, and Fayette coun-

ties, W. Va., besides some that are located in Perry and Athens counties, Ohio; and the principal part of the freight traffic of all the defendant railroad companies, except the Lake Shore, is bituminous coal in car load shipments, the principal mines along the Chesapeake & Ohio being in Kanawha, New River, and Big Sandy districts of West Virginia and Kentucky. A large part of the freight traffic of the Lake Shore is bituminous coal in car load shipments derived from branch roads tapping the Appalachian coal fields. The coal of the various fields mentioned is shipped on these roads from the portions of coal fields with which they are severally connected as before pointed out, to lake ports and to points in the North and Northwest.

[1] *Competitive Conditions.* The Hocking Valley and the Toledo & Ohio Central, when the latter and the Kanawha & Michigan are operated as they were for a long time as a through line, are naturally competing roads. However, evidence was offered to show that the river division of the Hocking Valley, running from Logan to Kanauga (and thence to Pomeroy, as stated), cannot be treated as a competitor of the Kanawha & Michigan, because of difficult grades on such river division. The Hocking Valley, as far south as Athens, and the Toledo & Ohio Central, are naturally competing roads. It is to be noted, however, that claim is made that competing relations cannot be ascribed to roads connected as these all seem to be with different sets of coal mines, even where such mines are located in the same coal field. As it seems to us, a broader view than this must be taken. The destinations of the coal shipped from these coal fields and the effect on the prices to be exacted of the coal purchasing and consuming public located at points beyond the lake ports and the boundaries of Ohio must be taken into consideration; and not merely the producers of coal and the carriers transporting it. Manifestly it can make no difference to the coal purchaser or consumer whether coals of the same quality be derived from one particular mine or another of the same field, no matter how close together or how far removed from one another such mines may be, so long as the prices of the coals and the freight charges to be paid are influenced by natural competitive conditions both at the mines and in transportation; and the right to have such conditions maintained cannot be validly abridged through arbitrary or unusual methods. This is equally plain respecting coals of different qualities originating in different fields and requiring varying distances of transportation over lines naturally competing in material parts; for the purchaser or consumer will obviously select the coal according to his particular needs or ability to sell or to pay.

It must follow that mere differences in locations of coal mines within the same general field, as well as differences in quality owing to differences in fields, cannot rightfully be made the basis for eliminating effective competition as between railroads traversing substantially the same territory along parallel lines from neighboring mines of the same coal field, or even of different coal fields, to the same general destinations; and the evil effects upon competition concerning rail roads and coal mines so related are accentuated wherever a union of interests is created and maintained between such producers and car-

riers of coal, particularly where producers and carriers through artificial methods become practically one and the same. If these views are at all applicable to a case such as this, the Kanawha & Michigan, when employed as a carrier exclusively in connection with either the Toledo & Ohio Central or the Hocking Valley, may, we think, be safely treated as a natural competitor of the one or the other of such roads, according as the connection may exist; because the destinations of its coal in either event are, in any rational competitive sense, the same as those of the other road respecting the coal originating on its line. It results (1) that traffic originating on either the Hocking Valley or the Toledo & Ohio Central should be accorded the benefits of free competition; (2) that when coal originating on the line of the Kanawha & Michigan is carried in part over both of these other roads to destinations beyond Ohio, as also coal originating on that road in West Virginia and destined to common points within Ohio, it is to the interest of the Kanawha & Michigan actually to employ the legitimate advantages arising from its opportunity to forward such coal (and this forms the great bulk of its traffic) over either of the other roads. The issue in a general sense is whether these competitive conditions have been suppressed; and the situation is further complicated by uniting coal interests with the railroad interests proper.

[2] *Combination and Conspiracy—Alleged Origin and Continuation.* The combination and conspiracy averred originated in 1899 and have been continued in one form or another ever since. What happened between that time and the year 1909 resulted in a suit in quo warranto by the state of Ohio against the Hocking Valley. State ex rel. v. Railway, 12 Ohio Cir. Ct. R. (N. S.) 49, 145. The first decision in that case was rendered April 24, 1909, and upon rehearing adhered to July 21st of that year; and on January 18, 1910, the court made a finding of facts, with separate conclusions of law thereon (set out in the present record), in terms ousting the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan, the Buckeye Coal & Railroad Company, the Sunday Creek Coal Company, the Sunday Creek Company, and the Continental Coal Company; from the power of guaranteeing bonds of the Continental Coal Company; from exercising control or management of the Kanawha & Michigan, the Toledo & Ohio Central, the Zanesville & Western, and the coal companies before mentioned; and from performing a certain contract between it, the Toledo & Ohio Central, and the Continental Coal Company for division of freight between such railroads. It was adjudged, also, that the road of the Toledo & Ohio Central for its entire length is parallel to and competitive with the road of the Hocking Valley from Toledo to Logan; that the roads of the Hocking Valley and the Kanawha & Michigan are parallel lines between Logan and Corning respectively and the Ohio river; and that the Kanawha & Michigan and Toledo & Ohio Central together are competitive with the entire line of the Hocking Valley. This judgment was allowed to become final.

In March following the Lake Shore and the Chesapeake & Ohio entered into an agreement (sometimes referred to by the parties as the

Schaff-Stevens agreement and sometimes as the agreement of March 12th, and again of March 17th), which has become the subject of a controlling issue in the present cause. Indeed, the government's position is that the operation and effect of this agreement, with what has been done under it, have been to continue the scheme so condemned by the judgment of the Ohio Circuit Court; while that of the defendants is that the agreement is valid, and that the acts of the parties thereto and of all the other defendants, since the date of the agreement, have in no wise been repugnant to any federal statute. It is not claimed that the issues determined in the state quo warranto suit are decisive of issues concerning interstate commerce; but it is urged that, apart from the state case, interpretation of the March agreement and of the conduct of the parties to it and those directly affected by it is distinctly aided by looking into the conduct of those who were interested in the properties before the agreement. Stated otherwise, the contention is that a view of the situation existing before the agreement and of the situation that has since existed cannot but be helpful to a proper solution of the controversy.

We do not propose to recite or discuss all the details of either situation, for such a course would occupy far too much space, and, moreover, is not necessary. If the locations and connections of the railroads and their relations to the coal properties are recalled, as before pointed out, it will not be difficult to apply the controlling features of the evidence adduced on the one side to prove, and on the other to disprove, the alleged combination and conspiracy and continuation thereof. In 1899 a plan for the reorganization of the Columbus, Hocking Valley & Toledo Railway Company (predecessor of the Hocking Valley) was entered into under date of January 4th, and direction of J. P. Morgan & Co. After judicial sale of the railroad property of the company, the purchasing trustees at such sale conveyed this property to the Hocking Valley, and the title thereto is still in that company. It was part of this plan to have the Hocking Valley acquire interests in the Toledo & Ohio Central and the Columbus, Sandusky & Hocking Railroad Companies, or successor companies, and in February, 1899, the stockholders of the Hocking Valley adopted a regulation reserving 50,000 shares of its preferred and 50,000 shares of its common stock for the purpose of acquiring such interests. These reserved shares were from time to time listed on the New York Exchange at the instance of the Hocking Valley and for the express purpose of acquiring such interests. The purchases of the stock in the Toledo & Ohio Central were made in the name of a New Jersey corporation, called the Middle States Construction Company, which was organized in February, 1899, for that purpose. In 1899 and 1900 the Hocking Valley, through the issue of over \$8,000,000 of its reserved preferred and common stock, purchased the bonded indebtedness of this construction company; and this indebtedness was secured by and convertible into the stock of the Toledo & Ohio Central, under a deed of trust of the Construction Company to the Central Trust Company of New York. Through the issue of the remainder of its reserved stock, the Hocking Valley, in 1902, purchased all the stock in

and all the bonds of the Zanesville & Western, which through judicial sale had acquired the portion of the Columbus, Sandusky & Hocking Railroad extending from Thurston, in Fairfield county, to Zanesville, in Muskingum county, with certain branch lines. It is not definitely shown when and in what amounts the purchases of the stock in the Toledo & Ohio Central were made; but it appears by stipulation that the Construction Company, in the years 1899 and 1900, acquired 58,921 shares of such stock, and the listing papers before mentioned show that the total issue of stock of the Toledo & Ohio Central was 102,080 shares, preferred and common. Moreover, from 1902 to 1909 the president and general manager of the Hocking Valley, not to speak of other officers selected later, occupied corresponding positions in the Toledo & Ohio Central and the Zanesville & Western. The control thus signified in the Hocking Valley carried with it also the control of the Kanawha & Michigan. In 1890 the Toledo & Ohio Central acquired 45,000 shares, and in 1899 an additional 100 shares of the capital stock of the Kanawha & Michigan, constituting a majority of that company's outstanding capital stock, and these two roads were operated practically as a through line; and, further, as early as February, 1891, the former guaranteed the 100-year bonds of the latter at the rate of \$10,000 a mile for 134 miles, or \$1,340,000, and thereafter advanced it moneys from time to time. Further, in 1903, the Hocking Valley exchanged its holdings of stock and bonds in the Zanesville & Western for the shares held by the Toledo & Ohio Central in the Kanawha & Michigan. Thus the Hocking Valley attained practical control of the two parallel systems of railroad between Toledo and the Ohio river, including the Zanesville & Western; and, apart from influence exerted by certain trunk lines alluded to later, the Hocking Valley alone remained in control of this entire system of railroads until the execution of the agreement of March 12, 1910.

We shall gain a better knowledge of the situation as it existed prior to the March agreement, if at this point we look further into the coal fields, which were tributary to this system of roads and especially into certain portions of such fields that were under the practical control of the Hocking Valley. Much evidence was offered upon this subject, and some of it is clarified by admissions contained in some of the pleadings. By several methods the Hocking Valley procured control of large coal properties both in the Hocking and Kanawha fields. Pursuant to the plan of reorganization of 1899, that company and the Buckeye Coal & Railway Company were incorporated under the laws of Ohio, February 25, 1899, and thereafter they joined in the execution of a mortgage under date of March 1st following, providing for the issue of first-mortgage bonds in the sum of \$20,000,000, and secured by the properties acquired by such companies. This coal company was organized for the purpose of acquiring the coal properties of the Hocking Coal & Railroad Company, and these properties were bid in and conveyed to the Buckeye Coal & Railway Company by the purchasing trustees at the judicial sale; and such trustees received from the new coal company 2,495 shares of its total capital stock of 2,500 shares, and thereupon entered into a traffic agreement with the Hock-

ing Valley to secure rail connections between coal mines and the main railroad line and also coal transportation, and the trustees at the same time turned over the stock in the coal company to the Hocking Valley. Out of the sales proceeds of the first mortgage bonds mentioned the Hocking Valley acquired the stock and properties of the Ohio Land & Railway and the New York & Western Coal Companies, which had belonged to and been controlled by the Columbus, Hocking Valley & Toledo Railway Company; also all the stock in the Boston Coal, Dock & Wharf Company and the Rabould Coal Company; also a majority of the preferred and likewise of the common stock of the Sunday Creek Coal Company, and afterwards the Hocking Valley increased its holdings in that company to 12,963 shares of preferred and 19,400 shares of common out of a total issue of 15,000 shares of preferred and 22,500 of common.

A different method was adopted for securing control of the Kanawha Hocking Coal & Coke and the Continental Coal Companies, as also quite a number of other coal properties to which we shall refer in a moment. The Toledo & Ohio Central and the Hocking Valley entered into a contract to guarantee first-mortgage bonds of the coal companies last named, the details of which are not essential to an understanding of the case. It suffices to state that agreements were made under which syndicates were formed to underwrite bonds of the companies (\$3,250,000 par value in all of the first company and \$3,023,000 par value in all of the second company); the Toledo & Ohio Central and the Hocking Valley guaranteeing payment of such bonds, but the Hocking Valley assuming the entire obligation as between it and the other guarantor company. In connection with these guaranties the coal companies agreed to deliver all their coal to the Kanawha & Michigan for transportation, and by further agreement such coal was to be equally divided between the Hocking Valley and the Toledo & Ohio Central and so carried northwardly and beyond the Ohio terminus of the Kanawha & Michigan, and the Kanawha & Michigan agreed to purchase all its fuel coal from the coal companies at a price at least 20 cents per ton above production cost. The stock of these two coal companies and certain beneficial certificates of the first company were issued to J. P. Morgan & Co. to secure performance of these contracts of guaranty. The bonds so guaranteed were sold and large portions of the proceeds were used to purchase coal properties of 28 owners (consisting mostly of companies) at prices varying from \$8,875 to \$541,125 and aggregating \$5,194,940.04. The remainder, after paying organization expenses, was placed in the treasuries of the coal companies. Further, the Toledo & Ohio Central owned the entire capital stock of the Imperial Coal Company and also the National Coal Company; the former being \$300,000 and the latter \$160,000 par value.

We are unable to discover from the evidence the acreage of these coal lands or their precise locations. An estimate made by the vice president of the Sunday Creek Company, of its unmined coal acreage on December 31, 1910, showed that there were 42,710 acres in Athens, Perry, and Hocking counties of Ohio and 33,000 in Kanawha and Fayette counties of West Virginia. But in July, 1905, the Sunday

Creek Company (not the Sunday Creek Coal Company, another subsidiary company of the Hocking Valley) was organized under the laws of New Jersey with an authorized capital stock of \$4,000,000 for the purpose of engaging in business in the state of Ohio and owning and developing lands containing coal and other minerals. It is averred in the bill that the Sunday Creek Company controls more than 100,000 acres of land, including about 50 mines and about 350 coke ovens, and owns the beneficial certificates of the Continental Coal Company and the Kanawha & Hocking Coal & Coke Company; and these averments are admitted in the answer of the Sunday Creek Company, as also in the joint answer of the Hocking Valley and the Chesapeake & Ohio, and the coal property held by the Sunday Creek Company seems to comprise all the coal properties so accumulated as before shown. At the time of the incorporation of the Sunday Creek Company the Hocking Valley exchanged \$3,236,300 par value of the stock it held in the Sunday Creek Coal Company for the same amount of stock of the Sunday Creek Company; and the Toledo & Ohio Central exchanged 2,037 shares of the preferred and 3,100 shares of the common stock it held in the Sunday Creek Coal Company for a like amount of the stock of the Sunday Creek Company. Thus the Hocking Valley and the Toledo & Ohio Central, in the proportions mentioned, acquired \$3,750,000 par value of the total of \$4,000,000 par value of the capital stock of the Sunday Creek Company; and on April 23, 1906, 2,488 shares were ordered to be issued in a single certificate in the name of the Central Trust Company of New York, to the end that they would not be issued except with its approval, the remaining 12 shares having apparently been issued as qualifying shares for directors.

The Trunk Lines' Purchase of a Majority of the Hocking Valley Capital Stock. Prior to the merger so made of the coal interests of the Hocking Valley, to wit, June 29, 1903, five of the trunk line railroads, viz., Lake Shore & Michigan Southern Railway Company, Erie Railroad Company, Baltimore & Ohio Railroad Company, Chesapeake & Ohio Railway Company, and the Pittsburgh, Chicago, Cincinnati & St. Louis Railway Company, entered into an agreement with J. P. Morgan & Co. to purchase from that company 69,242 shares of common capital stock of the Hocking Valley at a price and upon terms specified; Morgan & Co. having "arranged to borrow the moneys forthwith to make payment for said shares to the depositors under a syndicate agreement dated December 4, 1902." Morgan & Co. were to carry the loan for the benefit of the purchasing companies for three years; and such purchase was completed. The aggregate purchase price was \$7,270,410, and each of the purchasing companies obtained one-sixth interest in the shares so purchased, except the Pittsburgh, Chicago, Cincinnati & St. Louis, which acquired two-sixths. As indicative of the effect of this upon the policy of the Hocking Valley, it is sufficient to state that an advisory committee (composed of representatives of the trunk lines) and the president of the Hocking Valley had frequent conferences relative to the financial affairs of the Hocking Valley and the coal companies in which it was interested, and the introduction or not of track connections between the lines

of the Hocking Valley system and the independent coal mining operators and the like. Among the results of these conferences were the incorporation of the Sunday Creek Company for the purpose of handling the coal interests of the Hocking Valley, as before pointed out, and maintaining an operating system that was satisfactory to the trunk lines. One of the features of this operating system was to restrict rail connections with coal mines to such as were already in operation, and to refuse and by litigation to contest applications for rail connections with new mines. These conditions were in practical effect continued until the agreement of March, 1910.

Shares of Capital Stock in the Sunday Creek Company Placed in Names of Trustees. It should be stated here that, when the Sunday Creek Company was organized, the 5,137 shares of stock in that company, which belonged to the Toledo & Ohio Central, were issued in one certificate in the name of John H. Doyle, as trustee, who indorsed the certificate in blank and delivered it to the vice president and general manager of the Toledo & Ohio Central; and, further, in April, 1908, just before the commodities clause of the Hepburn Act was to take effect, it is testified that such stock was sold to him to be held as trustee for the stockholders of the Toledo & Ohio Central, in whose names its stock might from time to time be registered on the books of the company, and to whom any dividends should be paid. This arrangement was effected through the redelivery of the old stock certificate to the trustee, from which he at the time erased his original indorsement, and a contract executed by him and the Toledo & Ohio Central bearing date April 30, 1908; and this certificate and contract are still in his possession. After the date of this contract the trustee on two or three occasions issued a proxy to the president of the Sunday Creek Company, at his request, to vote the stock at annual meetings; but the trustee has not received any request or any suggestion from the Toledo & Ohio Central, or the officers of any other railroad company, with respect to the giving of proxies or the voting of the stock. On April 30, 1908, another contract, similar to the one so made between John H. Doyle and the Toledo & Ohio Central, was entered into between the Hocking Valley and the Central Trust Company of New York, respecting the shares of the Hocking Valley in the Sunday Creek Company. After reciting that the Hocking Valley is the owner of 32,375 shares of the Sunday Creek Company (also, among other things, that all these shares with others were pledged through a trustee as collateral security for the bonds issued under the first consolidated mortgage of the Hocking Valley and the Buckeye Coal & Railway Company, and that in view of the penalties imposed for violation of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) and of a desire to obey the law if constitutional, and at the same time to preserve to the owners of the capital stock of the railway the equity in such coal properties, which could not be disposed of by reason of such pledge), it was agreed that the railway company had sold and assigned to the trustee all its interest in such shares of stock, subject to the lien of the mortgage and the rights of the bondholders thereunder, in trust, for the proportionate benefit of the holders

of record of the stock of the Hocking Valley and for any distribution of its assets; that the trustee should have the right to vote the shares of stock at all meetings of stockholders of the company, to collect dividends, and (if the Hocking Valley is not in default under its mortgage) to distribute them among the holders of the stock. The only other provisions of the contract so made with John H. Doyle and the Central Trust Company that need be noticed are set out in the margin.²

Nothing further has been done with the stock of the Sunday Creek Company, and no sale or other disposition of the coal properties has been made in pursuance of these trusts or otherwise. The railroad control of the coal interests remained practically the same, at least until the date of the March agreement, as it was before.

Conclusion Respecting Situation Prior to March Agreement of 1910. We are bound to hold that the situation described was indefensible under the Anti-Trust Act; indeed, no attempt has been made here to justify it. It is quite plain that by the reorganization commenced in 1899 and the course pursued thereafter until the trunk lines obtained their interests in the Hocking Valley the purpose was to unite and hold the four railroads,³ and their several coal interests under a single controlling power; and we are satisfied from the evidence that this design was consummated at the instance of such companies, and finally rendered more secure through the interests and indirect control of the trunk lines. One of the reasons offered to induce and defend the reorganization was the existence of "undue and bitter competition." After stating that the principal business of the Columbus, Hocking Valley & Toledo (the predecessor of the Hocking Valley) was the transportation of bituminous coal from mines on adjacent property, it was declared that the business was strictly and intensely competitive,

² "In the event, however, that the said Supreme Court shall decide said commodity clause of said Hepburn Act constitutional, then said trustee shall dispose of the equity in said coal stocks sold and assigned to it in trust for the purposes of this agreement (subject, however, to the lien of the first consolidated mortgage, and its rights as pledgee trustee thereunder), when and as directed in writing by the persons, firms or corporations holding and owning of record a majority in amount of the stock of the Railway Company as hereinafter provided, and when such sale or distribution is made by the trustee hereunder, and the entire proceeds, whether of stocks, bonds, moneys, or other securities, shall have been actually paid to and received by the said trustee, then the said trustee shall distribute, less its proper charges and expenses, all such proceeds in kind received from the disposition of said stocks, among such persons, firms and corporations, their successors and assigns, as shall be stockholders of record of the Railway Company on the first day of the months in which said proceeds and all of them shall have been finally received, pro rata in proportion to their said record holdings of stock of the Railway Company. Any such sale or disposition, however, it is understood shall be made subject to the lien of the first consolidated mortgage thereon and to all the terms and conditions of the said mortgage, and only in the event that said Railway Company is not then in default of any requirement of said mortgage."

³ The Columbus, Hocking Valley & Toledo, the Toledo & Ohio Central, the Columbus, Sandusky & Hocking, and the Kanawha & Michigan Railway Companies.

and that the field in Ohio was covered by seven railroad lines (including in their number the lines of the present Hocking Valley, the Toledo & Ohio Central, and the Columbus, Sandusky & Hocking, the predecessor of the Zanesville & Western), and that of these seven lines three operated in one district and the other four lines in a field lying east of that district. The three lines so alluded to could have been no others than the exclusively Ohio lines now in question. It was further declared that, in addition to the competition above indicated, the situation was complicated by the fact that of late years the West Virginia coals were rapidly supplanting the Ohio coals in the markets reached by the latter. And, in short, the evidence fairly shows that the union of interests so induced was carefully developed, and that its inevitable tendency and effect were to combine and monopolize the stocks and interests of these railroad companies and coal companies, and so to stifle competition in restraint of trade among the states within the settled meaning of the Anti-Trust Act.

[3, 4] *The Conditions Created by and Maintained Since the March Agreement.* Has the situation described been so changed by or under the agreement of March 12, 1910, as to entitle defendants as they claim to a dismissal of the bill? They forcibly urge that what was done prior to the March agreement has nothing to do with what has been done since. Objections were continuously made to the introduction of evidence tending to show conditions existing before the agreement. Complainant insists that what followed the execution of the March agreement was but a continuation of what preceded it. The fact that we have considered the evidence shows, of course, that we regard it as admissible. It cannot escape notice that some of the defendants were parties to such earlier transactions, and that others acquiesced in and adopted such transactions before the March agreement was made. *Lincoln v. Claflin*, 74 U. S. (7 Wall.) 132, 138, 19 L. Ed. 106; *United States v. Standard Oil Co.* (C. C.) 152 Fed. 290, 294, per Sanborn, Circuit Judge, and Circuit Judges Van Devanter, Hook, and Adams concurring. The acts and transactions of the first period therefore ought to aid in some measure to elucidate the intent and effect of the March agreement, and of the acts and transactions of the parties since, no matter what conclusion may be reached touching the second period. *Standard Oil Co. v. U. S.*, 221 U. S. 1, 76, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *Darius Cole Transp. Co. v. White Star Line*, 186 Fed. 66, 108 C. C. A. 165 (C. C. A. 6th Cir.); *U. S. v. E. I. Du Pont De Nemours Co.* (C. C.) 188 Fed. 128, 134.

[5] *The March Agreement.* The agreement was signed by the Lake Shore and the Chesapeake & Ohio, and, so far as now material in substance provided, that the Lake Shore would purchase from the Hocking Valley the bond it held of the Middle States Construction Company, which as stated was exchangeable for the entire capital stock of the Toledo & Ohio Central (such stock to carry with it, for the benefit of the Toledo & Ohio Central, the ownership of 45,100 shares of stock in the Kanawha & Michigan, 5,137 shares of stock in the Sunday Creek Company, and the entire capital stock in and all the bonds of the

Zanesville & Western) at an aggregate purchase price of \$10,197,874.67; and would make provision for loaning to the Sunday Creek Company as needed and on its notes \$1,143,110.50. Such purchase to be coupled with an agreement that a contract for 25 years would be made and should provide that the line of the Hocking Valley and the line of the western division of the Toledo & Ohio Central, between their terminals at Toledo and their connections with the Kanawha & Michigan at Chauncey, might (for cost alone of maintenance and operating expenses according to joint usage) be used at the option of either for the movement of its through freight trains; that an additional agreement should be made to protect the Toledo & Ohio Central and the Hocking Valley under their previous guaranty of bonds of coal companies, and given (as before stated) under an agreement for an equal division of the coal traffic derived from the properties of such coal companies; that an arrangement for distribution of the business, so far as could legally be made, should be effected to protect the interests of the Toledo & Ohio Central and the Hocking Valley respecting their guaranty of such coal bonds. Upon making such purchase, the Lake Shore was to sell to the Chesapeake & Ohio 22,550 shares of the Kanawha & Michigan for \$1,623,600 and 11,540 shares of the Hocking Valley for \$1,384,800 (which latter stock seems to have been the one-sixth interest that the Lake Shore acquired at the time of the purchase made by the trunk lines). Still another contract was to be made "for trusteeing or otherwise jointly handling" the 45,100 shares (a majority of the stock and called the "controlling interest then to be owned by the two companies") in the Kanawha & Michigan. In case the stock was so placed in trust, provision was to be made for such trackage agreements with the Kanawha & Michigan as would protect the purchasing companies against loss of control of the property. Privilege was to be given to make certain connections between the Kanawha & Michigan Railway with the Virginian Railway or with the Lake Shore or Chesapeake & Ohio, the intent being that the lines of the Kanawha & Michigan could be used to the fullest extent by either of the purchasing companies in building up its interest either in local territory on the Kanawha & Michigan or in making through routes and connections beyond it, protecting, however, all the stockholders of that company. Provision was also made for acquiring all or part of the outstanding stock of the Kanawha & Michigan; for having the Kanawha & Michigan purchase the securities of the Pomeroy Belt Railway Company and indemnifying the Hocking Valley against liability assumed by it in the purchase thereof and granting to it a trackage right over such belt road, etc., for securing to the Hocking Valley trackage between Athens and Hobson over the Kanawha & Michigan for Hocking Valley through business from or to its line between Gallipolis and Pomeroy. The whole agreement was made subject to a condition that the other roads embraced in the trunk line purchase, before pointed out, should sell their holdings in the stock of the Hocking Valley to the Chesapeake & Ohio.

The Chesapeake & Ohio thereupon acquired the holdings of the other trunk lines of Hocking Valley stock, which, with the one-sixth it had

previously obtained through the trunk lines syndicate purchase and the one-sixth derived under the March agreement, gave to the Chesapeake & Ohio 69,240 shares of such stock. The preferred stock of the Hocking Valley was retired in April, 1910, leaving 110,000 shares of common, of which the Chesapeake & Ohio now owns (through increase of its holdings) 88,258 shares, and that company and the Lake Shore now each own 40,271 shares of the stock of the Kanawha & Michigan (being 80,542 of a total capital of 90,000 shares). The result is that, instead of five trunk lines holding as formerly, only two, to wit, the Lake Shore and the Chesapeake & Ohio, now hold the controlling power, it is true through independent ownerships, in the Hocking Valley, the Toledo & Ohio Central, the Kanawha & Michigan, the Zanesville & Western, and also (subject to the trusts and pledge before stated) the Sunday Creek Company. Their interests in the Sunday Creek Company cover its entire outstanding capital stock (included in this are the 12 qualifying shares belonging to the Hocking Valley).⁴

Now it is to be observed of the March agreement that its avowed purpose was not to avoid violation of any federal act, but to comply with the decree of the Ohio Circuit Court in the quo warranto case. Such a purpose might, it is true, be entirely consistent with the federal Anti-Trust Act; but whether this was so here must be tested by the intent to be inferred both from the agreement and the extent and nature of the control thereby secured over the railroads and the coal traffic and other commerce dependent on them (*United States v. St. Louis Terminal*, 224 U. S. 394, 395, 32 Sup. Ct. 507, 56 L. Ed. 810); and such intent and control may, we think, be further ascertained from comparison of important features of the situation existing before the agreement with some of those found in the situation created under it. In applying these tests, it should be stated in the outset that the government has failed in several respects to sustain the averment that there has been since the agreement a continuation of the same conditions as those existing before. Admittedly a change in the ownership of the stocks and bonds of the railroads has been made under the agreement, as before pointed out; and it must be conceded under the evidence adduced that the independent coal operators in the coal fields in question have received greater concern and accommodations at the hands of the railroads since the agreement than they were given before. But we are convinced that the changes so wrought in ownership of stocks have resulted in a concert of action and control of the railroads and coal interests secured by the agreement, which is inconsistent with the rule requiring freedom of competition in commerce among the states; and that rule is too firmly established to be shaken by argument against the beneficial results ascribed to it. *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 87, 88, 33 Sup. Ct. 53, 57 L. Ed. —; *United States v. St. Louis Terminal*, supra, 224 U. S. 401, 32 Sup. Ct. 507, 56 L. Ed. 810; *Loewe v. Lawlor*, 208 U. S. 274, 293, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Northern Se-*

⁴ Compare holding shown by stipulation (Rec. 572), with holding stated in Exhibit E, to bill.

curities Co. v. United States, 193 U. S. 331, 332, 24 Sup. Ct. 436, 48 L. Ed. 679; Pearsall v. Great Northern Railway, 161 U. S. 646, 676, 16 Sup. Ct. 705, 40 L. Ed. 838; United States v. E. C. Knight Co., 156 U. S. 1, 16, 15 Sup. Ct. 249, 39 L. Ed. 325; Chesapeake & O. Fuel Co. v. United States, 115 Fed. 619, 620, 53 C. C. A. 256 (C. C. A. 6th Cir.); United States v. Standard Oil Co. (C. C.) 173 Fed. 177, 188 (C. C. A. 8th Cir.).

Evidence was adduced to show that, owing to litigation and other causes, some of the provisions of the March agreement have not been carried out; and some of the evidence tends to show that, if all its provisions had been carried into effect, it would have resulted beneficially to the volume of traffic and those interested in it along the lines of the roads in question. This does not indicate a purpose not to carry out the March agreement ultimately; but it does show that a virtual consolidation of all these naturally competing roads (coupled with the division of the coal traffic provided for), so far as concerns the through traffic in coal to the lakes, is necessary to accomplish the result stated, although it does not purport to show how long such increase in volume would last. It is contended by learned counsel, however, that all the provisions of the agreement are valid and enforceable, so long at least as the interested stockholders themselves are satisfied with its performance.

Moreover, evidence was offered to show that the Ohio roads are controlled and operated independently of one another and of either the Lake Shore or the Chesapeake & Ohio or both; and similarly as respects the Sunday Creek Company, and all these roads either collectively or separately. It is true that the officers of the railroads and the railroad offices are distinct, and this is true of the Sunday Creek Company; also that the managerial officers of these subordinate companies have been instructed to exercise their own judgment respecting the interests they represent, and yet the natural and probable effect of all this needs but little consecutive thought. Such officials are at last dependent for their positions upon the will of the two trunk line companies controlling the stocks; and it is vain to say that such officers do not become sensitive to the interests and policies of the real masters of the situation. Illustrations of this, as also of the effect of the new régime upon interstate commerce and trade, are contained in the evidence relating to both the coal and railroad properties. We have seen that the Sunday Creek Company still holds the same title to the coal properties that it held before the execution of the agreement of March, 1910; and that the Chesapeake & Ohio and the Lake Shore together have been brought into the same relation to the entire capital stock of this coal company that the Hocking Valley alone previously bore to it.⁵ In the March agreement no allusion was made to the trust agreements under which the stock of the Sunday Creek Company was on

⁵ It should be stated that as early as June, 1905, provision was made by the Sunday Creek Company for purchasing certain trust certificates representing the beneficial interests in the stock of the other two coal companies which are parties to this cause, and this arrangement seems to have been carried out.

April 30, 1908, placed in the names of trustees. The shares placed (rather continued) in the name of John H. Doyle, as trustee, were in the March agreement treated as the property of the Toledo & Ohio Central; and the same general policy concerning the coal handled by the Sunday Creek Company that prevailed before the March agreement has been pursued since. This has resulted in the continuance of an equal division substantially of the coal traffic originating on the Kanawha & Michigan between the Hocking Valley and the Toledo & Ohio Central. All the coal carried in Kanawha & Michigan equipment is so divided. While the coal that is carried in the equipment furnished by the other two companies respectively is divided according to such equipment, yet it would seem from the correspondence and testimony that the desire and effort are to equalize either the cars received or the advantages and consequent profit of transportation, say as between coal and coke, since coke appears to yield more freight revenue to the carrier than coal. Further, some of the evidence (concerning at least the conduct of the Lake Shore) discloses an apparently asserted right to demand, rather than a design simply to persuade, the allowance of such division; and seemingly the officers of the Kanawha & Michigan are disposed to yield it in the same spirit. This augments the similarity in purpose between the division now made of the coal traffic, and the division that was admittedly made prior to the March agreement in obedience to contract.

We do not overlook the testimony to the effect that this additional agreement has not been executed; but it is not perceivable how the companies can in substance do the same thing that the agreement provided for, and escape its effect on the ground either that it has not been reduced to writing and signed, or that such a division is fair. In short, our interpretation of the evidence is that this division of traffic is not due alone to a desire to be fair to connecting companies; but that it is actuated also by a purpose practically to carry out the provision of the March agreement in this behalf, and so protect the Toledo & Ohio Central and the Hocking Valley as joint guarantors "on the bonds of certain coal companies for equal division of the coal from these coal properties." Such a provision or practice is inconsistent with the statutory right accorded to shippers since 1910, say along the Kanawha & Michigan, to secure the benefit of competitive through rates by routing their own traffic by way of either the Hocking Valley or Toledo & Ohio Central, according as they might be able through perfectly legitimate means to induce the one or the other company to file and publish lower rates. See amendment to section 15 of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), passed June 18, 1910, c. 309, § 12, 36 U. S. Stat. L. 552 (U. S. Comp. St. Supp. 1911, p. 1301), striking from amended section 15, Act June 29, 1906, c. 3591, § 4, 34 Stat. L. 590 (U. S. Comp. St. Supp. 1911, p. 1301), the limitation: "Provided no reasonable or satisfactory through route exists." That it would be entirely practicable for shippers of coal to secure, with respect to through traffic, a substantial competition with the Hocking Valley and the Toledo & Ohio Central, but for the joint ownership and control

of the Kanawha & Michigan, seems to us obvious. The president of the Kanawha & Michigan, and its general freight agent, testified, in substance, that they had made no effort to secure from the Hocking Valley or the Toledo & Ohio Central in favor of their own company a greater division of the freight rate charged for through traffic; in other words, the motive is lacking to bring about real competition between these parallel roads. Nor does it appear that the officers of either the Hocking Valley or the Toledo & Ohio Central have done anything respecting a greater or less division of the freight rate charged for through traffic. And we do not discover that the officers of the Sunday Creek Company have ever sought to induce any of these railroads to file or publish lower freight rates; and the president of the company (who has filled the office since June, 1910) testified:

"We do not do any routing * * * unless it is where coal must be delivered on one road or the other."

Further similarity between the course pursued before the March agreement and since is to be found in the "operating proposition" as it is characterized in the evidence, which "practically makes each road (the Hocking Valley and the Toledo & Ohio Central) a double track railroad." The arrangement consists of moving the north-bound through freight trains of the Toledo & Ohio Central, over the Hocking Valley railroad from Hobson to Fostoria, and of returning the south bound freight trains of the Hocking Valley over the western division of the Toledo & Ohio Central from Hickox to Columbus; and this is a continuation of the same reciprocal use that was commenced in 1901. Stress is laid both in the evidence and argument upon the economy of this interchange of facilities, since it secures easier grades over the Hocking Valley, as compared with those of the Toledo & Ohio Central, and avoids the necessity of building double tracks and of operating opposing trains over single track roads with the usual sidings. These advantages may be conceded from an operating point of view; yet the logic of it all would in the end destroy competition between parallel roads generally. The reciprocal use in this instance developed only with the noncompetitive period of these railroads. It is not meant by this that there may not be circumstances under which reciprocal trackage arrangements may to a certain extent be lawfully entered into and carried out. Nor is it meant that this trackage arrangement, standing alone disassociated from the joint ownership and control of the Kanawha & Michigan, would violate the federal Anti-Trust Act. What is meant is that this trackage arrangement, considered in connection with the other facts pointed out, tends to disclose a unity of purpose and concert of action on the part of the companies involved to maintain conditions that are inimical to effective competition. Testimony was offered to show that giving to the Chesapeake & Ohio and the Lake Shore equal interests in the Kanawha & Michigan and adding the advantages of this reciprocal use of tracks, operate to stimulate rather than to retard the transportation of coal, and, in fact, have resulted in substantial increase in volume of traffic; and, further, that, if these arrangements were broken up, the traffic in West Virginia coal would be monopolized by the Kanawha & Michigan and the To-

do & Ohio Central. This loses sight of the natural development of the coal fields tributary to the Kanawha & Michigan, which should occur under normal conditions. It also evades the obvious question whether, if the Kanawha & Michigan were owned and operated independently of both the Hocking Valley and Toledo & Ohio Central, and those roads were brought into competition for the traffic originating on the Kanawha & Michigan, there would not be a still greater stimulus given to interstate trade than has heretofore existed. There would, in that event, be neither reason nor opportunity for a monopoly of such traffic by the Kanawha & Michigan and Toledo & Ohio Central. The conceded easier grades of the Hocking Valley furnish adequate answer to the suggestions of such a monopoly. *Pearsall v. Great Northern Railway*, 161 U. S. 676, 16 Sup. Ct. 705, 40 L. Ed. 838; *United States v. Union Pacific R. R. Co.*, *supra*.

Insistence is made that a number of the things complained of were in and of themselves lawful, and so, in effect we take it, their union or joint use could not become unlawful. For instance, it is urged that it would have been well within the power of the Lake Shore to purchase the entire stock of the Toledo & Ohio Central and the Kanawha & Michigan, because the Kanawha & Michigan is a continuation of the Toledo & Ohio Central. Likewise it is insisted in respect of the Chesapeake & Ohio that it possessed charter power to purchase the stock of the Hocking Valley, and that it was both its purpose and right to secure control of a railroad leading directly to the lake ports. Let these claims be conceded for sake of discussion; still, does it follow that the Lake Shore and the Chesapeake & Ohio could lawfully become joint and equal owners in the controlling portion of the stock in the Kanawha & Michigan? Could they at the same time add to this mutual control of that road the reciprocal trackage arrangement respecting the other roads, and so virtually consolidate these railroads as respects the through traffic in coal? These questions are stated, not merely with reference to the apparent violation involved of the statutory policy of Ohio respecting parallel and competing railroads (*State v. Hocking Valley*, 12 Ohio Cir. Ct. R. [N. S.] 66, 67, before cited), but particularly with respect to the effect that such joint ownership and trackage arrangement must have upon interstate commerce. The policy of the United States and of Ohio, as expressed by legislation and judicial interpretation, is quite as distinctly opposed to any union of ownership and arrangement involving the power to control parallel railroads or the transportation of traffic that is tributary to and must pass over one or both of them, as it is to formal consolidation of such railroads. *Northern Securities Case*, *supra*, 193 U. S. 362, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. St. Louis Terminal*, *supra*, 224 U. S. 395, 32 Sup. Ct. 507, 56 L. Ed. 810; *United States v. Union Pacific R. R. Co.*, *supra*; *State v. Hocking Valley*, *supra*. We have seen that the Ohio Circuit Court ousted the Hocking Valley from the power of owning and holding shares of stock in the Kanawha & Michigan. The Hocking Valley, it is true, does not now own stock in the Kanawha & Michigan; but the Chesapeake & Ohio does, and it also owns the controlling interest in the Hocking Valley.

The Chesapeake & Ohio thus holds stock in two roads, which are in substantial degree parallel and naturally competing. Can this result, or the results before pointed out as brought about since the March agreement was executed, be rightfully traceable to the charter powers of these two railroad companies, the one to reach the lake ports and the other the coal fields?

It cannot be that those companies can justify their separate stock purchases of the control of these roads, and also escape responsibility for the inevitable tendency of the present conditions to stifle free competition simply on the theory that the companies holding the legal titles to the roads are alone responsible for this result; for that would be to overlook, not only the manifest unity of purpose of the Lake Shore and the Chesapeake & Ohio, but also and especially their acquiescence, not to say concurrence, in the acts of the subordinate companies. This cannot be avoided on the ground that corporate ownership of stock in railroad corporations created by a state is not interstate commerce (considered in the Northern Securities Case); nor, in the present instance, by the fact that capital stock in two of the competing roads is held separately by two corporations instead of one corporation; for the other matters involved here, or anything like them, were not present in the Northern Securities Case. To ignore such matters would be to furnish an easy method to frustrate the statutory inhibitions in question. Indeed, if these two purchasing companies are not in effect equivalent to a committee to regulate rates, certainly the subordinate railroad companies under their control are, within the meaning of the concurring opinion of the late Justice Brewer, in the Northern Securities Case. When speaking of the single holding company in question there, the learned justice said (193 U. S. 362, 24 Sup. Ct. 467, 48 L. Ed. 679):

"In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates."

If the intention of placing the ownership of the stocks in question in the Lake Shore and the Chesapeake & Ohio can be rightly inferred from what has actually been done since, "the purpose to combine and by combination destroy competition" (Northern Securities Case, 193 U. S., at page 362, 24 Sup. Ct. 467, 48 L. Ed. 679) existed when the March agreement was executed, quite as certainly as such purpose was held to exist in that case "before the organization of the corporation, the Securities Company." The form given to a combination is of no consequence. As the learned Chief Justice said in the Tobacco Case, 221 U. S. 181, 31 Sup. Ct. 648, 55 L. Ed. 663:

"* * * It was pointed out (in the Standard Oil Case) that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

It hardly need be said that the cases relied on by the defense, like *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 721, 728, 94 C.

C. A. 13, decided by the present Mr. Justice Lurton in this court, and by Judge Knappen in the court below, have no application.

There is to be added the apparent purpose of the Lake Shore and the Chesapeake & Ohio to retain their relations with the Sunday Creek Company. The feature of the trust agreements of present importance is quoted in the margin of an earlier portion of this opinion. It provided that, in case the Supreme Court should hold the commodities clause constitutional, each trustee was to dispose of the equity in the railroad companies in the Sunday Creek stock, as directed by the holders of a majority of the capital stock of the Hocking Valley and the Toledo & Ohio Central respectively, and distribute the entire net sales proceeds among such holders. It need not be stated that the commodities clause, as construed by the Supreme Court, has been held to be constitutional. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458. The first of these cases was decided May 3, 1909, about 10 months prior to the date of the March agreement, and considerably more than a year before the commencement of this suit. It is said that such sales cannot be enforced in this case, because of infirmities in the pleadings. If in the view we take of the evidence this objection can be regarded as material (*Lockhart v. Leeds*, 195 U. S. 427, 436, 25 Sup. Ct. 76, 49 L. Ed. 263), we perceive no sufficient reason why at this stage of the case the objection cannot be met by amendment. *Neale v. Neale*, 76 U. S. (9 Wall.) 8, 9, 19 L. Ed. 590; *The Tremolo Patent*, 90 U. S. (23 Wall.) 527, 23 L. Ed. 97. As respects the power of the court to require such sales and distributions to be made, we think it is clearly given by section 4 of the Anti-Trust Act (26 U. S. Stat. 209; *Standard Oil Case*, 221 U. S. 78, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *Union Pacific Case*, *supra*); and, if the trustees or the absent stockholders, in the Hocking Valley are indispensable parties defendant, they may be brought in (*Hoe v. Wilson*, 76 U. S. [9 Wall.] 501, 504, 19 L. Ed. 762; *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 616, 83 C. C. A. 380). It is to be observed that there is no Ohio legislation authorizing railroad companies to hold shares of stock in coal companies. The Ohio Circuit Court held in the quo warranto suit before cited that the Hocking Valley was not a "kindred" corporation within the meaning of the statute empowering private corporations to hold shares of stock "in other kindred but not competing private corporations," etc. Section 8683, 4 Ohio Gen. Code, 239; 12 Ohio Cir. Ct. R. (N. S.) 59-63. If these companies are to be allowed potential control both of producing and transporting coals in 100,000 acres of coal lands, it is difficult to see why in spite of the commodities clause common carriers may not combine the benefits of transportation with the benefits arising from the control of any of the other necessities of life, no matter in what quantities. *Attorney General v. Great Northern Ry. Co.*, 29 Law Journal (N. S. Equity) 798, 799; approved in *New Haven R. R. v. Interstate Com. Com.*, 200 U. S. 393, 26 Sup. Ct. 272, 50 L. Ed. 515.

The only remaining matter needing consideration is the testimony offered in open court tending to show that the grades of the southern division of the Hocking Valley are so difficult as to prevent successful movement over it of through coal trains; and, further, that by reason of the configuration of the territory adjacent to the Kanawha river there is no room for the construction of a track additional to that of the Kanawha & Michigan on the one side or to the tracks of the Chesapeake & Ohio on the other.

Decisions are cited to show that these physical conditions warrant alike disuse of the southern division for through coal service, and the joint control acquired of the stock in the Kanawha & Michigan. Among these is *United States v. Union Pacific R. Co.* (C. C.) 188 Fed. 102, reversed in part December 2, 1912 (226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. —, before cited). We think the undisturbed portion of the decision below is distinguishable, and what is said in this behalf will serve to indicate our views concerning the other cases cited in connection with it. The material points of distinction appear in certain facts: (a) The San Pedro line from Salt Lake to Los Angeles was found to be practically a continuation of the Union Pacific or (its subsidiary company) the Oregon Short Line, and not a natural competitor of any other line in question; (b) the physical obstacles encountered on the San Pedro line find no analogy here, unless it be south of the Ohio river and adjacent to the Kanawha & Michigan or a portion of the Chesapeake & Ohio, but it is not shown that connection between the Chesapeake & Ohio and the Hocking Valley is not otherwise reasonably available; (c) there was nothing in the Union Pacific Case to correspond in any way with the combined coal interests here and the relations between them and the present railroad companies. In that case the failure to build two projected parallel lines of railway between Salt Lake City and Los Angeles was held not to be violative of the Anti-Trust Act; while here, without repeating what has been said before respecting the present railroads and coal properties, the resultant fact cannot be ignored that between Toledo and Kanauga, two actually existing parallel lines of railroad have practically been converted into one line so far as respects the through traffic in coal. The disuse of the southern division of the Hocking Valley is claimed to be justified in the face of several admitted facts. It was constructed as a substantial portion of the Hocking Valley system, and there is no showing that it was not projected by experienced railroad men. At the time the reorganization was commenced in 1899, the railroad agencies concerned found that there had been undue and bitter competition in the coal traffic dependent upon the railroads operating in the Hocking field. The suppression of competition worked out through that reorganization was obviously calculated to engender neglect of either the Kanawha & Michigan north of the Ohio river, or the southern division of the Hocking Valley, as respects the movement of heavier trains. The railroad defendants here were participants in the policy that succeeded that plan of reorganization. And yet it is in effect insisted that the original plan and construction of the road, as well as its continued maintenance,

should be condemned as part of a through line and its practical abandonment for that purpose sanctioned by judicial decree.

[6] There is a clear distinction between the power to grant relief respecting past failure to construct one of two projected parallel lines, as occurred in the Union Pacific Case along the course of the San Pedro division, and the power to prevent the elimination of one of two parallel roads in actual existence and operation. After all, the difficulty north of the Ohio river is due alone to differences in grades, and it may be judicially noticed that grades may be changed. *Delavan v. New York, N. H. & H. R. Co.* (Sup.) 137 N. Y. Supp. 207, 212. It hardly would be contended, even apart from express statutory inhibition that such differences would warrant formal consolidation. It may be said of this situation as Mr. Justice Lurton said December 16, 1912, of a situation involved in the cases of the Reading Company concerning prices of coal at the seaboard, that "the situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices" of coal at the lake ports and beyond. The paramount evil here is the joint ownership of the Kanawha & Michigan, and, so long as that continues, effective competition will we think remain impossible. Effective competition is not limited alone to a matter of freight rates. It embraces a variety of other subjects, such as quality and promptness and sufficiency of service both as to equipment and roadbed, which are dependent above all upon separate and independent ownership or control alike of the competing roads and of the commerce under compulsion to use them. Surely the necessity to maintain such conditions as these is not affected, as claimed, by anything contained in the act to regulate commerce; for plainly that act was not intended to supplant either the settled rule respecting freedom of competition or the purpose of the Anti-Trust Act to deal with corporate ownerships or agreements that constitute barriers to such competition.

In the Northern Securities Case, after declaring the comprehensive character of the statute, Justice Harlan expressed the prevailing general rule, as we understand it, thus (193 U. S. 332, 24 Sup. Ct. 454, 48 L. Ed. 679):

"That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition."

Are the averments of the bill charging continuance in different form of the combination begun in 1899, so far supported by the proofs offered in that behalf as to justify the granting of relief touching the situation created by and under the March agreement? Comparison of that agreement and what has been done under it, with the first situation, cannot we think fail to show material identity between the two periods in dispute. True, combination by the March agreement

or by anything done since then is denied by the answers, and testimony was introduced in support of the denial. We need not recapitulate either the terms of the agreement or the facts and conditions already stated. We cannot believe that the changes in ownership of stocks, in managerial officers and the like, have operated to relieve the railroads and coal interests in question from the influence in practical effect and consequence of a unified control. It cannot be that, in the absence of intent or design, substantially the same things of controlling importance could have been worked out during the later period that were before. It is not necessary that the proofs should show that precisely similar methods were adopted to bring about the continuance averred, or that all the parties theretofore engaged, like the withdrawing trunk lines, continued as actors. The results attained and continued through a unity of purpose and concert of action by those remaining in the combination at and after the date of the March agreement are the true tests of the trend of the evidence as an entirety.

Upon the whole we conclude that the March agreement, and what has been and is being done under it, operate unreasonably to restrain and monopolize commerce among the states, and consequently that complainant is entitled to relief; but the precise extent and nature of relief to be awarded cannot at this stage be determined. The case has been tried on the issue of continuance or not of the antecedent combination and restraint; and this has resulted in leaving the court unadvised of the claims of counsel for either side as to the nature and extent of relief, if any, that should be granted. However, we now hold (1) that the equity of the Lake Shore and of the Chesapeake & Ohio in the capital stock of the Sunday Creek Company shall be disposed of by absolute sale, and to this end the trustees in whose names such stock is held shall be made parties defendant to this suit (Bates Fed. Eq. Proc., § 639; Perrin, Adm'r, v. Lepper [C. C.] 26 Fed. 545, 548; St. Louis, etc., Ry. Co. v. Wilson, 114 U. S. 60, 62, 5 Sup. Ct. 738, 29 L. Ed. 66; Woodward v. McConnaughey, 106 Fed. 758, 45 C. C. A. 602 [C. C. A. 9th Cir.]); (2) that the joint ownership and control of the Kanawha & Michigan must be terminated. The questions not decided and upon which leave will be given for further argument are (a) whether the holders of capital stock in the Hocking Valley, other than the Chesapeake & Ohio, are indispensable parties to the cause; (b) in what manner the termination of the joint ownership and control of the Kanawha & Michigan shall be effected; (c) whether in connection with the means adopted for the termination of such joint ownership and control of the Kanawha & Michigan the reciprocal trackage arrangement over the Hocking Valley and the Toledo & Ohio Central must be terminated; and (d) to what further extent and in what further respects, if any, relief shall be granted touching the control and operation of the other railroads mentioned.

Such further argument will be had at a date hereafter to be fixed between January 21st and 31st next.

KNAPPEN, Circuit Judge, concurs.

DENISON, Circuit Judge (concurring in part, dissenting in part). I quite agree that the present ownership of the Sunday Creek stock by or for the railroads is unlawful, and that the coal companies and the railroads should be separated. This conclusion must be tentative, until the other necessary parties can be heard, but it seems probable that all the facts have been developed. I would base this result on the commodities clause of the Hepburn Act and the "mere instrumentality" theory of the Lehigh Case, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458, rather than upon the Sherman Act; but the use of either basis brings the same result. Beyond the matter of the coal companies, and in the mere present relation of the railroads to each other, I am unable to see any monopoly or restraint of commerce forbidden by the anti-trust law. Some of the considerations compelling me to this opinion are these:

1. It is true that the history of their former relations during the 1900-1910 period must be studied for whatever bearing it may have on their present intent; but this study discloses to me, not continuance but change, not identity but antithesis. The Hocking and the Central⁶ were parallel roads with common termini and with other common points. They had competed bitterly for the Hocking coal district traffic to Columbus and to Toledo, as well as for all other traffic originating on their lines and destined to common points. In 1900, the Hocking bought the Central, and from then until March, 1910, this naturally and theretofore actually competing line was owned by the Hocking. The Hocking dictated the policy of both. Both had the same directors and managing officers. The merger was complete. Competition was not restrained; it was eliminated. No more perfect union and joinder in operation, while saving the former corporate identity of each, could be stated. After March, 1910, these two roads continued physically as before; but neither the Hocking nor its dominating stockholder had any ownership of the Central or had any interest, direct or indirect, in such ownership; nor did the Central or its dominating stockholder have any ownership of or direct or indirect interest in the Hocking. No director or officer of one road was director or officer in the other, or had any share in its management or operation. No more complete severance of the two roads could be formulated. There remained no connecting link (except the common control of the Kanawha, hereafter discussed).

2. Since March, 1910, there has been full and complete competition between these two roads (save only for the Kanawha traffic). As to all the Hocking coal district traffic bound for Columbus or Toledo, and as to all other business originating on these roads, competition is unimpaired. So reads all the evidence; there is no proof to the contrary. The competitive conditions prevailing before the unlawful merger of 1900 have been restored—excepting only that the rate-cut-

⁶ I will refer to the Hocking Valley Railway Company as "the Hocking"; to the Toledo & Ohio Central and the Zanesville & Western Railroads as "the Central"; to the Kanawha & Michigan Railway Company as "the Kanawha"; to the Lake Shore & Michigan Southern Railway Company as "the Lake Shore"; and to the Chesapeake & Ohio Railway Company as "the Chesapeake & Ohio" or "the C. & O."

ting war then in progress has not been resumed. Both roads maintain their rates against sudden or secret cuts, as they are bound to do by both state and federal law. To base the assumption that they are combining in restraint of trade solely upon their maintenance of the same rates between common points would, by the same token, convict every railroad in the United States which is obeying the law; yet such assumption is, to my mind, the only basis for believing that such combination has existed since March, 1910 (still excluding from our thought and reasoning the Kanawha traffic).

3. The conclusion just stated—that there is no other basis for inferring a suppression of competition—is not affected by observing the joint trackage contract. It is true this contract was made during the period of undue intimacy, and probably it would not have been made between roads actively competing as strangers to each other; but this does not determine its character or effect. In March, 1910, the two purchasers (the Chesapeake & Ohio and the Lake Shore) of these roads found this joint trackage contract in existence. They saw that the entire physical and traffic situations on both roads were accommodated to this contract. They saw that it served, in large measure, as a substitute for double tracking each road; that it enabled each road to haul more traffic and give better service and at a less cost, and so, presumably, at a less rate, than either could otherwise have done, except by expending vast amounts in double tracking; that it was an operating arrangement having no connection whatever with competitive traffic seeking; that of itself it was of great and undisputed benefit to both railroads and to the shipping public, and of itself did not and could not work any harm to any interest, public or private. Under these circumstances, the purchasers preserved and continued this public and private benefit, and I cannot see how such conduct has any bearing, even evidential, to convict them of suppressing competition in traffic getting.

4. The conclusion that since March, 1910, competition in traffic originating on these lines has not been restrained, is confirmed by the fact that there is no complaint by shippers of such traffic. Serious or long continued restraint of proper competition is a disease producing inevitable and well-known symptoms—discrimination, excessive rates, poor service, unfair practices, and the like. The relations now said to be unlawful had been in existence for a year when this bill was filed, and for another year before the testimony was closed; and we did not have pointed out to us in the argument, nor have I seen in the record, any instance of any complaint by any shipper or consignee on any of these subjects.⁷

⁷ I do not overlook the broad complaint that the rates from the Hocking district were too large in proportion to the rates from the Kanawha district; but, in fact, all rates were fixed with relation to the Pittsburgh-Ashtabula rate. This rate was not made by these defendants, but it was the "key-stone of the arch." When the Commission reduced this Pittsburgh rate from 88 to 78 cents, the Hocking voluntarily reduced its Hocking-Toledo rate from 85 to 75 cents, and the 75-cent rate has been sustained by the Commission. See *Interst. Com. Com'n R.*, opinion No. 1941, case No. 4274, *New Pittsburgh Coal Co. v. Hocking Valley Ry. Co.*, vol. 24, p. 244.

5. If I am so far correct, there remains for consideration among the primary inquiries only the matter of joint control of the Kanawha by the other two roads; and the conclusion which we reach as to whether or not this joint ownership and control, as developed in this case, are violative of the law, must, I think, determine the whole case. I agree that the fact of the ownership of this stock by the Chesapeake & Ohio and the Lake Shore, instead of by the Hocking and the Central, is not of itself controlling. The presence of the former roads, instead of the latter, in the field of the problem, can affect only the question of the dominant intent in the whole transaction. The name in which they entered their Kanawha stock purchases means nothing. I agree, also, that the entire arrangement of March, 1910, was accompanied by, and in some degree depended upon, a clear understanding (and, therefore, an agreement) that the Kanawha should, as far as it could, divide its through north-bound traffic equally between the Hocking and the Central. This does not become less true because they never executed the contemplated written agreement, nor because their perfected understanding referred to a division that should be "fair" rather than to one that should be "equal." Under the anticipated conduct of all parties—equal furnishing of cars, etc.—no division which was not equal would be fair, and the two mean the same thing.

6. We are brought, then, to the general question when and how far the purchase, by two parallel and competing roads, of a common connecting and continuing road, under an agreement to divide the through traffic derived therefrom, violates the law, and then to the specific question of application to the facts of this case.

Purchase by one line of a connecting and continuing line has never been thought unlawful, although, if the purchasing line is one of two or more competing for the through traffic from the connecting line, such purchase, inevitably, strongly tends to destroy existing competition.⁸ Such a joint purchase by two competing lines has never been held *ipso facto* unlawful. Indeed, the Supreme Court has said (by what is probably a dictum, *Southern Pac. Co. v. Interstate Com. Com.*, 200 U. S. 559, 26 Sup. Ct. 330, 50 L. Ed. 585) that such competition is not the competition which an analogous statute was intended to preserve. In March, 1910, the first carrier had the right to select the continuing carrier. After June, 1910, this right belonged to the shipper, if he chose to exercise it; and it calls for a construction of the statute which has not yet been given to say that an agreement between carriers as to how they will divide and carry this kind of traffic (a very differ-

⁸ At one time, the New York Central, the Erie and the Lehigh competed at Buffalo for the east-bound through traffic from the Lake Shore, and the Michigan Central, Grand Trunk, and Lake Shore competed for the west-bound through traffic from the New York Central. The purchase of the Lake Shore by the New York Central restricted, if it did not end, this competition, for not until June, 1910, could joint rates have been compelled, nor, if there had been through joint rates, did the shipper, until that time, have the right of selection. See 36 Stat. at Large, 552, 553. Formerly, a through joint route could be compelled only as there was no existing "practicable" through route. And see note 14 as to joint through routes after June, 1910.

ent thing from a pooling contract) or the carrying on of such division when this bill was filed is a monopolizing or restraint of trade or commerce contemplated by the act.⁹ At the same time it is clear that competition between carriers for traffic from one connecting line may affect the condition of the shipper upon the originating line, and I see no reason to doubt the proposition which, in this respect, must underlie the opinion of the court, viz., that the forbidden restraint *may be* found in this joint purchase of a common extension by two competing roads; but it seems clear that in a case of this class the criterion must consist in the principle stated by Mr. Justice Lurton in the St. Louis Terminal Case, 224 U. S. 394, 32 Sup. Ct. 510, 56 L. Ed. 810:

"Whether it (the transaction in question) is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of Congress * * * will depend upon the intent to be inferred from the extent of the control thereby secured over the instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted."

From this statement and from the very recent, familiar decisions of the Supreme Court, including the Union Pacific Merger Case, *supra*, and the Reading Case, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. —, it seems accurate to say that whether the situation created in March, 1910, operated in aid of interstate commerce or in the forbidden, unreasonable restraint thereof will depend upon (1) the extent of commerce restraining power inherent in the joint ownership of the Kanawha; (2) the characterizing intent and purpose of this joint ownership to be inferred not only from the power secured, but from all the proofs; in other words, whether such restraint of competition as was inherent in the joint ownership would amount to a primary, and therefore direct, restraint of trade, or would rather be incidental to ends primarily lawful; and (3) the amount of restraint, actual or potential, which did take place.

7. If this joint ownership has the prohibited effect, it must be found (a) in competition as to divisions; (b) in competition as to rates; or (c) in competition as to service.

(a) Clearly this joint ownership tends to prevent the Central and the Hocking from bidding up against each other in the divisions that they will offer to the Kanawha for this traffic, and so the other Kanawha stockholders might make less money. This is not the kind of competition which the statute desires to preserve. It serves no public interest. It tends, because of a disproportionate division to the initiating carrier, to poor service by the continuing carrier and to indifference by both to the interests of the shipper. It has long been recognized as a traffic evil. On its elimination we cannot predicate guilt.

(b) It is clear, too, that an agreement to divide traffic would, as a

⁹ Without doubt, two parallel roads might join in building, from a common terminus, and owning a new road connecting with and continuing both. Joining in buying an existing extension seems to stand, logically, on the same ground, unless, as matter of fact, the purchase was with the dominant purpose of stopping existing or normal competition.

general proposition, have some tendency to prevent competition in rates; that is, the Hocking would not be so likely to name its lowest rate from the Ohio to the lake as if it was not sure of half the traffic any way, and so the through rate from the Kanawha district to the lake might not fall to the point where it would be brought by full competition.¹⁰ This is, I think, as strongly as this feature can be stated. It is, of course, now perfectly well settled that free competition is the policy of the law, and it is none of our concern whether this is, as to railroads, the best economic policy; but, when we are trying to decide whether we are compelled to find a dominating intent to restrict trade merely because one inducement to compete in rates is removed, we cannot shut our eyes to the small part which rate competition now plays. These contracting parties knew, in 1910, as we all now know perfectly well, that under the thorough and efficient administration of the Interstate Commerce Law rate cutting, as a means of getting business, either from shippers or from connecting lines, has ceased. All rates, through as well as local, must be published, and cannot be cut until after 30 days' notice. A published cut is reasonably sure to be met by all who are competing without a differential. No contract for traffic in consideration of a cut can be made, and, as cutting rates will not get business away from a competitor, rates are not voluntarily cut. I do not mean to say that this disappearance of rate cutting makes lawful a contract to maintain rates—not at all; but it does affect and minimize the evidential importance of a contract removing one inducement to cut rates, when we are determining the character of the entire transaction of which that removal is only one element.¹¹

(c) Coming to competition in service, it is not to be denied that such a traffic-dividing agreement as here exists tends to discourage this kind of competition, and that there is here, in theory, some degree of restraint, more likely to have actual effect than is the restraint as to rates.¹²

We find, then, both as to rates and service, some impediment to ideally free competition; but that ideal is rare, if it exists at all. We must have a practical standard of comparison. That standard must be

¹⁰ The actual effect of the (theoretical) rate sustaining interrelationship is minimized by the fact that coal rates go by districts, and a change in one district would affect all the others. (See note 2.)

¹¹ In the same way, when some tendency to maintain high rates is only an incident of the contract under attack, we may well remember that the shippers' meritorious grievance on this point is the maintenance of an unreasonable rate, and for that he has an effective remedy.

¹² While each road is content with half the Kanawha traffic, and the Kanawha has the power to equalize, the agreement to divide tends to make both Ohio roads careless as to good service. Now that the shipper has the absolute right of through routing, the Kanawha's power to equalize rests solely on its relations to the Sunday Creek mines, which originate a considerable part of the tonnage, available as an equalizing medium, so that here, too, the Sunday Creek ownership is the real evil. With this removed, the agreement to divide the Kanawha traffic becomes comparatively ineffective, and the shippers' right of through routing must bring the freight solicitors to them in competition.

the lawful situation which would exist, except for the agreement said to be forbidden. This lawful situation is usually that which was displaced by the agreement under attack; but in this case the next earlier situation was itself unlawful, and to get on solid ground we must go back to 1899. The theoretically perfect remedy would be to restore the condition existing in 1899. The bill of complaint and the logic of the situation lead there and lead us nowhere else. When we get there, we find that the Central practically owned the Kanawha. For 10 years it had been the majority stockholder, and it was in absolute control. For the Kanawha traffic, the Kanawha and the Central formed one through unitary line from the mines to the lake. The Hocking could not compete for part of the haul, and, so far as concerns any benefit to the Kanawha shippers, the Hocking might as well have been out of existence.¹³ As compared with this situation, I cannot doubt that the present arrangement is an aid, not a restraint, to competition.

This was in 1899. If we ought to look for a standard of comparison in 1910, that standard must be such other lawful arrangement as might naturally have resulted in the course of separating the two Ohio roads, if the contract for joint control of the Kanawha had not been made. This other arrangement would almost certainly have been the purchase of the Kanawha by or for either the Hocking or the Central exclusively in its own interest. The Kanawha had always been operated in connection with one or the other or both of these roads. It had little reason for existence, except as an extension of one or both of these roads. Except in co-operation with them, it could not get its coal to market. It is not impossible that a wholly independent purchaser for the Kanawha might have been found, but that there should be an independent purchaser who did not plan to resell to one of the other through lines, and who would pay anything like the price which the road was worth to either one of the Ohio lines as an extension, is highly improbable. Suppose, then, that it had been purchased in 1910, by or for the Central (and the government concedes this would have been lawful), it follows that all the Kanawha traffic would have gone through Ohio over the Central so far as the Kanawha and the Central, acting directly or indirectly, could have brought about this result. So long as a satisfactory through route was provided by the Kanawha-Central line, the Kanawha could not have been compelled to establish a through route or rate by way of the Hocking, and the Hocking could not have competed at all.¹⁴ Even if the Kanawha could have been compelled to establish

¹³ There was then (in 1899) no way of compelling the Kanawha to join the Hocking in a through route or joint rate; nor was there, indeed, in 1910. (See note 14.)

¹⁴ In March, 1910, the Commission could direct two roads to join in a through rate and route only, "provided no reasonable or satisfactory through route exists." 34 S. L. 590. It seems clear that the Kanawha-Central route would have been made and kept a "reasonable and satisfactory through route" so that the power to compel the Kanawha to join with the Hocking never would have arisen. In June, 1910, this proviso was cut out, but its place was taken by the provision (36 S. L., 552): "And in establishing such through

a through route and rate via the Hocking the same as via the Central, the Kanawha-Central could have made the part of the rate south of the Ohio river so high, and the part north of the river so low, that the Hocking could not make a competing local rate; or, even if this trouble was overcome, there would still remain the numerous practical obstacles which the Kanawha-Central management could oppose to a diversion of part of its through traffic. In any of these events, the Kanawha shippers would have no remedy from the law or from the Interstate Commerce Commission, excepting to compel a reasonable through rate; and that remedy has never been impaired.

These considerations lead me directly to the conclusion that the Kanawha-Hocking-Central relationship now attacked produced (inherently) for the Kanawha district shippers less monopoly and more competition and better service than would have followed from either of the alternative arrangements which would naturally have resulted in 1910, if this one had not been made. The other would have been concededly lawful. I cannot find unlawful monopoly, resulting from inherent power to restrain competition, where that power is less than it would be in the lawful alternative situations.

8. If the intent unlawfully to monopolize or restrain may not be inferred merely from the existence of the power, where that power is of the limited extent and of the peculiar nature which have been described, is that intent otherwise proved by this record?

The five trunk lines had been engaged in an unlawful combination and had been directed by the Ohio Supreme Court to dissolve such combination. It is their purported dissolution which is now under review. Where the only question is whether the defendants are in bad faith continuing a violation of the law after having pretended to quit, it seems to me reasoning in a circle to draw, from their former misconduct, any serious inference of their present bad faith.

If the Chesapeake & Ohio and the Lake Shore had purchased the Kanawha stock with no interest in the subject-matter, except to control its traffic for the Hocking and the Central, the question would be different; but that was not the sole interest of either purchaser. The Chesapeake & Ohio desired an outlet to Lake Erie for all of its own great

route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This is awkwardly expressed, because of the lack of definite antecedent for "to do so"; but it seems to mean that if the condition in 1899 was restored, and if the Hocking demanded from the Kanawha a joint through route, via either Athens or the river division, the Kanawha could not be required to comply, because such route would embrace substantially less than the entire length of the Kanawha to Corning, and less than the entire route between its termini, the Kanawha district and Toledo, over railroads "operated in conjunction and under a common management and control." So the Hocking solicitors, in the Kanawha district, would have been helpless.

traffic.¹⁵ For this purpose, it desired to buy the Hocking. This purpose and this desire were beyond criticism; but to reach Gallipolis, the nearest point on the Hocking, it must build across the Ohio river and over 30 miles of difficult country, and it must then, for its traffic, either practically rebuild the Hocking river division, 75 miles, to Logan, or build, new, 50 miles, to Athens, in order, one way or the other, to reach the modernized lines of the Hocking. Why should it be required to do this, paralleling the Kanawha, when it could buy such an interest in the Kanawha as secured to it the indefeasible right to use the Kanawha as this connecting link? What rule of public policy required it to build this new road instead of buying the existing road?

Turning to the Lake Shore, we find that it desired to buy the Central for the purpose of reaching the coal fields and getting both coal traffic and fuel coal for itself and its allied New York Central lines, and to make connections for through traffic both ways, with the Coal & Coke and the Western Maryland roads. These were rightful and legitimate objects, also beyond criticism. So was its desire to have this feeder reach the Kanawha district. Apparently, no one questions that it could rightfully have purchased the Kanawha outright, nor is there, to my mind, any reason for ascribing to the Lake Shore any moving purpose in the whole transaction of March, except that just mentioned.

We find, then, that the Chesapeake & Ohio had the legal right to buy the Kanawha and a strong and lawful motive for so doing, and that the Lake Shore had the same right and an equally strong and lawful motive, and that this underlying and justifying motive by each had nothing to do with the thought of suppressing competition between the Hocking and the Central; yet the Lake Shore knew that, if the Chesapeake & Ohio made the purchase, the Lake Shore would be defeated in its plan of reaching the Kanawha fields, and the Lake Shore's subsidiary, the Central, would get no Kanawha traffic which the Kanawha could divert; and the Chesapeake & Ohio knew that, if the Lake Shore made the purchase, not only would the former's subsidiary, the Hocking, get little through traffic, but the whole scheme for the Chesapeake & Ohio outlet to the lake would be defeated. Under these circumstances, what more natural than that they should join in buying the Kanawha, each secure against exclusion by the other, and what primary or characterizing unlawful purpose can be found in such a joint purchase? If this joint purchase was, for these reasons, rightful and lawful, as I believe it was, the arrangement for dividing between

¹⁵ That this was real, not pretended, is shown by what happened. In 1909, the first full year before the change, the C. & O. delivered to the Kanawha for hauling over its line, 4,000 tons of coal and coke and 70,000 tons of other freight. In 1911, the first full year after the change, it so delivered 811,000 tons of coal and coke, and 168,000 tons of other freight. Between the same periods, southeasterly bound freight received by the C. & O. from the Kanawha increased from 122,000 tons to 199,000 tons. This enormous tonnage given by the C. & O. to the Kanawha was not merely diverted from the other connections of the C. & O., because there was no decrease in the tonnage given to these other connections.

the Central and the Hocking the traffic originating on the Kanawha, though important in itself, becomes relatively a mere incident of the main transaction, and its real purpose was to prevent a monopoly of this traffic by either purchaser. It makes little difference how express the equal division agreement was. Such an agreement would be implied from such a situation. Nothing else would be fair or right. If a receiver should be appointed for the Kanawha, the court would direct him to do just what this division agreement called for and what these parties have been doing, viz., divide this traffic equally between the two Ohio lines, so far as he could do so and so far as they were equal in their furnishing of cars and other facilities; in other words, "to treat them fairly."

9. The remaining element of the assumed general criterion is the amount of restraint, actual or potential, which did take place.¹⁶ Here, again, we find that the natural symptoms of a suppression of competition did not exist. No one complains of any suppression or of any practices resulting therefrom; and this for the very good reason that there never was any competition to suppress. It is difficult to prove that defendants have put a burden upon a thing which never existed. Not only is the record barren of any suggestion that the Kanawha shippers ever had the benefit of any competition between the Central and the Hocking, but it affirmatively shows that during the 10 years before 1910 competition was impossible, because the Hocking controlled everything; and that before 1900 it was impossible, because the Kanawha belonged to the Central.

It is certain, then, that the result which will condemn the agreement must be found in the suppression of "potential" competition, and we must ascertain what this means. In the Union Pacific Case the thought was applied with reference to undeveloped traffic from territories already reached by the two roads, and which traffic might grow into larger volume; but the same idea must extend to new and likely methods of competition and even, in some instances, to the building of new roads or branches to make competitive territory out of that which has been tributary to one road only. Whether competition, between the roads now existing, in cutting rates, etc., is probable enough or would be serious enough under the facts of this case to be that potential competition which must be preserved, has been discussed. It is still possible that the Ohio road which saw the Kanawha sold away from it would have built a new line to the Kanawha district even in spite of the great topographical difficulties. Such new road apparently could not have reached any mines now on the Kanawha, because there is room for no new track along the river next to these mines; but, treating the district and not the individual mines as the shipping unit, it could have reached other parts and developed new mines. That

¹⁶ The Kanawha traffic to be divided was about twenty-five per cent. of the total traffic of the two Ohio roads. This appears only as to the Hocking; I assume a similar ratio on the Central. I reach this result by taking the figures for 1911 (Ex. 138) and excluding the south-bound tonnage from the total of Kanawha and excluding the C. & O. tonnage from total Kanawha and total Hocking.

it would have done so is, however, the merest surmise. It is not even probable, so far as the record informs us; and I cannot condemn the joint Kanawha purchase because it has possibly prevented the building of another line in some unknown location at some vague future time. An arrangement which removes the motive for building a competing line cannot, for that reason alone, amount to an unlawful forestalling of potential competition, unless such forestalling was a substantial and moving purpose of the arrangement, and unless the building of such other line was at least reasonably probable—indeed, the latter condition covers both, because it could not be the main and sufficient motive, unless the new road was foreseen as probable.

Finally, in testing the actual results, we must look to the Kanawha shippers. All this controversy is to protect their interests—and, of course, the correlative interests of the public which buys from them. Have the shippers been injured? Are their rights in jeopardy? On one hand, it appears that there is somewhat less of motive on the part of the Central and the Hocking to compete on a part of the through haul than there would be under certain other circumstances which never did exist, which would not have been a probable alternative, but which perhaps might have come into existence. I find nothing else to put on this side of the scale. On the other hand, it appears that the great trouble in coal shipments is to get cars, and that the Kanawha, even when in combination with the Central and the Hocking, was poorly supplied with cars and served its shippers poorly. It was greatly interested in its own coal companies, and it would have supplied them if it could, even if it did not impartially distribute all the cars it could get. Under these conditions, coal shipments from the mines along the Kanawha amounted, in the last six months of 1909, to 36,000 cars. With the transfers in March, 1910, there came a new outlet to all the western C. & O. territory, and direct and close relations which made it to the interests of these two trunk lines to furnish cars to the Kanawha.¹⁷ It seemingly must have been due, at least in a large part, to these greater facilities that the shipments by the mines along the Kanawha had increased in the last six months of 1911, to 42,000 cars. This does not seem to indicate a substantial restraint of trade and commerce. It seems to me clear that the Kanawha shippers and their dependent public have been benefited by the transaction of March, 1910, taken as a whole, and that interstate trade and commerce have been promoted thereby;¹⁸ while the only restraint affecting such shippers or such commerce is theoretical rather than actual, and such as

¹⁷ Up to July, 1909, the Hocking, Central, and Kanawha cars were pooled and used interchangeably on these roads. During the nine months intermediate the end of this pooling arrangement and May 1, 1910, the date of full effect of the March contracts, the Central furnished to the Kanawha an average of 266 cars per month. During the same months of 1910 and 1911 it so furnished an average of 1,466 per month.

¹⁸ In 1909 the New York Central lines were furnishing 1,600 cars per month to the Central; in 1911, 8,300 cars per month. Coal production at the mines on the Central increased 500,000 tons for 1911 over 1909.

it is, arises out of a natural, if not necessary, incident of the main transaction.

10. There remain for consideration two further suggestions. It is said that the Hocking and the Kanawha are competing roads, and hence that the former cannot take part in managing the latter, either directly or through the instrumentality of the Hocking's chief stockholder. I am not satisfied that these two roads are in any fair sense competing. That portion of the Kanawha extending from Hobson north 40 miles to Corning, and that portion of the Hocking extending from Logan south 50 miles to the river, are substantially parallel and 20 miles apart. There is some traffic to and from two or three small towns, Pomeroy, Middleport, and Gallipolis, but the Kanawha does not reach these towns with its own track, and runs to them over the Hocking under a trackage contract which does not permit it to compete with the Hocking, except by the latter's sufferance. A small amount of coal is produced at some mines along the southern part of the Hocking river division. The Kanawha might, by building its own spurs and branches, reach these three towns and these mines, but the whole of the traffic so reachable and as to which, theoretically, there might be competition, is negligible both in percentages and in total volume; neither is any reason shown to anticipate increase.

The relative positions of the Hocking and the Kanawha are not those of parallel and competing roads, but those of connecting and continuing roads having an end overlap. It is, in principle, though not in degree, as if the New York Central ran from the east to Niagara Falls through Buffalo, and the Michigan Central, from the west, to Buffalo, through Niagara Falls. Here would be from Buffalo to Niagara Falls two parallel roads, and they might compete for the freight originating at those and intermediate points. This could hardly be thought sufficient to deprive these two roads of their substantially connecting, rather than competing, character. So here, one looking at the map must, I think, observe that the Hocking and the Kanawha form substantially a connecting and continuing line from Gauley Bridge to Lake Erie, and do not lose this character because a branch or spur of the Hocking Toledo-Athens main line branches off at Logan, parallels the north end of the Kanawha and strikes it at Kenauga.

It is true the Ohio court made a finding that these roads were parallel and competing, but the court was considering that portion of the Kanawha north of the river, and not, as we must do, the entire road; and also was treating the Kanawha as part of one system with the Central, a thing which we now cannot do. That court was also considering intrastate commerce, as to which the conclusion of fact might well be different from the proper conclusion regarding the immense volume of traffic involved under this record.

11. It is also said that the C. & O. and Kanawha are competing roads, and hence the former cannot take part in the management of the latter. The roads are parallel from Gauley Bridge to Charleston, a distance of 30 miles along opposite sides of the Kanawha river. The mines on one side ship over the Kanawha; on the other side, over the C. & O. On neither side can they practically reach the other rail-

road. The cost of crossing the river would be prohibitive. On neither side could another railroad track be built, the river valley being, at many places, a mere gorge. From Charleston to the Ohio river the courses are generally divergent, one tending north, the other west. Charleston is a common point, and there should be, at this point, competition for freight originating at Charleston or coming in over the Coal & Coke Railroad and destined for the Northwest. The interest of the C. & O. in the Kanawha would theoretically tend to restrict this competition, though the tendency would be imperfect, because over its own lines the C. & O. would get the entire haul to Chicago, while the other way it would be interested in half the profit on the haul from Charleston to Armitage, and half of the volume of the traffic from Armitage to Toledo. One common point, with the amount of traffic existing at Charleston, would, in any event, be hardly sufficient to give a competing character to these railroads, but, even if the theoretical but imperfect tendency to limit this competition could ever sufficiently invalidate an interest by one in the other, yet, in this case, such tendency must yield to the undisputed testimony, which is that the competition at Charleston between the soliciting agents has continued active and vigorous since March, 1910, as before.

The map also suggests that control of the Kanawha might be used to block the making of a through line from the seaboard to the lakes, by way of the Virginian, the Kanawha and the Central, which through line would, as a whole, compete with the C. & O. It is sufficient to say of this suggestion that no such issue is suggested by any pleading, and that the Lake Shore, in purchasing its interest in the Kanawha, guarded against interference by the C. & O. with such possible future plan.¹⁹

Upon the whole case I see two great shipping districts with interests involved—the Hocking coal district and the Kanawha coal district. The Hocking shippers *were* subject to a monopolistic combination of all transportation facilities. They *now* have these facilities divided between two trunk lines, wholly independent of each other, as to competition between which there exists no obstacle which a court can remove. The Kanawha shippers *were always* subject to that monopoly which results from having only one railroad outlet. This has been neither increased nor diminished; but by the alliance between their railroad outlet and two strong lines the shippers can reach much new territory, and the outlet has its facilities and usefulness much increased. As to the one feature (joint Kanawha control), in which the position of the shippers might be better, we are asked, it seems to me, to *create* competition.

¹⁹ Indeed, the entire subject-matter of this numbered paragraph should be disregarded for the same reason. Paragraph 20 of the bill limits the issue to the charge of a continued combination between the Hocking, the Central, the Zanesville and the Kanawha. It is important to know what the C. & O., as owner of the Kanawha, is doing with the Kanawha; but, to the issue tendered and made, it is immaterial whether the C. & O. is under disability to become the owner of the Kanawha.

THE MARGARET J. SANFORD.

THE S. 11.

(District Court, E. D. Virginia. January 31, 1913.)

1. COLLISION (§ 71*)—MOVING AND ANCHORED VESSEL—NEGLIGENT ANCHORAGE.

The steamship Strathleven, 350 feet long, light, without authority from the harbor master, required by Code Va. 1904, § 2024, with a strong westerly wind blowing, anchored on the western line of the channel in Elizabeth river in Norfolk, where the channel was 800 feet wide but obstructed on the eastern side by a dredge at work. At this time a tug with two scows in tow on a hawser was approaching from upstream and only 500 or 600 feet distant. The steamship at once began to drag her anchor, and 45 fathoms of chain were paid out before she brought up, with her stern near the east side of the fairway. The tug and first scow passed safely to the east, but the second scow grazed her stern, doing some injury. The tug went as far to the eastward as was safe. Whether the steamship had stopped moving at the time of the collision was in dispute. *Held*, that in either event she was solely in fault for obstructing the channel by anchoring where she did and permitting her anchor to drag, and even paying out chain, in disregard of the right of other vessels to use the channel, and in violation of both the state law and federal Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543).

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. COLLISION (§ 69*)—OBSTRUCTION OF CHANNEL—VESSEL DRAGGING ANCHOR.

In such case the steamship was not entitled to claim the privilege of an anchored vessel as between herself and other shipping lawfully using the harbor and which had no reason to anticipate danger from the unusual and improper character of her movements.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.*]

3. NAVIGABLE WATERS (§ 3*)—OBSTRUCTION BY ANCHORED VESSELS—CONSTRUCTION OF STATUTE.

The provision of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), that "it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft," the violation of which subjects both the vessel and her master or pilot to severe penalties under section 16, should be construed and strictly enforced, in the interest of safe navigation; the duty being not negatively but affirmatively and positively imposed on vessels coming to anchor in navigable channels to see that they do not under any circumstances, accidents excepted, prevent or obstruct the passage of other vessels or craft.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. NAVIGABLE WATERS (§ 3*)—RIVER AND HARBOR REGULATIONS—FEDERAL AND STATE STATUTES.

Such act does not supersede state legislation establishing regulations for rivers and harbors which does not conflict therewith.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 3; Dec. Dig. § 3.*]

In Admiralty. Suit for collision by the Strathleven Steamship Company, owner of the steamship Strathleven, against the steam tug Margaret J. Sanford and the scow S. 11. Decree for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hughes & Vandeventer, of Norfolk, Va., and Ralph J. M. Bullowa, of New York City, for libellant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the morning of 19th January, 1912, about 9 o'clock, the steamship Strathleven, 3,996 tons gross, 350 feet long, 52 feet 3 inches beam, and 28 feet draft, light, came up the Elizabeth river, Norfolk, Va., in charge of a Virginia pilot, and cast anchor under the beacon near the entrance to the West Norfolk channel, on the western side of the river. The wind was blowing heavily from the northwest, some 30 miles an hour, and the tide slightly flood. On the opposite, or eastern side, of the river, and a little upstream, a dredge was at work, under contract with the government. The Sanford was proceeding down the river on the eastern side of the channel, towing two loaded mud scows to the dumping grounds below Ft. Wool. The Sanford was about 80 feet long, 11 feet draft, and the scows each about 100 feet long, 35 feet beam, and draft of about 11 feet. The scows were made fast to each other by means of lines three or four feet in length, from the rear of the forward scow to the forward end of the rear scow, and were being towed on a hawser between the forward scow and the tug of some 25 fathoms. The deep water channel of the river was 800 feet wide, and the range stakes from the dredge on the eastern side of the channel extended well out in the deep water channel. The Strathleven's anchor dragged, and 45 fathoms of chain was paid out before she finally brought up on her anchor; and she drifted, or was driven across the channel, under the influence of the then prevailing wind, over to the eastern side thereof, her stern extending into the range stakes aforesaid. About the same time, while the tug and tow were thus navigating down the channel, on its eastern side, having passed the dredge, and shortly before reaching the Strathleven, it received two signals from the Maryland, a passenger steamer of some 300 feet long, coming up from behind the Strathleven, and which it had not previously observed, to pass the Sanford starboard to starboard; and the Maryland and Sanford so passed in close proximity to each other, about the Maryland's length above the Strathleven. The Maryland passed out into the range stakes, and to the extreme eastern side of the channel, the Sanford bearing as far to the eastward as possible, having regard to the presence of the Maryland, and passed the Strathleven safely, as did its forward scow, but the rear one slightly grazed the stern of the Strathleven on her port quarter, breaking, as is claimed, her propeller and shaft.

The Strathleven insists that she was in all respects free from fault and properly anchored, and that the collision occurred because of the failure of the Sanford to have a proper lookout; that she was handling a heavy and unwieldy tow on too long a hawser, which she could not properly control; and that she was grossly negligent in not so directing her navigation as to avoid collision with the steamship at anchor.

The tug insists that it was entirely free from fault, and that the collision was brought about solely: (1) By the ship's failure to keep a lookout; (2) by anchoring in an improper place, considering the condition of the weather and tide; (3) by not putting out an additional anchor to hold the steamship; (4) by putting out so much chain as to permit the vessel to tail into and across the channel, so as to materially obstruct the navigation thereof; (5) by not going ahead on her engines, to keep the vessel up to her anchorage.

Upon this statement of the circumstances of the collision, and the contentions of the respective parties, it will be readily seen that the real question to be determined is whether the accident occurred because of the improper manner and place of anchorage of the Strathleven, or from the failure of those in charge of the tug and tow to exercise proper care in proceeding down the channel, having regard to the Strathleven's position.

A large number of witnesses were examined on behalf of the parties respectively, many of whom saw the impact, which occurred in broad daylight, between 9 and 9:30 in the forenoon, most of them seafaring men, who gave intelligent accounts of just what did occur; and, while the conflict between them on some of the important questions involved is irreconcilable, as to the essential and more material facts, there is little or no difficulty in harmonizing their statements.

Ordinarily, the position of the libellant, that there is no excuse for a collision in these waters in broad daylight, with a vessel at anchor, may be conceded, and that those navigating the harbor are charged with the duty of looking out for and avoiding a collision, or the risk of collision, with a ship thus at rest; but whether the Strathleven on this occasion should be treated as a ship at rest, and the Sanford charged with the obligation of avoiding collision with her, within the meaning of the rules of navigation, is a very different proposition. On the Sanford's statement, and there is much evidence to support it, certainly that of her own master, the master of the Maryland, in a favored position to observe the vessel's movements, and that of the harbor master, who was near to the scene of the accident, there would be no doubt of responsibility for the collision, since the Strathleven's continuing to drift across the channel caused her to collide with the rear scow in the tow.

[1] In the view taken by the court, it is not necessary to determine the conflict between the parties, as to whether the Strathleven drifted into the tow or not; since the facts sufficiently establish her negligence and that of the freedom from fault of the Sanford, under the circumstances of this case, whether the Strathleven had actually ceased to drag or not. The Strathleven, light, without authority from the harbor master, and apparently without the slightest regard to the rights of those lawfully navigating the river, with a strong westerly wind prevailing, cast her anchor on the western line of the channel, and was driven across the channel, taking up nearly the entire fairway, the ship's length, and that of her hawser, being 620 feet. The harbor master, who was near by, says that the tug and tow was not more than 500 or 600 feet upstream when the Strathleven

cast anchor, and both the steamer's master and the pilot, who was in charge of her navigation, say that they did not observe the presence of the tug and tow until after the ship had brought up on her anchor; the master placing them at a ship's length away from his vessel, and the pilot about 200 yards away. The pilot also stated that this was within three minutes of the time of the collision, and that he had only stopped his engines four minutes before it occurred and paid out his anchor chain up to within one minute of the time he stopped; and further that he neither looked up nor down the stream for other vessels, and had not observed the Sanford until just before the collision; and both he and the master admitted that they neither observed the tug and tow coming downstream, nor the Maryland coming up, and that no report was made to them by the lookout of the presence of either of the vessels, until seen as stated above. The harbor master, who saw and observed the ship's anchorage, properly and promptly, but not until after the collision had occurred, caused the ship to move to a proper and safe place.

Assuming that the Strathleven had the right to anchor where she did, she should have seen that her anchor did not drag, and, if necessary, put out an additional anchor or anchors (The Severn [D. C.] 113 Fed. 578; The Director [D. C.] 180 Fed. 606), and in no event should she have continued, in disregard of the rights of others, to pay out her chain in the presence of other shipping, until she virtually monopolized the channel. She had no right to assume that, upon her coming to anchor on one side of the channel, all navigation would cease; and during the time either that she was letting out her anchor chain, or fetching up on her anchor, she should have exercised the utmost diligence to have advised others of what she was doing, and, if necessary, have kicked or moved up on her engines, to prevent her unduly obstructing the fairway; and at least she should not, in such an emergency, have shut off her engines, thereby losing, instead of keeping, control of her movements.

[2] For a collision thus brought about, she is not entitled to, and cannot claim, the privileges of an anchored vessel, as between herself and other shipping lawfully using the harbor, which had no reason to anticipate danger arising from the unusual and improper character of her movements. *Culbertson v. The Southern Belle*, 18 How. 584, 587, 15 L. Ed. 493; *The Clara*, 102 U. S. 200, 202, 26 L. Ed. 145; *United States v. Transportation Co.*, 184 U. S. 247, 255, 22 Sup. Ct. 350, 46 L. Ed. 520; *Marsden on Marine Collisions* (6th Ed.) 479, and cases cited; *Spencer on Marine Collisions*, §§ 99, 106; *Hughes on Admiralty*, 261, 262.

The obstruction of the channel, in the view taken by the court of this case, was in plain contravention as well of the state statutes and harbor rules and regulations applicable to the waters in question, as the federal statute on the subject. Section 2024 of the Code of Virginia prescribes the duties of harbor masters, as follows:

"Duties of Harbor Masters; Port Regulations.—Each harbor master shall cause every vessel coming within his jurisdiction, to moor as soon as may be, and at such place as he may judge best for the general safety, not being within fifty fathoms of any wharf or other vessel; * * * and shall

require the masters of all vessels, as soon as may be, after coming to anchor or hauling to any wharf, if he deem it necessary (not exceeding twenty-four hours), to rig in his jibbooms and all fore and aft spars, and to top or brace up sharp his lower and topsail yards, so that the passage of other vessels and steamboats or ferryboats shall not be obstructed; he shall attend to the unmooring of any vessel, and if by stress of weather or any accident any vessel be driven from her moorings, he shall attend to the remooring of her. * * *

And sections 3 and 6 of the rules and regulations of the board of harbor commissioners of the port of Norfolk, Portsmouth and Norfolk county, under the head of "Their Duties," are as follows:

"(3) They are vested with authority to designate the anchorage grounds of all vessels, and are required to keep the channel way and track of steamers clear."

"(6) The harbor masters must see that the regulations forbidding vessels from anchoring in or obstructing the channelway, and all other regulations herein contained are strictly observed, and in so doing they may board any vessel, speak her, or adopt any course that they may in their discretion deem best to carry out this object."

And section 5 of the rules governing the use of the waters of the harbor is as follows:

"(5) Vessels entering the harbor and intending to come to anchor or dropping out from wharves or docks preparatory to departure, must anchor under direction of a harbor master, and are forbidden to anchor in the channel."

This state statute, and the harbor rules and regulations in question, make clear the duties of harbor masters; they are specifically required to cause vessels to be properly moored, and to see that the regulations forbidding vessels from "anchoring in, or obstructing the channelway," are strictly observed. And the board of harbor commissioners is vested with authority to designate the anchorage grounds of all vessels, and is required to keep the channelway and track of steamers clear.

While in this port no specific anchorage grounds have been designated, nor, may it be said, adopted by special usage, notwithstanding the crowded condition of the channel, still it is entirely within the power of the board of harbor commissioners to establish such anchorage grounds, and to do what is reasonably necessary to keep the channel or fairway open for the purposes of commerce. These local laws and regulations are valid and enforceable in courts of admiralty, as well as in the local courts (*United States v. Transp. Co.*, supra, 184 U. S. 247, 255, 22 Sup. Ct. 350, 46 L. Ed. 520, and cases cited), and certainly, so far as they are in aid and furtherance of the purpose of commerce, the courts of admiralty, as respects maritime matters, will carry out and enforce the same.

[3] The federal statute referred to (Act of Cong. March 3, 1899, c. 425, 30 Stat. 1152, 1153, §§ 15, 16, 17 [*U. S. Comp. St.* 1901, pp. 3543, 3544]) is quite comprehensive. Section 15 provides:

"That it shall not be lawful to tie up, or anchor vessels or other craft in navigable channels, in such manner as to prevent or obstruct the passage of other vessels or craft."

And section 16 imposes a penalty not only upon navigators who obstruct channels, but upon the vessels also; and section 17, among other things, prescribes the method of enforcing the provisions of the act.

The interpretation placed upon this act of Congress (*The Job H. Jackson* [D. C.] 144 Fed. 896, and authorities there cited) has not tended to give to the statute its real force and effect, and certainly that which its importance demands. In *Hughes on Admiralty*, a work of recognized value and authority, published shortly after the passage of the act, will be found an interesting and able discussion of the subject, the gist of which is that by the act vessels are forbidden from completely obstructing the channel, or so obstructing it as to render navigation difficult. This view of the act has been taken by several of the District Courts—whether correctly or not this court is not prepared to concede, the vice in the interpretation being that it largely nullifies, or fails to give any effect to the statute. It accords to moving and anchored vessels the same relative rights and privileges as respects the use of the channel or fairway, and enables those at rest to occupy any part of it desired, forcing those moving to pick their way through as best they can. Without the act, vessels could neither completely obstruct channels, nor make their navigation difficult, except at their peril in answering in damages to those injuriously affected thereby. Under the interpretation thus given to this act, it has to all intents and purposes in this vicinity been a dead letter, and no one has given heed or attention to its positive commands. The true meaning of the act, the court thinks, is that under it the duty is not negatively, but affirmatively and positively, imposed upon vessels coming to anchor in navigable channels, to see that they do not under any circumstances, accidents excepted, “prevent or obstruct the passage of other vessels or craft”; not, of course, that they shall not anchor in such channels at all, but that when they anchor therein, outside of an established anchorage ground, they shall so anchor, and in such method, as not to close, or unduly or unreasonably prevent and obstruct, the passage of other vessels or craft.

This would cause no hardship on any one, and is the fair and reasonable meaning of the law, since its purpose and intent, manifestly, was in aid and furtherance of the ends of commerce; that is, to keep open, and not to close up, the rivers and water courses of the country. Ships “must go on” in their business, and, while they of necessity frequently stop or tie up, when so doing they have as a rule many choices of location, and they can deliberately set about either to find such place as will within itself be secure, or adopt such method of protection as will save them from all harm, always having in view that the path of commerce should be kept open, and that those unnecessarily or unduly obstructing it do so at their peril, and subject themselves to the penalties of possible fine and imprisonment. This was certainly the view taken by the court of the act, in *The Minnie*, 100 Fed. 129, 40 C. C. A. 312, a decision of the Circuit Court of Appeals of this circuit, and not that the law was without meaning or incapa-

ble of being enforced, and to be more honored in its breach than its observance.

Adopt the view herein suggested, and let the act be enforced, and those navigating the waters of the United States will quickly adjust themselves to the same, and by apparent concert of action so come to anchor as to leave open a general and well-defined path or fairway, through which all vessels can easily navigate, and not drop anchor here and there and at most any place in midchannel or on either side of the stream, in such manner as to make it next to impossible for those passing to work their way through the alternating obstructions placed in their way. That this must have been the purpose of Congress is manifest from the heavy punishment imposed for violation of the act, and the vigorous and summary method prescribed for its enforcement.

By section 16 of the Act of March 3, 1899, 30 Stat. 1121, 1152, et seq., it is provided:

"That every person and other corporation that shall violate or that shall knowingly aid, abet, authorize or instigate a violation of the last-named section, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding two thousand five hundred dollars, nor less than five hundred dollars, or by imprisonment (in case of a natural person) for not less than thirty days, nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving the information which shall lead to the conviction; and any and every master, pilot and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall * * * willfully obstruct the channel of any waterway in the manner contemplated by section * * * 15 of this act, shall be deemed guilty of a violation of this act, and shall, upon conviction, be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft or other craft used or employed in violating any of the provisions of sections * * * 15 of this act, shall be liable for the pecuniary penalties specified in this section, and in addition thereto, the amount of damages done by said boat, vessel, scow, raft or other craft, which latter amount shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and that said boat, vessel, scow, raft or other craft may be proceeded against summarily by way of libel, in any district court of the United States having jurisdiction thereof."

And section 17:

"That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen inclusive of this act, and it shall be the duty of all district attorneys of the United States to vigorously prosecute all offenders against the same, whenever requested to do so by the Secretary of War, or any of the officials hereinafter designated; * * * and for the better enforcement of the said provision, and to facilitate the detection and bringing to punishment of said offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under and by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power to swear out process, and to arrest and take into custody with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this act, or who may violate any of the provisions of the same; provided that no person shall be arrested without process for any offense not committed in the presence of some one of the afore-

said officials; and, provided further, that whenever any arrest is made under the provisions of this act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States, for examination of the offense alleged against him, and such commissioner, judge or court shall proceed in respect thereto as authorized by law in cases of crime against the United States."

The court has enlarged somewhat upon the law, national and state, and the local ordinances, in force at the scene of the collision, for the reason that their enforcement has become a necessity, having regard to the importance of the harbor of Hampton Roads and vicinity, and the congested condition of many places within the waters of the Elizabeth river and the harbors of Norfolk and Portsmouth. The present case is but an illustration of those that not infrequently arise in the court, and that are of almost daily occurrence, within one's everyday observation. In the waters of Hampton Roads there is ample room for vessels of the deepest draft to anchor on either side of the channelway, leaving open a fairway in the middle of the stream, and perhaps to anchor in the center, leaving room on either side; though, confessedly, it would be safer and better to use one side as an anchorage ground, and leave the other open for free navigation, and within the waters of Elizabeth river, and in the harbors aforesaid, sufficient room exists for anchorage purposes, by using one side of the stream, and allowing the other to remain open, and not permit anchorage to be had wherever it may occur to the particular navigator as the most convenient place for his vessel.

Of course, these anchorage grounds would have sometimes to be located on one side of the channel, and then on the other, dependent upon the sinuosities of the channel, and the usual courses of navigation thereof, as well as because of docks and piers on either side of the river, or within the harbors; but this is mere matter of detail. Within these waters, certainly at the places where the congestion chiefly exists, ample room for anchorage purposes will always be found reasonably near by, if not at the particular spot or location where it would be most desirable from the viewpoint of economy and expedition for vessels to anchor, while waiting turn either to coal, or to load or unload, or for any other purpose, and it should be considered no great hardship on vessels anchoring in a channel, to move or change position, as may be found convenient for them, or the necessities of business require. As before stated, the board of harbor commissioners has full authority to establish anchorage grounds within their jurisdictions, which has been done at Newport News, where light vessels are required to anchor above the Old Dominion Land Company's Pier A, and all loaded vessels below pier 12, each well to the west side of the channel, and not less than 2,000 feet from the piers, and, in the court's judgment, the advantages to this port and the purposes of commerce would be greatly benefited by their so doing; but, whether they do so or not, the federal statute, *supra*, should be strictly enforced, and carried out by those charged with its execution.

[4] The further suggestion is made that perhaps the state law has been superseded by the passage of the federal legislation in question. This view is not without force, since ordinarily legislation by the fed-

eral government upon a subject within its control is deemed exclusive of other authority, and this is clearly a subject within the dominion of federal legislation. *Gibbons v. Ogden*, 9 Wheat. 1, 98, 196, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. Ed. 678; *Brown v. Houston*, 114 U. S. 630, 5 Sup. Ct. 1091, 29 L. Ed. 257. While this is the general rule, the language and scope of the national act would largely determine its purpose, and the intent of the Congress in passing it, and whether it was really meant that all local legislation should be set aside. Other sections of the act under discussion, March, 3, 1899, *supra*, having to do directly with rivers and harbors, the establishment of harbor lines, the granting of permits by the Secretary of War to build out into the navigable waters of the United States, have been the subject of review by the Supreme Court (*Cummings v. Chicago*, 188 U. S. 410, 428, 430, 23 Sup. Ct. 472, 47 L. Ed. 525; *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965); and the contention was there as here made, but the court ruled that it was not the purpose of Congress to take away from the state the right to control its internal waterways, and that the true meaning of the act was that both governments should act conjointly therein, and hence that the legislation was not exclusive of the power and authority of the local governments in the premises. See, on this general subject, also, *Gilman v. Philadelphia*, 70 U. S. (3 Wall.) 713, 18 L. Ed. 96; *Pound v. Turck*, 95 U. S. 459, 462, 24 L. Ed. 525; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629.

This, although navigation may be said to be a subject more particularly within the federal domain, in the view of the court, is the proper interpretation of the sections of the act under consideration here; and hence, that the two governments, and their officers, under existing legislation, can and should join or vie with each other in the effort to see that the same are enforced and respected, regarding these important matters.

The difficulty of preventing collisions in narrow channels is necessarily great, and hence the strictness of the law referred to above; and those lawfully using the waters should do so having regard to the high duty they owe to others, which obligation is not only recognized and enforced by the general maritime law, but especially enjoined by the statutes, state and federal, before mentioned. On this occasion, the *Strathleven* having plainly failed to perform the duty imposed upon her by maritime practice and the rules of good seamanship, she must bear any loss resulting therefrom.

In what has been said, the court is not unmindful of the privileges accorded to anchored vessels. All that is said in that respect is fully approved, and the authorities cited recognized; and the burden imposed upon the tug and tow, the moving vessel on this occasion, as well to avoid the risk of collision, as the collision, assuming the steamer to have been at rest, is undoubted. Still the court can but believe that the *Sanford* met the burden imposed upon it; the real question being whether she exercised reasonable maritime skill and caution in continuing to navigate on the eastern side of the channel, in the face of the

Strathleven having cast anchor to the westward line of the channel. In a word, had not the Sanford the right to assume that the Strathleven, anchored on the western side of the channel, would not disturb her in her navigation on the eastern line thereof? The court clearly thinks that she had such right, especially under the circumstances of this case, and that, moreover, having regard to the presence of the dredge, and meeting the steamer Maryland, she did all that good seamanship required of her, and that any error committed by her after the presence of danger or possible danger from the movement of the supposed anchored ship across her course became obvious should be treated as error in extremis. She ported her wheel and went to starboard as far away from the supposed anchored vessel as possible, and as far as it was practicable to go, having regard to the presence of the Maryland then meeting her. Indeed, the only criticism that seems to be especially made of her course, by those navigating the Strathleven, is that, if she had reversed her engine, she might have been driven away by the wind and tide from, and not have come into, collision with the steamer. Assuming that she should have so checked up and drifted, instead of porting and going ahead, it was a matter for the exercise of wise judgment, at the moment, and while we do not know what would have been the result of slowing down, and the drifting process suggested, we do know that both the tug and forward scow passed the Strathleven safely, and the latter scow barely touched her in the collision; and the court thinks it equally clear that it was not practicable for the tug and tow to have navigated to the westward and around the stem of the Strathleven, as one or two of libellant's witnesses contended might be done.

It follows, from what has been said, that the Strathleven is solely responsible for the collision, and a decree to that effect will be entered when presented.

BURGIE v. HICKS.

(District Court, N. D. New York. March 10, 1913.)

1. SALES (§ 150*)—CONTRACT—BREACH—"Now."

Where a seller, in answer to the buyer's request for performance, replied, "I cannot now comply," followed by a statement that because of the buyer's prior request for delay in shipment of a part of the merchandise the seller was not obliged to further perform, the word "now" did not mean that the seller could not comply "at present" or "just now, at this particular time," but that he could not comply for the reason that the buyer did not order the goods shipped as, or when, he promised to do so, and that the seller was under no further obligation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 350, 351, 354, 355, 356; Dec. Dig. § 150.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4851-4853.]

2. SALES (§§ 62, 201*)—CONTRACT—CONSTRUCTION—SEVERABILITY.

Where a contract provided for sale of 1,000 barrels of vinegar to be shipped as ordered in car load lots, to be paid for at a specified price, f. o. b. cars at Memphis, Tenn., within 30 days after receipt of the same, title did not pass until delivery of each car load at Memphis, and hence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the contract was divisible and separable both as to shipments and payments.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179, 529-541; Dec. Dig. §§ 62, 201.*]

3. SALES (§ 174*)—CONTRACT—BREACH—DELIVERY IN INSTALLMENTS.

Where a contract for the sale of vinegar was deliverable at the buyer's option in car load lots, payable 30 days after receipt of each car load, the buyer's failure to pay for a car load received December 9, 1910, was no excuse for the seller's breach of contract on December 17th following, by refusing to make further shipments; the buyer on such refusal being entitled to withhold further payment, using the price of the shipment delivered to offset his damages for breach of the contract or sue for such damages, leaving the seller to counterclaim for the amount due on such shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. § 174.*]

4. SALES (§ 406*)—CONTRACT—BREACH—RIGHT TO SUE—CONDITION PRECEDENT—PARTIAL PERFORMANCE—PAYMENT.

Where a buyer sued for the seller's breach of contract in refusing to make further shipments, claiming that a sum due him for breach of the contract was in excess of the sum due the seller for shipments made and unpaid, payment for such shipments was not a condition precedent to the plaintiff's right to maintain the action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1156-1158; Dec. Dig. § 406.*]

5. CONTRACTS (§ 176*)—QUESTIONS OF LAW OR FACT—CONSTRUCTION OF CONTRACT—CORRESPONDENCE.

Where, in an action for breach of the contract of sale, there was no dispute as to the facts, the construction of the contract and correspondence, and their legal effect, were for the court.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

6. TRIAL (§ 168*)—QUESTIONS OF LAW AND FACT—DIRECTION OF VERDICT.

It is the duty of a federal court to direct a verdict when the evidence is such that the court would set aside a contrary verdict as against the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. § 168.*]

7. SALES (§ 418*)—CONTRACT—BREACH—DAMAGES.

In an action for breach of a contract for the sale of vinegar made by the seller in New York and deliverable to the buyer at Memphis, Tenn., at a specified price per gallon, the buyer's measure of damages was the difference between the contract price and the market price at Memphis, Tenn., of the same kind and quality of vinegar, for the amount the seller failed to deliver, less the amount due for vinegar delivered under the contract and not paid for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

8. SALES (§ 418*)—CONTRACT—SELLER'S BREACH—OBLIGATION OF BUYER.

On seller's breach of contract to deliver vinegar, the buyer was entitled to recover the difference between the contract price and the market value, without going into the market and actually purchase vinegar of the character and amount the seller refused to deliver; the buyer being entitled to the benefit of the contract and to recover for the breach thereof, without further act on his part.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

At Law. Action by Jeff L. Burgie against Knowlton V. Hicks for breach of a contract of sale. On defendant's motion to set aside a verdict for plaintiff for \$2,384.44. Denied.

Visser, Whalen & Austin, of Albany, N. Y., for plaintiff.

J. W. Atkinson, of Waterford, N. Y., for defendant.

RAY, District Judge. On or about July 14, 1910, the parties entered into a written contract by which the defendant, Knowlton V. Hicks, agreed to sell and deliver to the plaintiff, Jeff L. Burgie, f. o. b. cars at Memphis, Tenn., 1,000 barrels of apple cider vinegar, 52 grains strength, at \$1.25 per gallon, and ship 600 barrels of same on or before December 1, 1910, and the balance, 400 barrels, at such time thereafter as plaintiff should order. Each delivery was to be paid for within 30 days after receipt of same less a discount if paid within 10 days. Prior to November 22, 1910, the defendant delivered 80 barrels of the vinegar contracted for, and same was paid for. November 22, 1910, the defendant shipped to plaintiff 75 barrels of such vinegar, and same was received December 9, 1910. This was not paid for. October 7, 1910, in acknowledging the receipt of vinegar and making remittance therefor, plaintiff wrote:

"It is going to be a little difficult for us to take out the 600 barrels by the first of December and, if you can will be glad to have you extend the time of the delivery of the 600 barrels. However if you cannot we will simply have to have the same shipped here and store it."

In reply, and on the 12th day of October, 1910, the defendant wrote:

"Yours of the 7th to hand and in reply will say that we are willing to extend the time for your taking the 600 bbls. if it will please you, will not forward the next car till after November 1st."

October 29th the plaintiff ordered another car of vinegar, and November 14th defendant wrote:

"Your letter of Oct. 29th and telegram of 12th recd., and we are sorry we cannot ship the car ordered at once, we received a lot of crude cider this past summer, that upon running the same upon our generators would not make a high grade vinegar we are now starting our new stock and just as soon as we can get the 5% goods will ship. In your letter of Oct. 7th you said you were in no hurry to take the vinegar so, we blended our high test with the vinegar that would not come up to the test, and before we realized the fact our 5% vinegar was all out, but just as soon as we can get it to going again will ship. As to an additional thousand bbls. the apple crop in this section was so short we cannot at this writing say what we can do, are scouring around and if we have any success will let you know, are very sorry but this is the condition."

November 22, 1910, as stated, 75 barrels were shipped, and defendant wrote:

"We ship you today a car of 75 bbls., of vinegar, it tests 48 grains. We have charged you the same price as for the 52 grain, because it *cost us more* than the other did, with the present price of apples, and cider, our vinegar at 45 grain is going to cost us *more* than we will get for it. Have shipped by the Southern States Dispatch."

November 28, 1910, the plaintiff wrote:

"We are in receipt of your invoice for car of vinegar shipped us on Nov. 22nd. We do not think that you should ask us to lose 4 gr. per gallon on

this shipment. Our contract is for 52 gr. vinegar, and that is what we expect you to deliver or make the price less accordingly if you should reduce the grainage. Please ship us another car at once. We are now out of vinegar due to your delay in shipping.

"Our relation have always been pleasant and we want them to continue so, but we have sold vinegar against our contract with you and must insist that you deliver us the vinegar as per our contract. Please advise us at once what we may expect in the matter."

December 2, 1910, the defendant wrote:

"Yours of 28th Nov. to hand, replying to same, will say that you *forget* a year ago, when you agreed to take 600 bbls. at 14¢ f. o. b. cars here, that you wrote us asking us to cancel the contract, and we, notwithstanding contract, made price 13¢, now this season you did not want the goods when we had them, but *now* when we can get 13¢ f. o. b. cars here, for 45 grain vinegar, you insist that we fill contract, we will now do as you did, ask you to cancel the contract, or if you do not want to do that what will you do for us to help us out, cider apples were scarce in this section, and we are very short on our stock, we are scouring the country for cider and if we do not succeed in getting the cider we cannot make the vinegar, hope to forward another car, within ten days."

December 10, 1910, the plaintiff wrote:

"The car of vinegar arrived and am sorry to say, it had been in a wreck, and a good many of the barrels had broken staves and considerable loss was sustained by reason of the leakage, however, we have made claim against the railroad company for damages and will not bother you with the matter.

"As to our contract, will say, that we certainly expect you to fill it as it would be disastrous to us if we should fail to get the vinegar as per our contract. We well remember the contract for 600 barrels, also that we lost at least \$2.00 per barrel, although you reduced the price 1ct. per gallon, which was very good of you. Notwithstanding this reduction we stood loser \$1,200.00 on this contract, we took our medicine without a murmur. We want to say that we, at all times, stand ready to return a favor shown us in a business way. We will agree to make the price on the remainder of this contract 13½ cts., f. o. b. Memphis instead of 12½ cts. Now we cannot see how you could reasonably ask any more of us, as we are allowing you more, in the way of prices, than you ever did us. We are running short on vinegar and will ask that you ship us two or three cars at once on our contract. We certainly rely upon you and as fair business men we expect you to fill this contract."

The car of vinegar referred to was the 75 barrels. December 17, 1910, the defendant wrote:

"Your favor of the 10th to hand, we are sorry to hear that the car of vinegar shipped you last month was in wreck, but the R. R. must make good, as you have their receipt for it in good order.

"Now in regard to shipping you another car, it will be impossible, for the cider we have bought is at the mills where purchased, and since Dec. 1 we have had zero weather, and cannot move any of it, we are very sorry but cannot help it."

December 21, 1910, the plaintiff wrote:

"We are in receipt of your letter of Dec. 17th, and the contents are surprising to us.

"We regret to have to say that after reading and considering all of your correspondence with us, we have come to the conclusion that you are expecting or trying to get out of filling your contract with us for vinegar. We beg to advise you that we do not intend to release you from this contract, as we have contracted to sell vinegar based upon your contract with us and if

we should not get this vinegar from you it would damage us very much. We expect you to ship us a car of vinegar at once, and if you fail to do so we will place your contract in the hands of our attorney to see if there is any justice in the courts of equity in this country. Excuses, will certainly not release you from your contract and we want to say, that your excuse of zero weather, does not sound like business to us. Probably if this contract price were 2 cents over the market price, the zero weather would not have such an effect upon the factory.

"Now, gentlemen, we regret very much to break up several years of pleasant relations by such unpleasantness, but we must and do insist upon your filling your contract with us. You are the architects of this contract and justice and fairness alone should cause you to fill the contract without litigation.

"Wire us, at once, when you will ship car. If we do not hear from you at once we will order car from some other manufacturer and charge your account with the difference in what we have to pay and your contract price.

"Now gentlemen, there is no use trying to dodge the business, for if you are going to ship us vinegar do so at once and if you are not simply say so and we will then clear the decks and see who is who and what is right and equitable.

"Trusting that you will reconsider and go ahead and ship us our vinegar and thereby continue our pleasant business relations, we beg to remain,

"Yours truly."

December 30, 1910, the defendant telegraphed:

"Letter received. See ours of this date."

January 5, 1911, the defendant wrote:

"Your letter of the 21st ult. at hand. It does not contain the usual happy greetings customary at this time of the year, but on the contrary is loaded with threats of dire consequences to us if we do not wire you at once when we will ship a car of vinegar.

"We are unable to ship you any more vinegar at this time for the reasons given in our previous letter. When we had the vinegar to ship you, you neglected to order it pursuant to the terms of the contract, and now when it is impossible to ship, you give us the alternative of shipments or a lawsuit.

"We will not consent to your charging our account with the difference in what you have to pay and our contract price."

January 9, 1911, the plaintiff wrote:

"We are in receipt of your favor of the 5th instant. Contents carefully noted. Contents of same are not surprising to us.

"We have placed the contract and correspondence in the hands of our attorney and you evidently will hear from them in due course of time."

January 14, 1911, the plaintiff's attorney wrote to the defendant:

"The Burgie Vinegar Company of this city, have turned over to this office a claim against you, growing out of your contract of the 14th day of July, 1910.

"As we understand it, only a very small part of the goods called for under this contract has been delivered by you, and that the Burgie Vinegar Company is now entitled to something like 850 barrels of vinegar on this contract.

"My client is exceeding anxious to have you keep and perform this contract. They are very anxious to have you ship the remainder of this vinegar at once, at least as much as you can, and the rest of it as early as possible.

"The contract is simple, and under which you agreed to furnish the Burgie Vinegar Company 1,000 barrels of vinegar 52 grain at 12½ cents per gallon, f. o. b. cars at Memphis, and we are simply calling upon you to perform this contract. We are ready, willing and anxious to accept the goods and

pay for them according to contract price. If you cannot furnish all the goods just now, forward what you have and let us have the rest as early as possible.

"I sincerely hope that we can avoid any trouble about the matter, and can see no reason why there should be any. It is simply a matter of contract, and my client is ready, willing and ready to comply with the contract, and we know of no reason why you should not do the same.

"Let me know what you will do. If you do not purpose to fill the remainder of this contract I sincerely hope that you will say so.

"The Burgie Vinegar Company has contracted to sell goods on the faith of this contract with you and they need these goods in order to keep their contract. You will see, therefore, that it is of the utmost importance that the company know immediately your disposition and intention. If you do not mean to further comply with the provisions of the contract the Burgie Vinegar Company should know it."

In reply the attorney for the defendant wrote the plaintiff's attorney as follows:

"Waterford, N. Y., January 27, 1911.

"R. E. Maiden, Esq., Attorney at Law, Memphis, Tenn.—Dear Sir: Your letter of the 14th inst., to William Hicks & Son, of this village was handed to me some days ago for an answer.

"Under the contract you refer to, the Burgie Company was to order 600 barrels of vinegar on or before the 1st day of December, 1910. This it neglected to do, and Hicks & Son cannot now comply with their request as they have not the vinegar for shipment.

"Very respectfully yours,

J. W. Atkinson."

The plaintiff testified that when he wrote for an extension of delivery of the 600 barrels he had in mind 60 or 90 days. This is not of much importance, as this was not expressed or communicated to the defendant and no particular length of extension was agreed upon. A reasonable time would be implied, and a reasonable time in which to make shipments in view of this modification of the original agreement. However, there was no modification as to the remaining 400 barrels. This action was not brought until after March 1, 1911. It is evident from the Atkinson letter of January 27, 1911, that the defendant did not intend to ship any more of the vinegar, and this intention not to perform the contract is fully evidenced by the subsequent conduct of Hicks, who failed thereafter to ship any vinegar or to offer any excuse for his failure. In fact, his attorney placed himself on the proposition that as Burgie had agreed to order the 600 barrels on or before December 1, 1910, and had failed to do so, he had broken the contract, and that Hicks was not under obligations to ship any more vinegar. There is no reference to the extension; no excuse for not shipping unless it be that Hicks did not have the vinegar. He indicated no purpose to procure it. True the language is:

"Under the contract referred to, the Burgie Company was to order 600 barrels of vinegar on or before the 1st day of December, 1910. *This it neglected to do*, and Hicks & Son cannot *now* comply with their request as they have not the vinegar for shipment."

[1] It was the duty of Hicks to have the vinegar, and the word "now" must be given the meaning that Hicks & Son (the defendant) would not comply with the agreement for the reason the Burgie Com-

pany had not kept the contract by ordering the 600 barrels prior to December 1st. This is the plain import and meaning of the language and made certain by the subsequent failure to ship or offer to ship any vinegar. If it had been the purpose to say that Hicks could not ship at that time but would later on, such purpose should have been expressed in some way. The words "cannot now comply" might mean cannot comply at present, or just now, at this particular time; or the words might mean cannot comply for the reason you did not order as or when you promised and I am under no further obligation; that is, "Things being so, as the case stands, after what has been said and done," you not having ordered as you agreed, I cannot comply with your request and am not obligated to. See Century Dictionary, "now." Taking the correspondence as a whole and the subsequent nonaction of Hicks, the meaning is perfectly plain. Was there a breach of the contract by Hicks December 17, 1910? Clearly we find nothing in the correspondence or evidence to suggest a modification of the agreement as to delivery whereby zero weather excused shipments of the 400 barrels, or 600 barrels for that matter, on request or demand. The contract called for delivery of 600 barrels on or before December 1, 1910, "the balance or remainder of said 1,000 barrels of said vinegar to be shipped thereafter as ordered."

[2] The letter of December 17, 1910, and the subsequent correspondence and acts of the parties, show clearly a breach of contract on that date, December 17, 1910. Clearly the vinegar was to be delivered by defendant at Memphis, Tenn. The contract says the Burgie Company is "to pay therefor the sum of 12½ cents per gallon f. o. b. cars at Memphis, Tennessee." Also, "And the said party of the second part agrees to pay and remit to the party of the first part for each shipment of said vinegar within thirty days *after the receipt* of the same, one per cent. off ten days." It was purchased to be paid for in 30 days after delivery free on board the cars at Memphis. It was not to be paid for until received at Memphis, and we can hardly understand that it was intended to pass title at Waterford when put on the cars there, payment deferred until it reached Memphis. Payment for the shipment of 75 barrels was not due until January 5, 1911, 30 days after its receipt at Memphis, December 5, 1910. The contract reads:

"This agreement, made this 14th day of July, A. D. 1910, between William Hicks & Son, of the village of Waterford, in the county of Saratoga and state of New York, party of the first part, and Burgie Vinegar Company (Inc.), of the city of Memphis, in the state of Tennessee, party of the second part, witnesseth: That the said party of the first part has agreed to sell, and hereby does agree to sell, and the party of the second part has agreed to buy, and hereby does agree to buy from the said party of the first part one thousand (1,000) barrels of apple vinegar, 52 grain strength, and to pay therefor the sum of twelve and a half cents per gallon, f. o. b. cars at Memphis, Tennessee.

"And the said party of the first part agrees to ship six hundred barrels of said vinegar on or before the first day of December, 1910, the balance or remainder of said one thousand barrels of said vinegar to be shipped thereafter at such time or times as ordered by the party of the second part.

"And the said party of the second part agrees to pay and remit to the

party of the first part for each shipment of said vinegar within thirty days after the receipt of the same, one per cent. off ten days.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"Wm. Hicks & Son. [L. S.]

"Burgie Vinegar Co., by E. C. Walker. [L. S.]"

This is not a contract where prices are to be fixed at Memphis, but one where there was to be no payment at all; the prices having been fixed, except the vinegar was delivered with freight paid at Memphis. The vinegar was to be shipped in car load lots, and each shipment paid for 30 days after its receipt, and hence the contract was divisible. See *Clark v. West*, 137 App. Div. 23, 28, 29, 122 N. Y. Supp. 380; *Ming et al. v. Corbin*, 142 N. Y. 334, 37 N. E. 105. By agreement of the parties deliveries were several and separable as were the payments. The promise of the purchaser to pay was not conditional upon entire performance by the vendor, but the price to be paid was apportioned to each delivery. By express terms delivery was to be made in car load lots and each lot paid for within 30 days thereafter.

[3] The contention of the defendant cannot be maintained that plaintiff first broke the contract by not paying for the 75 barrels of vinegar shipped November 22d, and received on December 9th, as payment therefor was not due until January 9, 1911, and December 17, 1910, the defendant violated the contract by neglecting and refusing to ship as directed, and the defendant thereafter did not suggest or intimate any purpose to ship or make shipments conditional on payment for the car load delivered December 9th. The plaintiff thereafter had the right to withhold payment for that car load until defendant showed a willingness to perform at least. Being first in default himself in not delivering according to the contract, the defendant cannot excuse such default by saying that plaintiff did not subsequently pay for a car load of the vinegar, payment for which fell due after such default, although delivered prior to such default. When Hicks made default in shipping, the plaintiff had the right to withhold further payment, stand suit for the price, offsetting his damages, or sue for his damages, leaving Hicks to counterclaim the sum due. *Thomson v. Poor*, 147 N. Y. 402, 409, 410, 42 N. E. 13, relied on by defendant, has no application here. The plaintiff bases no claim on any default in making shipments prior to December 1, 1910.

Thomson v. Poor, supra, holds that where one entitled to performance of an act at a certain time consents to a postponement of performance of the act, and the other has acted on such consent and permitted the contract time to pass, the one entitled to performance is estopped from subsequently recalling such consent and waives his right to treat the nonperformance within the original time fixed by the contract as a breach of the contract. The justice of this rule no fair-minded person will question. It is conceded that there was a modification as to the delivery of the balance of the 600 barrels to the extent that same were not to be delivered on or before December 1, 1910. There was no consent that defendant should not deliver the 400 barrels when called for, or the balance of the 600 barrels *after* December 1, 1910, on demand, at least within a reasonable time thereafter.

The defendant insists that the plaintiff cannot recover here, or maintain this action, for the reason that March 30, 1911, when this action was commenced, he was in default for nonpayment of the sum due for the 75 barrels of vinegar delivered December 9, 1910, and due January 9, 1911, notwithstanding the default of the defendant December 17, 1910, in refusing to deliver vinegar pursuant to the contract. This is equivalent to saying that if A. agrees to sell and deliver to B. at a specified price per barrel 100 barrels of vinegar, same to be delivered in two lots of 50 barrels each, at different dates 30 days apart, and each lot is to be paid for 60 days after delivery, and A. delivers the first lot but refuses to deliver the second lot, B. cannot maintain an action for his damages for the nondelivery until he pays for the lot delivered and which payment was not due or payable when A. breached the contract. I do not so understand the law. *Lennon v. Smith*, 124 N. Y. 578, 27 N. E. 243, relied on by the defendant here, is an authority against him. There plaintiff breached the contract to do certain work by a specified time. The contract fixed damages for each day's delay. The plaintiff sued for the work done, and defendant alleged and proved nonperformance and counterclaimed for damages. The referee found nonperformance by plaintiff in part and refused to allow plaintiff for the value of the work performed and gave defendant full damages for the breach by plaintiff. The court said:

"But having determined that the defendant was entitled to relief from the obligation of her contract by the breach of it by the plaintiff, and having for that reason wholly relieved her from it accordingly, it is difficult to see how the referee could properly have awarded damages in her favor against the plaintiff for the nonperformance of the contract. She could not repudiate the contract for the purpose of barring the plaintiff's claim for his work, and at the same time make it effectual for the recovery of damages against him for its breach, although she might, if the facts permitted, recover damages, if any there were, in excess of the price or value of the plaintiff's work. And the reason is that in such case the contract is permitted to remain operative for the purpose of the remedy and relief of both parties to it, and it is no less essential to support the defendant's claim for damages than it is to sustain that of the plaintiff founded upon it for his work. It is apparent that a rule having the effect to give one of the parties to a contract the benefit of it to the exclusion of the other in the same action would or might work very unjustly to the latter and quite unreasonably to the profit of the former. *Walker v. Millard*, 29 N. Y. 375; *Woodward v. Fuller*, 80 N. Y. 312. In the present case the conclusion was warranted by the evidence that the work performed by the defendant at the contract prices amounted to more than the damages recovered by the defendant. The effect of the recovery directed by the referee was to give the defendant the benefit, such as it was, of all the work performed by the plaintiff, and, in addition, the damages awarded to her against him. This was justified by no sound principle of law. The conclusion of law was based upon the fact found that the work which the plaintiff undertook by the contract to do was not substantially performed by him, not that his work was of no value to the defendant."

That is, when one party partially performs a contract and sues on same, nonperformance proved will defeat recovery, but will not both defeat recovery for the part performed and justify a recovery of damages by the other for the breach. The defendant in such case may say the contract was broken and terminated and affords no ground of ac-

tion, or he may treat it as in force or operation to allow him to counterclaim and recover his damages, and, in such case, he may allege and prove his damages, and, if they exceed the value of the work done or goods delivered by plaintiff under the contract, may have judgment for the excess; the one being offset against the other. But if he elects to treat the contract as in force and claims damages for its breach, and the amount earned by the plaintiff exceeds such damages, then plaintiff will have judgment for such excess. As said by the court:

"And the reason is that in such case the contract is permitted to remain operative for the purpose of the remedy and relief of both parties to it, and it is no less essential to support the defendant's claim for damages than it is to sustain that of the plaintiff founded upon it for his work."

[4] So here the plaintiff sues *on the contract* (treats it as in force) to recover his damages for the breach thereof by defendant, not denying that something is due the defendant according to its terms, but claiming that the sum due him for the breach is in excess of the sum due defendant for his partial performance. In such case as this the contract is permitted to remain operative for the purpose of the remedy and relief of both parties to it, and hence payment of the sum claimed or due for partial performance by defendant is not essential to the maintenance of the action. The plaintiff sues to recover damages for the breach by defendant. Defendant might have proved, if he could, that plaintiff *first* broke the contract and so exonerated him from further performance. This he failed to do, and, having pleaded his counterclaim for the amount earned under the contract, on the trial was allowed full compensation therefor; but the plaintiff's damages exceed the amount earned and due the defendant, and hence he had judgment. *After* defendant broke the contract, plaintiff was under no obligation to perform its terms as a condition of suing to recover his damages. Payment for the 75 barrels delivered December 9, 1910, due January 9, 1911, was not a condition precedent to compliance with the demands of December 10, 1910, and December 21, 1910, made and refused.

"When the performance of acts by one party are to precede performance by the other, he may be sued for nonperformance, though the other party has not offered to perform." *Williams v. Healey*, 3 Denio (N. Y.) 363.

"Where performance by defendant is to take place before performance by the plaintiff, the plaintiff may sue without having performed." *Supervisors of Schenectady v. McQueen*, 15 Hun (N. Y.) 551.

[5] There was no dispute as to the facts, and the construction of the contract and correspondence and their legal effect were for the court, not the jury. *Smith v. Dotterweich*, 132 App. Div. 489, 494, 116 N. Y. Supp. 896.

[6] In the United States court it is the duty of the court to direct a verdict when the evidence is such that the court would set aside a verdict the other way, if rendered, as against the evidence.

[7] As to the damages it is clear that the plaintiff was entitled to recover the difference between the contract price and the market price at Memphis, Tenn., of the same kind and quality of vinegar, less the

amount due for the 75 barrels with interest added. *Joyce on Damages*, § 1621, p. 1676, and numerous cases there cited; *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14. In this *Saxe* Case the court held:

"1. Contract of Sale—Breach by Vendor—Measure of Damages. The general rule for the measure of damages, where the vendee sues the vendor for the breach of a contract of sale of merchandise at a fixed price, is the difference between the contract price and the market value at the time and place of delivery; and, when the vendee can go into the market and buy the article which the vendor has failed to deliver, this is the only rule.

"2. Rule as to Duty of Party Injured by Breach of Contract, to Mitigate Damages. The rule, that the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can, is without practical application to a case where the subject-matter of the contract has a market value at the time and place of delivery."

[8] The court adopted the figures most favorable to the defendant. It was not necessary for the plaintiff to go into the market and actually purchase the vinegar before bringing suit. He was entitled to the benefit of his contract and damages for the breach thereof, even if he had gone out of business before the time for bringing suit arrived or before he wanted the vinegar in his business. *Saxe v. Penokee Lumber Co.*, 159 N. Y. 371, 54 N. E. 14. There the court held:

"The law does not require the vendee to go into the market and buy, in order to secure the damages actually sustained by him through a breach on the part of the vendor of the contract for the sale of an article having a market value."

I do not see how the defendant can complain that the damages given are excessive. The proof showed the market value of 52 grain vinegar at Memphis to be 20 cents per gallon, but the court limited the plaintiff to 19 cents per gallon as stated in his bill of particulars. The plaintiff purchased 3,749 gallons of 50 grain vinegar of American Fruit Products Company at 15¾ cents per gallon delivered in New York, and the freight paid to Memphis increased the cost to 19.48 cents per gallon. Later the plaintiff purchased 3,245 gallons at a cost of 15¾ cents in New York and with freight added it cost him 19.29 cents per gallon in Memphis, Tenn. So far as plaintiff did purchase vinegar (so far as the proof shows), it cost him more at Memphis than he was allowed by the court in directing a verdict. If the place of delivery was Waterford, N. Y., the plaintiff can recover only 3¾ cents per gallon instead of 6½ cents allowed as damages, or \$1,457.63, to which shall be added interest, and from this should be deducted \$372.03. But I cannot doubt that the place of delivery was Memphis, Tenn. And it is clear from the proofs that the zero weather did not prevent delivery, as defendant testified he sold some vinegar in December, 1910, and some in January, 1911. However this may be, as he had agreed to deliver *after* December 1, 1910, as demanded, up to 400 barrels, he should have been and was obligated to be ready to deliver on demand. I think zero weather at Waterford, N. Y., in December, January, and February may reasonably be anticipated.

I am unable to see how the court could have done otherwise than direct a verdict as it did, and the motion to set aside the verdict directed and grant a new trial must be denied.

THE VIRGINIA.

(District Court, E. D. Virginia. January 25, 1913.)

COLLISION (§ 95*)—STEAM VESSELS IN HARBOR AT NIGHT—MUTUAL FAULTS.

A collision in Elizabeth river off Norfolk & Western Railroad piers at Lambert's Point on a dark and stormy night between a tug with a heavy dredge in tow attempting to pick her way into the harbor, which was crowded with anchored shipping, and a steamer, which was attempting to pass out, *held* due to the fault of both vessels; the tug being in fault for not sooner sounding passing and danger signals, when she admitted seeing the searchlight of the steamer some time before she sounded such signals, and the steamer, being equipped with searchlights and knowing the crowded condition of the harbor, for not exercising greater vigilance in looking out for incoming vessels, and not keeping herself under better control; both also *held* in fault for not sounding fog signals under the existing conditions.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Lambert's Point Tow Boat Company, owner of the steam tug Triton, against the steamer Virginia. Decree dividing damages.

Hughes & Vandeventer, of Norfolk, Va., for libellant.

Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the evening of December 13, 1909, about 7 o'clock, the libellant's steam tug Triton, towing a dredge, came into collision with the steamship Virginia, of the Old Bay Line, resulting in damage to both vessels, but particularly to the tug, for the recovery of which the libel in this case was promptly filed, though no trial was asked until some three months since.

The collision occurred in the Elizabeth river, about abreast of the merchandise piers of the Norfolk & Western Railroad at Lambert's Point. The Triton was a large tug, 225 tons gross, 114 feet 5 inches long, 26 feet 5 inches beam, 14 feet 5 inches depth, and the dredge, furnished with engines with which to pump mud, was 140 feet long, 40 feet wide, and at the time was being towed on a hawser of 25 fathoms. The Virginia, 300 feet long and about 60 feet beam, was a large passenger steamer plying between Norfolk and Baltimore.

The circumstances attending the accident are, briefly, these: At a point about opposite the merchandise piers, a tramp steamer was anchored in midchannel, tailing across the river to within a short distance of the railroad piers on the eastern side of the channel. At the same time a schooner was anchored a short distance, some 300 feet as is claimed, down the river, to the westward side of the channel, and tailing out into the channel, leaving between the bow of the tramp ship and the stern of the schooner but a narrow fairway. The harbor was greatly congested in this locality, particularly at and below where the schooner cast anchor. It was a dark, rainy, squally night, with the wind blowing heavily, the Virginia's lookout saying, "It was raining so thick you could hardly see anything."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The tug's position is: That she was in pursuit of a safe anchorage place for her tow on the western side of the river at Lambert's Point, and with that end in view, finding many vessels at anchor, she followed as close to them as it was prudent and safe for her to go; but, observing the crowded condition, determined to proceed beyond Lambert's Point up to the mouth of the Western branch of the river. While thus proceeding, she discovered the schooner before mentioned lying further out in the stream than the rest of the vessels at anchor, she at the time bearing on the schooner about amidships. That she at once starboarded her wheel, passed under the schooner's stern some 50 feet distant therefrom, then ported, passing the bow of the anchored steamship some 300 feet to the westward, and after passing the ship, and when her dredge was about abreast of the same, the collision in question occurred. That before she reached the schooner she observed a passenger steamer, which turned out to be the Virginia, up the river, in the vicinity of Pinner's Point, playing its searchlight down the channel. That this light was played on the dredge, the schooner, and the anchored steamer, first one and then the other, and then on the tug's pilot house, mainly upon the latter, whereby its navigator was blinded, and, finding that he was getting in close quarters, he blew his danger signals, which were answered by the steamer, when the searchlight was thrown off, and the collision quickly followed. The tug's navigator testifies that he did not know, and could not tell, whether the steamer flashing lights upon him was anchored or moving, and that, when he gave the danger signals, it was not in apprehension of a collision with that vessel, but because he was afraid that the tug would foul some anchored vessel.

The Virginia's position, on the other hand, is that she was coming down the river under one bell; that on reaching the Southern Railway piers, she encountered a heavy squall from the southwest, and stopped her engines; that it was dark and rainy, the wind blowing pretty strong, and the whole river congested with anchored craft on both sides; that, when about a quarter of a mile below No. 4 pier of the Southern Railway, her engines were stopped, and from thenceforth she moved under her own momentum; that it was not safe for her to navigate to the eastern side of the channel, and, having determined to go round the bow of the anchored steamship, she was playing her searchlight in that vicinity, and especially upon the anchored vessel's stem, with a view of discovering the nearness with which she could approach, taking into account her anchor chains; that suddenly, when in about the length and a half of his vessel, the Triton abruptly emerged from behind the anchored steamship, showing her red light, and proceeded to cross the Virginia's course, having immediately theretofore sounded its danger signals, to which the Virginia answered, and put her engines full speed astern; that the presence of the tug had not theretofore been observed, nor was it known then that she had a tow, nor had the Virginia's navigators observed the presence of the schooner tailing out into the western side of the channel.

Upon the facts thus stated, it will be seen that the case turns upon whether or not the tug and tow were in fault for coming unexpectedly

from behind the anchored ship, or the Virginia for failing to observe their presence, or whether the collision came about as the result of mutual fault on the part of both, or is a case of inevitable accident arising from the then effort to pass each other under existing conditions in the narrow channelway remaining between the schooner and the anchored steamship. If the tug's view be correct, that there was a space of 300 feet left in the channel between the schooner and the anchored steamer, and that she navigated within 50 feet of the stern of the schooner, leaving 250 feet of space open immediately in front of the down coming steamer, which was viewing the lay of the waters with its searchlight, there would seem to be but little difficulty in reaching a conclusion of the case favorable to the tug. But this view the court does not think is sustained by the testimony. On the other hand, if the Virginia's contention be accepted, that while she was proceeding down the river, virtually drifting, and taking due precaution to look out for obstructions ahead, that this tug suddenly emerged from behind the anchored ship, having given no previous indication of its presence, and crossed her course when too late for her to escape collision with it, her claim of nonliability would probably be equally clear.

The court, however, is not inclined to accept in their entirety the contentions or views of either vessel, certainly to the extent of holding either of them free from blame under the circumstances. In the crowded condition of the harbor, and the prevalence of the wind, rain-storm, and darkness, necessarily some uncertainty must exist as to just what did occur. It is hard to credit the tug's statement that navigating up the channel immediately in front of the downcoming steamer, playing her searchlights upon it, the Virginia would have continued on, or that the tug would have failed to give the proper passing signals and danger signals earlier. On the contrary, it is far more probable, having regard to the harbor and weather conditions prevailing, and especially taking into account the fact that the curve or bend in the river at which downcoming vessels changed their courses for Craney Island reach was just about where the tramp ship and schooner were anchored, that the distance between the stem of one and the stern of the other, even if 300 feet off the bow of the tramp, was nothing like so much on a straight line from the schooner's stern to the ship's bow, and hence when the Triton starboarded to go round the stern of this anchored schooner, having regard to the necessity for the safe passage of its heavy tow round the schooner, that it went so far to the eastward as to come across the line of the anchored ship and under its shadow, and that while thus moving under starboard wheel, and backing under the influence of the port wheel to go to the southward, at least its bow light and running lights may have been out of the vision of the navigators of the down coming steamer, and the same may have been true of the lights of the dredge on its forward and rear ends, and that hence the collision was largely brought about as the result of this tug and tow attempting, as is claimed in the libel, to "pick its way" through a fleet of vessels at anchor in the river, and moving in front of the down coming steamer, which it also attempted to pass. Upon the tug's own showing, having seen this steamer before reaching the schooner

at anchor, and before making the maneuver to pass under its stern, it was her plain duty under the circumstances, with the then existing conditions of the channel and weather before attempting to pass round the schooner with a long and heavy tow, the stern of this schooner tailing out from one side of the channel across the bow of the ship at anchor, to have given passing signals, and to have earlier sounded danger signals. It can hardly be conceived that had danger signals been given as she approached the schooner, and before making the maneuver first to port and then to starboard to go under the stern of the schooner, and across the stem of the ship, that the collision would have occurred in as short a space of time after giving the danger signals, as it did. Having regard to the speed at which the tug was moving, there must have been some interval of time in passing round the stern of the schooner, and if the danger signals, or even the passing signal had then been sounded, no collision would probably have occurred, as the Virginia would have earlier put her engines astern, and the two vessels have never reached each other. The evidence strongly tends in the view of the court to support the contention that certainly for some space of time the view of the tug was obstructed from the Virginia by the anchored ship, and that its danger signals were not sounded until in close proximity to her. This view would seem to make the fault of the Triton clear. Whether or not it can be said that the Virginia is free from fault, and hence should not in part respond for the loss sustained, is not so clear; but, under all the circumstances of the case, the court thinks, especially having in mind the burdens borne by the unincumbered steamship, to avoid as well the risk of collision, as the collision, with the tug and tow, that she cannot be held entirely free from fault; and hence must bear her share of the loss sustained. She was fully equipped with searchlights, and every facility to safeguard her progress, and to see if she thought it prudent to navigate at all, in the then congested condition of the river, that she did so in such manner as at all times to be able to control her movements, and this she seems not to have done. She was entirely justified in not attempting to pass to the eastward of the channel, but in going to the westward, she knew of the anchorage conditions about the bow of this anchored ship, and the congestion there, and around her generally at that time; and she should, especially having regard to the usual change of course in navigation at that point, and the fact that this anchored ship extended so far across the channel, have realized that it was an extremely dangerous risk she was taking in attempting to pass between its bow and the ships at anchor, and that others might be moving up the channel if she was moving down, and hence should have used extraordinary efforts to look out for moving as well as anchored vessels, and this duty in the judgment of the court she failed to perform. It is doubtless true that the tug's lights may have been confounded with those of other shipping at anchor; but, whether this be so or not, it does seem that this tug and tow, especially before its view was obstructed by the anchored ship, if it was so obstructed, ought to have been seen by those navigating the Virginia, and certainly that the Virginia would have observed the presence of

the schooner tailing out into the channel from the westward, which also seems to have entirely escaped her. The failure to observe the running lights of the tug and tow might be accounted for under the circumstances here, but it would seem that, by proper vigilance, the Virginia could and should have observed the stern light, and certainly the cluster of lights of the tug, and the fact that she did not do so cannot be excused. It is true the omission is largely due perhaps to vigilance in watching the bow of the tramp steamer, round which she was to pass, and with a view of not fouling her anchor, and to this the Virginia seems to have devoted most of her care and caution, which, however commendable, should not excuse her from otherwise observing and looking out for obstructions in the channel, and the rights of those lawfully navigating the same. Upon this statement the Virginia cannot avail herself of the defense of inevitable accident, as her omission in part brought about the disaster; and the case is one of mutual fault of the two vessels.

This is all perhaps that is necessary to be said upon the pleadings in this case, and the issues made between the parties. There are two other considerations that should not be lost sight of, which, however, do not change the result, as the parties are equally guilty in both particulars, though they tend perhaps to relieve any doubt as to the correctness of the conclusion reached:

First. It is entirely manifest, having regard to the width of the channel, the bend therein, and the necessities of commerce at that place, that the fairway was so congested at the time of this collision that it was imprudent for two vessels of the size here to pass each other within the space left open by those monopolizing the harbor for anchorage. There was no real excuse for either the schooner or the tramp ship to have anchored as they did, and it was inexcusable for them both to have been so anchored at the time of this occurrence. The tramp ship practically monopolized one-half of the channel, at one of its most crowded and difficult points, so that steamers leaving this harbor, many of them carrying large numbers of passengers, could not pass to the eastward at all, but had to go to the westward, taking chances of collision with the shipping then and usually anchored there. This ship, at least, should not have so anchored as to have both sides of the channel obstructed. Neither of the parties litigant have, however, seen fit to bring the anchored vessels before the court in any of the methods prescribed by law.

Secondly. It is equally clear that neither the Virginia nor the tug and tow were complying with the rules of navigation governing them in the then weather conditions. These rules prescribe, not only that vessels shall go at a moderate speed, having regard to the existing circumstances and conditions, during "fog, mist, falling snow or heavy rain storms," but that a steam vessel under way during the prevalence of such weather shall sound, at intervals of not more than one minute, a prolonged blast of its whistle. No attention whatever was paid to these regulations by either vessel, though the weather was such, particularly respecting the darkness of the night and the character and crowded condition of the channel, that they should have been strictly

observed by moving vessels. The master of the tug testified that it was a rainy, dark, squally night, with the wind blowing heavy from the southward; the master of the dredge, that it was raining very thick as they passed Lambert's Point; the master of the Virginia, that an ugly squall prevailed, and that it was dark and rainy, and the wind blowing pretty strong, and the whole river congested, filled with anchored craft on both sides; and the lookout on the Virginia, that it was raining so thick you could hardly see anything.

The Circuit Court of Appeals for this circuit, in an opinion by Judge Simonton, after giving the history and several modifications of the rules in question, says the enforcement of this rule is imperative, and that failure to observe the same constitutes fault on the part of the ship neglecting to do so. *Merchants' & Miners' Transp. Co. v. Hopkins*, 108 Fed. 890, 894, 48 C. C. A. 128. In this case, both vessels having failed to observe this salutary rule, neither can escape responsibility for so doing, unless it manifestly appears that the omission did not, and could not have entered into the occurrence, which is in no manner apparent here, as it is quite evident that the compliance with the rule on the part of either vessel, would have prevented this collision.

It follows from what has been said that this collision occurred as the result of mutual faults of the two vessels, and a decree will be entered so determining.

AMERICAN BONDING CO. OF BALTIMORE, MD., v. REYNOLDS.

(District Court, D. Montana. February 11, 1913.)

No. 236.

1. STATES (§ 110*)—PREROGATIVES OF SOVEREIGNTY—PRIORITY OF PUBLIC DEBTS.

Montana, in adopting, by Rev. Codes, Mont. §§ 3552, 8060, the common law of England, where not excluded by or inconsistent with constitutional or statutory enactments, adopted the crown's prerogative with respect to public debts, and the state as sovereign is entitled to priority of payment over private creditors of the same debtor.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. § 110.*]

2. STATES (§ 110*)—PRIORITY OF CLAIMS—RECEIVERSHIP.

The prerogative right of a state as a creditor to priority of payment from the assets of a banking corporation is not affected by the fact that a receiver has been appointed for the corporation in a suit brought by the state under statutory authority, since the receivership does not change the title to the property, but merely places it in the custody of the law for the protection of all interested parties.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. § 110.*]

3. SUBROGATION (§ 7*)—SURETY—PAYMENT OF DEBT TO STATE.

A surety who has paid a debt due to a state for which the state as sovereign was entitled to priority of payment from the property of the principal debtor is subrogated to such right.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 17, 18, 21-29, 38, 77, 83, 92; Dec. Dig. § 7.*]

In Equity. Suit by the American Bonding Company of Baltimore, Md., against S. G. Reynolds, as receiver of the First Trust & Savings Bank of Billings, Mont. Decree for complainant.

Walsh & Nolan, of Helena, Mont., for complainant.

Hathhorn & Brown, of Billings, Mont., for defendant.

BOURQUIN, District Judge. [1] Complainant seeks to recover a debt due the state of Montana from an insolvent bank of which defendant is receiver by virtue of appointment by a competent court on petition by said state by statutory authority, the debt being for public funds deposited in said bank by the state treasurer, for which complainant was surety, all by statutory authority, and which debt it paid. The funds of said bank are insufficient to pay all creditors. Complainant contends that public debts are entitled to priority, in that the state, having adopted the common law of England, succeeds to or is vested with a like prerogative of the crown.

Defendant contends that (1) the state has no such priority; (2) if it has, it cannot be asserted after the debtor's property has passed to a receiver. This prerogative of the crown or king of England is one of many attributes of sovereignty wherever it resides. The king, being the repository of sovereign power and authority, the supreme executory power and duty, is vested with these prerogatives. They consist of certain rights, powers, and privileges essential to the dignity of royalty, or necessary to the general welfare of the entire community, and which are denied to individuals. The first are direct; the second incidental. They are dictated by expediency, necessity, and public policy. That here involved and like are justified, in that, where the rights and interests of all the people meet those of one of them, the former is of more importance and must prevail. The crown's priority over subjects in payment of debts is to secure and conserve the revenues—the life blood of the state, that the latter may be maintained in peace and war and its obligations discharged. It is of the incidental prerogatives and belongs to the king, not as an individual, but *parens patriæ*, or as universal trustee for the people. It is, in fact, a reservation or exception to the general course of law in favor of the public or for its good. From its nature its origin may be said to be higher than, superior to, and to antedate the common law—of the fundamentals of all government. Its existence is suggested in *Magna Charta*. Coke notes that Littleton twice refers to it as the law. Blackstone says it is out of the course of the common law, and, while as a principle it enters into the British Constitution, in Halsbury's *Laws of England* it is said that it is created and limited by the common law. But whether it is of those prerogatives that necessarily enter into the political being of every state and so as much into ours as into that of England, or is of and created by the common law, it would seem to be of the law of Montana. The statutes of the latter provide that, where they declare the law, there is no common law. Otherwise, if not repugnant to, inconsistent, or in conflict with the Constitution or statutes of the state or United States, and if of a general nature and applicable, the common law of England is, and shall be, the law and rule of decision. Montana R. S. §§ 3552,

8060. And so has been the law in Montana for more than 40 years. There is no statute in this state relating to the priority of public debts. The rule of the common law in respect thereto is not objectionable in any of the particulars aforesaid. That it is of a general nature and applicable to the state's institutions and consistent with the spirit thereof cannot be gainsaid. That it is of general benefit and value is evidenced by the fact that the United States and some of the states have established it by statute, but it is not clear the fundamental law of states is not so in the beginning and apart from statute. These statutes may be taken as approval of the principle of priority of public debts, as evidence of the rule's applicability, and as largely declaratory of inherent or common law. Since this prerogative of the crown attaches to sovereign power wherever it resides (see *Bank v. U. S.*, 19 Wall. 239, 22 L. Ed. 80, *U. S. v. Hewes*, Fed. Cas. No. 15,359), it must attach to Montana, a sovereign state. *U. S. v. Bank of North Carolina*, 6 Pet. 35, 8 L. Ed. 308, is not opposed to this conclusion. In that case there was involved a public debt of a particular class with which Congress had dealt presumably with intent to establish a complete system in respect thereto. Under such circumstances the statute furnishes the only rule. See *Bank v. U. S.*, 107 U. S. 448, 2 Sup. Ct. 561, 27 L. Ed. 537. It may be noted that the opinion of the court in *U. S. v. Bank of North Carolina*, supra, was delivered by Justice Story, who earlier on circuit decided *U. S. v. Hoar*, Fed. Cas. No. 15,373, and therein gave full recognition to like prerogatives as inherent in the crown and states, needing no statute to establish or effectuate them.

Be it as it may, however, I am persuaded there is no escape in reason from the conclusion that by adopting the common law Montana adopted the prerogative rule of priority of public debts. That the law may not have been heretofore invoked is not considered important. Many laws, statutory as well as common, are quiescent for years, but are not thereby repealed or abrogated. No occasion to appeal to them may have arisen. The weight of authority and what seems to be the better reason is followed here. Cases thereon may be found collated at 18 Cyc. 550; 36 Cyc. 871; 29 L. R. A. (N. S.) 226, 1 L. R. A. (N. S.) 255. See *Carnegie Trust Co. Case*, 151 App. Div. 606, 136 N. Y. Supp. 466; *Trust Co. v. Ry. Co.*, 186 Fed. 291, 110 C. C. A. 1. To contend that this valuable and necessary prerogative or right is arbitrary and discretionary and that none can complain if the state refuses to exercise it is to contend it is discretionary with the state's officers to enforce the law, discharge their duty, and conserve the revenues and interests of the people. If true where no one has a special interest therein, it is not true in respect to a surety who pays the state's debt, and succeeds to the state's right, or is entitled to subrogation. This law of priority is not that of the ancient common law with all its rigorous methods of enforcement, but is that of the modified common law as it was when adopted by Montana. The right thereof can be exercised so long as the debtor's title to the property out of which it is sought to make the public debt is not divested. And this is true whether the property is levied upon and seized in the debtor's posses-

sion, or is in custodia legis when the priority is asserted. See *Middlesex Freeholders' Case*, 29 N. J. Eq. 268. At common law, even though another creditor has procured levy and seizure of the goods of the king's debtor, at any time before sale under the writ, the king's prerogative or priority prevails if asserted.

[2] Although the bank here involved is in the hands of a receiver appointed on the state's petition, its title to its property has not been divested. While the receiver is statutory to the extent that he is appointed by virtue of statutory authority under circumstances not of themselves warranting the appointment by a court of chancery, yet he has no greater or other rights and powers than those of a chancery receiver for the statute creates none.

A court of chancery's receiver does not take title to the property involved, but only possession as an officer of the court, and to dispose thereof as the court directs. The statute by virtue of which this defendant was appointed does not necessarily contemplate a winding-up of the affairs of the bank. It is not dissolved and may resume. The state has not waived its priority. The statute made it the duty of the state to petition for a receiver for the protection of all interested parties. Therein is nothing annulling the law of priority of public debts, and the discharge of this statutory duty is not inconsistent therewith. When a court of chancery takes possession of property by its receiver, it is familiar law the owner's title is not divested and in administration thereof the law of priorities and preferences govern in the payment of debts. Nor would the fact that the state received security from the bank seem to affect priority. It is but a precautionary measure of value to the state, and, injuring no one, the security to be primarily resorted to if the state pleaseth, or for the state's protection if in the exercise of its priority the bank's assets are insufficient to satisfy the state's debt.

[3] If another for reasonable cause pays the debtor's debt to the king, at common law he succeeded to the king's priority. Formerly a creditor of the king's debtor could not sue him without first satisfying the king's debt, but, having satisfied it, he succeeded to the king's rights in respect thereto. And so is it by subrogation.

Complainant, surety for the bank, necessarily paid the latter's debt to the state, and so succeeds to the state's right. It is entitled to recover here, and decree accordingly.

WRIGHT v. W. R. GRACE & CO.

(District Court, W. D. Washington, S. D. February 24, 1913.)

No. 622.

1. SHIPPING (§ 121*)—DAMAGE TO CARGO—LIABILITY—UNSEAWORTHINESS OF VESSEL.

On the voyage of a sailing vessel with a cargo of cement from Antwerp to Puget Sound ports around Cape Horn, occupying more than six months, the cargo under the main hatch was damaged by sea water. The hatch was caulked between the cover and coaming and between the sections of the cover, but the seams between the planks forming the sections were not caulked, and there was evidence that they were open. The hatch was also covered with three tarpaulins, which were not removed during the voyage, although at one time they blew partially off and the evidence tended to show that at that time the water entered through the seams in the cover. The weather was not worse than was to have been anticipated. *Held*, that the damage was not due to a peril of the seas, or other cause within the exceptions of the bill of lading, but to the unseaworthiness of the vessel at the beginning of the voyage because of the defective hatch cover, and to the negligence of those in charge in not properly caring for the cargo by removing the tarpaulins during the voyage and renewing them if necessary, for both of which the owner was responsible.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449-451, 466; Dec. Dig. § 121.*]

2. SHIPPING (§ 132*)—DAMAGE TO CARGO—BREAKAGE—BURDEN OF PROOF.

Under a bill of lading exempting the carrier from liability for loss by breakage, unless occasioned by improper stowage, the burden of proof rests on the shipper to establish such liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

In Admiralty. Suit by William Wright, as master of the British bark Gulf Stream, against W. R. Grace & Co. Decree for respondent on cross-libel.

Ira A. Campbell, of San Francisco, Cal., for libelant.

James M. Ashton and Huffer, Hayden & Hamilton, all of Tacoma, Wash., for respondent.

CUSHMAN, District Judge. This cause is now before the court for decision, after trial, upon the merits. The suit is a libel in personam, by the master of the British bark Gulf Stream against respondent to recover an unpaid balance for freight earned under a certain charter party, entered into with respondent, to carry a full cargo of cement and lawful merchandise for shipment from Antwerp to Seattle and Tacoma. There is no question as to this amount. The delivery of the cargo is alleged in good order and condition, "with the exception of such portions of said cargo as were damaged from dangers or accidents of the sea." Respondent, answering and by cross-libel, sets up an offset against libelant, alleging that the charter party warranted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"the said vessel being kept tight, staunch, strong and in every way fitted for the voyage"; and, further:

"That in the course of such voyage the said vessel met with such winds and weather as are ordinarily encountered thereon, and, by reason of the unseaworthy condition of said ship at such times, the water which boarded said ship during such ordinary weather entered through the main hatch of said ship, which was constructed so that there were large open spaces in the seams of such hatch, which in no manner were caulked or protected, and that by reason of the neglect on the part of the master of said bark, her owners and crew, to provide a hatch which would prevent the waters of the sea from passing through the same, a large quantity of the cargo of cement stowed and situated under said hatch became greatly damaged by the sea water which entered through the uncaulked and unprotected seams of said hatch."

That a number of barrels of cement, through the negligent handling by the libelant, were destroyed and lost and others damaged so that they had to be recovered.

The voyage was a long one, requiring the ship to pass twice through the Tropics and through the stormy region of Cape Horn in midwinter. The evidence taken shows that the main hatch was caulked with oakum between the hatch cover and the coaming of the hatch and between the sections of the hatch cover; but there was no caulking of the seams between the plank, or boards, forming the sections of the hatch cover. Neither were these seams covered by tarred strips of canvas or otherwise. The hatch covers were not removed during the voyage. The main hatch was covered with three tarpaulins, battened down over the plank of the hatch cover. These tarpaulins are described by the libelant as "one new, one six months old, and one in fairly good condition." After rounding Cape Horn, the tarpaulin over the main hatch had a corner torn off. The libelant testifies, "During the night, the main hatch tarpaulin washed off and tore out a corner." Again, when asked if it carried off a portion of the tarpaulin, he answered: "That we do not know, sir. Something may have struck it." This hatch cover was old and patched. It had graving pieces in it. Libelant did not show the actual age of the hatch cover.

The old hatch covers were replaced by new ones before the ship went out on her return cruise, after the delivery of this cargo. The fore and after hatches were smaller than the main hatch. In heavy weather, water came aboard about the main hatch and was carried aft. Each of the other hatches was caulked in a different manner than the main hatch. The tarpaulins on the forward hatch were in better condition than those on the main hatch. There was testimony that it was usual on long voyages of this character to remove the tarpaulins occasionally during the voyage and replace. When the hatch covers were removed at the end of the voyage, there were numerous cracks observable between the planks of the hatch cover; the witnesses differing as to the number and size. There is some testimony that they were as wide as an eighth of an inch. There was testimony on behalf of libelant that the caulking between the sections of the hatch cover, and between the coaming of the hatch and the cover, would close these cracks, and that, with the tarpaulin over the hatch cover and battened down, would make the hatch and cover tight, staunch, and seaworthy.

On July 1st, when the ship was 180 miles south of Cape Horn, in a severe storm, a skid stay was carried away, drawing the bolt, by which it was fastened, through the deck, making an opening which allowed water to pass through the deck onto the cargo. The morning after the tearing of the corner of the tarpaulin, one of the starboard bulwark stays was discovered to have drawn, breaking the palm with which it was fastened to the deck, thereby allowing the bolts to drop out and leaving holes through the deck. Owing to the conclusion which the court has reached, it is not necessary to determine whether the drawing of these stays would constitute a danger or peril of the sea, within the exception in the bill of lading, as contended by libelant. There is a question, under the testimony, when this stay broke. The holes left by the carrying away of the skid stay and the starboard bulwark stay are described as being three-quarters of an inch, or slightly more, in diameter.

Libelant relies upon the following authorities: *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 74 L. Ed. 256; *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft (D. C.)* 158 Fed. 174; *The Patria*, 132 Fed. 971, 68 C. C. A. 397.

Respondent relies upon the following authorities: *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *Dupont v. Vance*, 19 How. 162, 15 L. Ed. 585; *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 69; *The Mississippi (D. C.)* 113 Fed. 985; *The C. W. Elphicke (D. C.)* 117 Fed. 279, affirmed 122 Fed. 439, 58 C. C. A. 421; *The Mangalore (D. C.)* 23 Fed. 462.

[1] The bill of lading provided for the delivery of the cargo in good order and condition at Seattle, subject to certain exceptions, among others:

"The act of God, * * * the neglect and default of pilot, master, or crew, in the navigation of the ship, and all and every danger and accidents of the seas, rivers and navigation, of whatever nature or kind, are excepted. The ship is not liable for * * * breakage, * * * unless occasioned by improper stowage."

Despite the fact of the breaking of the skid stay and bulwark stay, it is apparent that no extraordinary storms were encountered upon the voyage, or any weather more severe than should have been anticipated. No damage is shown to have been suffered by the deck-houses or other permanent parts of the vessel. It also appears that the tarpaulin was torn from the hatch after passing through the severest storms encountered.

It is libelant's contention that the water leaked through the holes in the deck, left by the tearing out of the stay at the side of the ship. There were certain I-beams, forming a part of the cargo, immediately beneath the deck. It is further contended by libelant that the water passed through these holes, fell upon and ran along one or more of these I-beams, as in a trough, to the hatch, where it was discharged upon the cement. This contention cannot be sustained. The fact that practically all of the cement within the entire square of the hatch

was ruined overcomes the evidence, if any, supporting libellant's contention.

Libellant's contention that the caulking done around the hatch cover and between its sections would have the effect of closing all the seams in the cover is not persuasive. The seams, it is shown, open with the shrinking of the planks. It is therefore not clear, as each plank would shrink, how such caulking would close all of the seams, particularly those in the middle of the sections of the hatch cover.

There was evidence to the effect that on English ships it is not customary to pitch the seams between the sections of the hatch cover, but on American ships it is customary. No other reason is apparent for caulking between the sections of the hatch cover than to keep out the water, and, with the open seams in the sections of the hatch cover, the same course would appear necessary, as the water would enter through either.

From the evidence, it appears that the cause of the damage to the cement was that the tarpaulin came off, or was torn off, from over the hatch cover, and that the salt water entered the vessel and reached the cargo of cement through the cracks and seams of the hatch cover. The hatch cover and tarpaulin, together, served one purpose—to exclude the water. If one was defective—without which, the damage would not have occurred—this defect would be the proximate cause of the damage.

The libellant has not maintained the burden upon him of showing that the damage to the cement, by salt water's finding its way below decks, resulted from a peril of the sea. *The Patria*, 132 Fed. 971, 68 C. C. A. 397.

It is concluded from the evidence that the hatch cover, on account of its age and the open seams therein being uncaulked, unpitched, or otherwise stopped, was defective and the ship unseaworthy by reason thereof, at the commencement of the voyage. It is further concluded that the libellant was negligent in caring for the cargo, in not removing the tarpaulins for inspection and renewal, if necessary, during the voyage and prior to the damage to the cement.

In an ordinary voyage, such a precaution would be, doubtless, unnecessary; but, on a voyage of this character—six months or more in duration, where the vessel passed twice through the heat of the Tropics and through the storms and cold of midwinter of Cape Horn—ordinary care would have required the removal of the tarpaulins and their renewal or readjustment. Besides the ordinary wear of the tarpaulins over the edge of the hatch coaming, the water passing across the hatch would have a wearing effect, also, and, if the tarpaulins were frozen in cold weather, they would part very easily. Whether this is the true explanation of the tarpaulin's tearing over the corner of the hatch, or not, is not clear; but the existence of these conditions required greater care than was taken. *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688. This condition, alone, would make a vessel unseaworthy.

Cement is shown to be particularly liable to damage from moisture. To be seaworthy, it is necessary that a vessel should be fit to carry

the particular cargo which it undertakes to carry. *The Southwark*, 191 U. S. 1, at page 7, 24 Sup. Ct. 1, 48 L. Ed. 69.

The conclusion having been reached that the ship was unseaworthy at the commencement of the voyage renders it unnecessary to consider the provisions of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946)). *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 69.

[2] Respondent's cross-libel is sustained to the amount of 320 barrels of cement found to have been totally destroyed by salt water; but respondent has not sustained the burden of establishing the liability of libellant for the breakage of certain other barrels of cement. Under the terms of the bill of lading, this burden rests on respondent. *The Patria*, 132 Fed. 971, 68 C. C. A. 397.

UNITED STATES v. MORRISON et al.

(Circuit Court, D. Colorado. September 7, 1901.)†

No. 4,178.

1. INDIANS (§ 15*)—LANDS—ALIENATION—IRRIGATION.

Where lands were allotted to the Ute Indians in severalty, pursuant to the Ute treaty ratified by Act Cong. June 15, 1880, c. 223, 21 Stat. 199, providing that the lands should not be subject to alienation for a term of years, and an irrigation project was constructed by the government for the benefit of the Indians, they had no power to give, grant, or alienate any right to divert the water in the ditch.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—ALIENATION OF LANDS—CONSENT.

Where the United States constructed an irrigation project for the benefit of reservation lands granted in severalty to the Ute Indians, the government was not bound by a consent alleged to have been given by the Indian agent to complainant, who had entered lands within the reservation, not awarded the Indians, under the Desert Land Law (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]) and Homestead Act (Act May 20, 1862, c. 75, 12 Stat. 392), to draw water from the government ditch for the irrigation of such land.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

3. WATERS AND WATER COURSES (§ 7*)—IRRIGATION—INDIAN LANDS.

Where the United States, in pursuance of its right to manage and control the Ute Indians, having granted reservation lands to them in severalty, constructed an irrigation project for the benefit of such lands, the water was not subject to appropriation to irrigate lands within the reservation entered by a citizen, since the acts of Congress and of the state relating to the appropriation of water for irrigation apply only to cases arising between citizens, and not to water appropriated to a pub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Received April 3, 1913, and published by request.

lie use in the exercise of the government's sovereign authority over Indian tribes.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 2; Dec. Dig. § 7.*]

In Equity. Bill by the United States against Samuel W. Morrison and another to restrain the diversion of water from a government irrigation project to irrigate land claimed by Morrison. Writ granted.

HALLETT, District Judge. This is a bill by the general government against Samuel W. Morrison and Ignacio Mesa Ditch & Reservoir Company to restrain the diversion of water from a ditch constructed by the government for irrigating lands in the counties of Montezuma, La Plata, and Archuleta, in this state. The record discloses that the lands in question were part of an Indian reservation maintained for many years in that locality. June 15, 1880, Congress passed an act to ratify a treaty with the Ute Indians, who were then upon the reservation, and to award the lands in severalty among the Indians. Directions for allotting lands in severalty among the Indians were given, and it was declared that the lands so granted should not be subject to alienation for a term of years. Provision was also made for improving the lands so granted in order to make them habitable. Act June 15, 1880, c. 223, 21 Stat. at Large, 199. Pursuant to this authority the ditch in question was built. Obviously the purpose of Congress was to induce the Indians to abandon nomadic life and to become in some measure civilized and self-supporting.

[1] Respondent Morrison has filed an affidavit in which he shows that he has taken up a tract of land within the limits of the reservation which was not awarded to the Indians, and that the ditch constructed by the general government affords the only means of irrigating it. Respondent's occupation of the lands was begun in the year 1899 under the Desert Land Law (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]) and the Homestead Act (Act May 20, 1862, c. 75, 12 Stat. 392). His position in defense to the suit is not very well explained, but perhaps he means to say that the government, owning the ditch and also the lands which may be irrigated from it, should furnish water from the ditch to every one who may be able to apply it on government lands. Respondent states, however, that some of the Indians owning lands in severalty have given him the right to divert the water from the ditch. As already explained, the Indians have no power of alienation, and therefore any gift or grant made by them must be void.

[2] Respondent also alleges that the agent in charge of the Indians gave his consent, and that of the government, to the diversion of the water, and the agent has denied the charge under oath. However the fact may be on that point, it must be said that the government was not bound by anything said or done by the agent in its behalf.

[3] In a general view of the whole record, it is entirely clear that in building the ditch for the purpose of supplying water to the Indians the general government exercised an important function conferred upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it by law under acts of Congress. The government has had full authority to manage and control the Indians and to take all necessary steps for the welfare of those unfortunate people from the earliest times. Therefore the ditch and the diversion of water from the Rio Las Pinos was a public act done pursuant to law and for a public purpose.

Such acts are not subject to interruption from any source whatever. No citizen can interfere to prevent or annul anything done by the government pursuant to law in the management and control of the Indians. The acts of Congress and of the state Assembly relating to appropriation of water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the government in the exercise of its sovereign authority over the Indian tribes. This, however, is aside from the question in issue, because respondent has not in any way attempted to comply with local acts. He seems to have regarded the water in the ditch as *publici juris*, in the same way as if it was flowing in a natural channel and subject to appropriation by any one who might desire to use it.

The government is entitled to the writ it has asked, and it will be issued accordingly.

COMMERCIAL CITY BANK OF AMERICUS v. HALL.

(District Court, S. D. Georgia, W. D. March 18, 1913.)

PAYMENT (§ 39*)—APPLICATION OF PAYMENTS—SECURED DEBT—SALE OF MORTGAGED PROPERTY—PROCEEDS.

Civ. Code Ga. 1910, § 4316, provides that, when a payment is made to a creditor holding several demands, the debtor may direct its application; but, if he fails to do so, the creditor may appropriate it at his election, and, if neither exercises such privilege, the law will apply it in such manner as is reasonable and equitable, as to the parties and third persons, and that in general the oldest lien and the oldest item will be first paid. *Held*, that where a bankrupt, being indebted to a bank on an overdraft, and also on a note secured by a chattel mortgage, sold a portion of the mortgaged property at the instance of the bank and delivered the proceeds to it, the bank was bound to apply the deposit in payment of the mortgage debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

In Bankruptcy. In the matter of bankruptcy proceedings of George C. Hall. Petition to review a referee's order sustaining a motion to expunge the claim of the Commercial City Bank of Americus. Affirmed.

John R. L. Smith, of Macon, Ga., for Commercial City Bank.

SPEER, District Judge. This is a contest between the Commercial City Bank of Americus and George C. Hall, a bankrupt. It has been passed upon by the referee and brought here by a petition for review. It appears from the evidence that the bank held a mortgage dated

January 11, 1909. This was given to secure the payment of a note made by the bankrupt for the sum of \$1,000, and due on demand, "and all other notes or drafts which the grantor may execute to the grantee within 12 months succeeding this date to the amount of \$1,000." The mortgage pledged the property following:

"One light chestnut sorrel horse, named Happy Bob, about five years old; one dark chestnut sorrel horse, named True Tucker, about six years old; one black horse, named Frank, about ten years old; one black mare mule, named Beck, about seven years old; one red mare mule, named Mary, about eight years old; one two-horse wagon and one one-horse wagon; one single low-wheeled rubber-tire buggy."

Of these assets thus mortgaged it seems that Happy Bob was of more value than True Tucker, and the rest of his stable companions, not omitting one two-horse and one one-horse wagon and the low-wheeled rubber-tire buggy.

It appears from the evidence that the bank was aware of the superior value of Happy Bob, and demanded that he should be sold. The bankrupt testifies that the president of the bank told him that he must sell Happy Bob at some price and take up the mortgage on the 20th. Happy Bob brought \$2,000. The bankrupt testifies that he carried this sum to the bank on the 22d and instructed that it be applied on the mortgage. He also testified that he asked for his note and mortgage, but that Mr. McNulty, the cashier, said that he could not find it right then, but would find it and hand it to him. He went back for his mortgage afterwards, but did not get it. This statement was in part denied by the cashier of the bank. He testified that there were no instructions to apply the price of Happy Bob to the discharge of the mortgage. He also testified that Hall had an overdraft of something like \$3,000. He, however, added that he knew the horse had been sold, and that the \$2,000 was the proceeds of the sale, and the bank made no demand on Hall for the payment of any particular portion of his debt out of this fund.

The bank contends that the mortgage was not paid, and it had the right to place the \$2,000 to Hall's credit on the open account. It appears, therefore, that there is a sharp conflict in the evidence. The referee, passing on this question, having found in favor of the bankrupt, and he having heard the witnesses testify, under the familiar rule, I can discover no reason why I should disregard his finding. There is, moreover, a legal principle settled by the Code of Georgia which seems to make it clear that the referee is right. Section 4316 of the Code of Georgia provides:

"When a payment is made by a debtor to a creditor holding several demands against him, the debtor has the right to direct the claim to which it shall be appropriated. If he fails to do so, the creditor has the right to appropriate at his election. If neither exercises this privilege, the law will direct the application in such manner as is reasonable and equitable, both as to parties and third persons. As a general rule the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties."

This statute is a combination both of the common law and the civil law. It is a general rule of the common law that, if the debtor fails

to direct in what manner a payment shall be applied, the creditor may make whatever application he pleases. The rule of the civil law is different; it looks more to the interest of the debtor. It requires that, in case he makes no application of a payment, the creditor shall so apply it as to operate most advantageously to the debtor. In order to do this, it obliged the creditor to make the payment on that debt which was most burdensome to the debtor, or in which his safety or honor was most concerned, or that which he had the most interest to discharge.

The codification of our state law, as is generally known, is largely the work of that famous jurist, the late T. R. R. Cobb. The liberality of the mind of this renowned man impelled him to make large drafts upon the more liberal principles of the civil law. One of these, doubtless, is found in the last sentence of the Code section above quoted:

"As a general rule the oldest lien and the oldest item in an account will be first paid, the presumption of law being that such would be the fair intention of the parties."

Taking the testimony of the bank official to be true, and applying this principle, it is strongly persuasive that the finding of the learned referee was right. There is, however, an additional consideration in support of that finding. Happy Bob was mortgaged property. It is not denied that he was sold by the demand of the bank, and even if the debtor, who still held title to him, notwithstanding that he had been mortgaged to secure the debt, was silent as to the application of his price, the bank knew that he was part of the property given to secure the mortgage, and I think was under obligation to apply the deposit to reduce the amount due on that lien.

For these reasons, order will be taken confirming the findings of the referee.

In re SMITH.

(Circuit Court of Appeals, Sixth Circuit. March 14, 1913.)

No. 2,281.

1. BANKRUPTCY (§ 272*)—TRUSTEES—EMPLOYMENT OF ATTORNEY.

The general rule that the receiver may not employ the solicitor of either party to the suit in which he is appointed applies to trustees, but it is only when the trustee is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

2. BANKRUPTCY (§ 272*)—ATTORNEY FOR TRUSTEE OR RECEIVER—ADVERSE INTEREST.

In general, a trustee or receiver in bankruptcy should not employ the attorney who represents the bankrupt, or one who represents interests in litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

3. BANKRUPTCY (§ 272*)—ATTORNEY FOR TRUSTEE.

Where it had been the uniform practice in a district to permit the attorneys for the petitioning creditors or the attorney for other creditors to act as attorney for the receiver or trustee, except in those cases where such attorneys represent interests adverse to those of the general creditors, the fact that attorneys for the trustee represented certain creditors, whose interests were not adverse to the estate, did not absolutely disqualify them to represent the trustee, so as to preclude an allowance for their services to the trustee out of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

4. BANKRUPTCY (§ 446*)—REVIEW—ABSENCE OF SPECIAL FINDING—TRANSCRIPT.

In the absence of a special finding or a sufficient transcript from which it appeared that attorneys for the trustee in bankruptcy stipulated for their employment by the trustee in advance of the latter's appointment, the Court of Appeals, on petition to review, could not notice an objection to an allowance for the attorney's services to the trustee on that ground.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

5. BANKRUPTCY (§ 446*)—PRESUMPTIONS—ATTORNEY'S SERVICES—ALLOWANCE.

Where attorneys for a bankrupt's trustee applied for an allowance of \$1,950 for services for the trustee, and the court awarded \$1,500, it would be presumed, on a petition to review, that the court determined that they were entitled to \$1,500.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.*]

6. BANKRUPTCY (§ 272*)—ATTORNEY FOR TRUSTEE—FEES—ALLOWANCE—LUMP SUM.

The fact that attorneys for the trustee of a bankrupt were allowed \$1,500 in a lump sum, for services rendered, without a detail of items, afforded no ground for reversal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

7. BANKRUPTCY (§ 272*)—ATTORNEY FOR TRUSTEE—EMPLOYMENT—SERVICES—ALLOWANCE.

In the absence of a rule requiring the selection of attorney by the trustee of a bankrupt to be approved by the court in advance of the rendition of services, and in view of the custom of permitting attorneys to file papers in their own name on a claim for services rendered, it was no objection to a claim of attorneys for services rendered the trustee that no previous order was made by the referee authorizing their employment, that the trustees' accounts were silent on the subject of attorneys' compensation, and that they presented their claim directly on their own behalf.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern Division of the Eastern District of Michigan; Alexis C. Angell, Judge.

In Bankruptcy. In the matter of bankrupt proceedings of H. H. H. Crapo Smith. Petition of Lucy C. Smith to revise an order of the District Court allowing a claim of a firm of attorneys for legal services rendered to the trustee. Affirmed.

C. C. Smith, of Detroit, Mich. (H. M. & D. B. Duffield, of Detroit, Mich., of counsel), for petitioner.

Merriam, Yerkes & Simons, of Detroit, Mich., for respondent.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This case is here under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) for review of an order of the District Court allowing, in part, the claim of a firm of attorneys residing in Detroit for legal services in the administration of the bankrupt estate. The prominent facts are these:

Five days before the bankruptcy proceedings were begun, one Holmes obtained a judgment for nearly \$3,000 against the bankrupt. There was also pending a suit by another creditor of the same name, by the declaration in which \$10,000 damages were claimed. The attorneys mentioned, whom we shall call the claimants, represented the Messrs. Holmes, respectively, in the two matters referred to. It seems probable that the bankruptcy (which was voluntary) was induced by these suits. Claimants, as representing the Messrs. Holmes, procured an ex parte order appointing a trust company as receiver; this company having later been elected trustee. The bankrupt's wife (petitioner here) presented a claim of nearly \$52,000, and his daughter a claim of about \$1,500. The total claims, outside of the Smiths and the Holmes, were only about \$2,000. The Holmes claim not in judgment was defended by Mrs. Smith at her own expense, and the recovery reduced from nearly \$9,000 to less than \$4,000. The claimants here conducted the contest against Mrs. Smith's claim; their relations toward their creditor clients having never been changed. Her claim was allowed by the referee. The bankrupt's estate netted but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

little over \$20,000, or only about one-third of the claims allowed. Claimants asked an allowance of \$1,950 for their entire services, including the contesting of petitioner's claim. The latter, through her attorney, objected to the allowance of the claim here under review. The claim was allowed in full, upon the merits, the referee also expressing the opinion that as to \$1,000 provisionally allowed and paid, pending final hearing on the claim, petitioner was estopped to complain. The district judge reduced the allowance to \$1,500, not passing upon the question of estoppel as to the \$1,000.

We summarize, as follows, the principal grounds relied upon to defeat recovery, so far as they are pertinent in view of the district judge's conclusion: (a) That claimants, being the attorneys of the creditors Holmes, were not impartial and independent counsel as between different creditors, and so could not lawfully represent the receiver or trustee, especially in contesting petitioner's claim, and therefore, are entitled to no compensation; (b) that the selection of the trust company as trustee was made under an arrangement with claimants as attorneys for the creditors Holmes that claimants should be employed as attorneys for the trustee; (c) that no order was made by the referee authorizing claimants' employment as attorneys for the trustee, that the latter's accounts are silent upon the subject of attorneys' compensation, and that claimants presented their claim directly and on their own behalf; (d) that the allowance made is unreasonably large; that it is in a lump sum, without detail of items, and obviously includes items which the District Court held claimants not entitled to recover; (e) that the claim itself was not itemized and detailed; that the inquiry was unduly limited by the referee, and the testimony as to the value of claimants' services not as full as petitioners were entitled to; (f) that the recovery included work which the receiver and trustee should have performed; covers work by more than one attorney, in that a portion of such work was or should have been done by the regular office attorney of the trust company; and that the recovery is in result contrary to the intent of section 72 of the Bankrupt Act (U. S. Comp. St. Supp. 1911, p. 1512), which forbids further compensation to receivers and trustees than provided by the act.

1. Could claimants lawfully represent the trust company as receiver and trustee? Apart from the alleged unlawful bargain for claimants' employment previous to the trust company's appointment as trustee, later discussed, the only suggested ground of disqualification is that claimants represented the creditors Holmes, and that the bankruptcy litigation became substantially that of "Holmes v. Smith." Did the mutual antagonism of these individual creditors, under the facts presented here, make claimants' employment absolutely unlawful, so as imperatively to forbid, as matter of law, compensation for services actually rendered for the benefit of the estate, as distinguished from the question whether such employment was desirable or discreet? We say this because we are not at liberty, on this review, to determine questions of fact, or to exercise our own discretion, or to interfere with the exercise of discretion by the court below. We are limited to revision in matter of law only. In re Stewart (C. C. A. 6) 179 Fed. 222, 102 C. C. A. 348, and cases cited.

[1, 2] The general rule is that a receiver may not employ the solicitor of either of the parties to the suit in which he is appointed (Beach on Receivers, § 262); and this rule applies to trustees. But it is only when the receiver is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. Beach on Receivers, § 263; High on Receivers, § 217; Alderson on Receivers, § 233. The general rule doubtless is that a trustee or a receiver should not ordinarily employ the attorney who represents the bankrupt, or an attorney who represents interests in the litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee (Loveland on Bankruptcy [4th Ed.] p. 257); and where there are matters in controversy between different classes of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. *In re Rusch* (D. C.) 105 Fed. 607.

[3] It is seemly that the trustee have an advisor impartial as between different creditors. It is unfortunate that such course was not pursued here. It is likely that the length and bitterness of the litigation in this matter results in considerable part from the fact that claimants represented both the creditors Holmes, in the prosecution of their claims, and the trustee in the contesting of petitioner's claim; and a rule which, by anticipation, should effectually preclude such experience would seem wise. But the question here concerns only claimant's right to compensation for services actually rendered, so far as appears, without protest by any creditor to the court (either referee or judge) against the propriety of claimants representing the trustee. Petitioner seems to have contented herself with protesting to the trustee. She was not, we think, justified in conclusively assuming that no charge would be made against the estate for claimants' services. She alone objects to allowing the compensation asked. It is to be noted that claimants did not represent the trustee in respect of the claims of the creditors Holmes, and that the interests of their clients, with respect to the claim of Mrs. Smith, were not adverse to any class of creditors, or even to any individual creditor, except Mrs. Smith alone. In contesting the latter's claim they represented the interests of every other creditor. It was the duty of the trustee to be advised by disinterested counsel as to whether he should contest Mrs. Smith's claim; but, apart from personal bias engendered by the contest of the Holmes' claims, claimants were not necessarily less disinterested than would be attorneys employed specially by creditors to resist that particular claim; and we are not prepared to say, as matter of law, that it would not have been competent for the creditors to have chosen an attorney to contest Mrs. Smith's claim, had the trustee refused to do so (*In re Roadarmour* [C. C. A. 6] 177 Fed. 379, 381, 100 C. C. A. 611), or that mere personal bias on the part of the Holmes' attorneys would disqualify them as matter of law. We may remark, in passing, that if it was improper for claimants to contest Mrs. Smith's claim it was likewise improper for Mrs. Smith's attorney to contest the Holmes' claim. The original question of propriety does not wholly depend upon whether or not compensation from the estate is asked; nor should compen-

sation, otherwise proper, be denied merely because petitioner's claim is of such size that she must pay five-sixths of the recovery. That the bankrupt estate was not prejudiced by claimants' advice to contest the claim in question affirmatively appears by the referee's conclusion that "the facts disclosed by the examination of the bankrupt warranted the trustee and its attorney in making a most thorough and searching investigation as to the bona fides" of Mrs. Smith's claim; and by the assumption of the district judge, in view of the referee's opinion, that "the trustee was justified in directing its attorney to endeavor to defeat the claim. * * *" It has in some cases been considered proper that counsel for creditors should be employed by a receiver appointed in a suit brought to set aside fraudulent sales because of his familiarity with the proceedings. Beach on Receivers, § 263; Alderson on Receivers, § 233, and cases cited. In *Keyes v. McKerrow*, 180 Mass. 261, 62 N. E. 259, it was held that, in the absence of a rule of court forbidding such employment, a trustee in bankruptcy might lawfully employ the bankrupt's attorney in the collection of debts, on the ground that there were no conflicting interests between the bankrupt and the trustee in that matter. In the instant case the referee states that it has been the uniform practice in the district, since the present Bankruptcy Act was passed, "to permit the attorneys for the petitioning creditors or the attorney for other creditors to act as attorney for the receiver or trustee, except in those cases where such attorneys represent creditors whose interests are adverse or contrary to the interest of the general creditors"; and the district judge states that the practice has been "to allow attorneys for creditors to advise the trustee." The effect of these statements of the referee and judge as to the practice is not overthrown by the decision of the former district judge in *Re Columbia Iron Works (D. C.)* 142 Fed. 234, in which, on review of a selection of counsel previous to the performance of services, a conclusion was reached opposed to the propriety of the appointment here in question. The district judge, in deciding the instant case, said:

"In the absence of a rule or decision distinctly forbidding it, it would be unjust to put such rule into force and give it retroactive effect."

We cannot disturb this conclusion.

[4] 2. The alleged agreement in advance with the trust company, that if claimant procured its appointment they should be retained as advisors. The district judge properly said:

"If such were the fact, no allowance should be made. * * * Any practice of the kind must be utterly condemned."

We cannot construe anything said by the district judge as finding the existence of such fact. Attached to the petition for revision is the testimony of the trust company's office attorney, relied upon to prove the fact of such prior agreement. But not only does this testimony fail unequivocally so to assert, but the record does not purport to contain all the testimony upon this subject. The allegation in the petition is not proof of the fact. In the absence of special findings or sufficient transcript, we cannot review the question. *In re Roadarmour*

(C. C. A. 6) 177 Fed. 379, 100 C. C. A. 611; In re Throckmorton (C. C. A. 6) 196 Fed. 656, 116 C. C. A. 348.

[5, 6] 3. There was evidence tending to show that the value of the time spent by claimants was \$2,300. The amount included for each item making up this gross amount does not appear. The amount asked before the referee was \$1,950. Claimants were held entitled to nothing from the estate for procuring the appointment of the receiver and attending the creditors' meeting at which the receiver was chosen trustee. The amount charged for such services, or for those the charges for which were not criticised by the district judge, does not appear. The items, the charges for which were criticised, seem to have amounted to about \$1,800 out of the \$2,300 mentioned. The total award was \$1,500. We are unable to say, from the record, that the allowance made by the district judge was unreasonably large, or that it included items which the judge held claimants were not entitled to recover. While the judge did not, in terms, declare that claimants are entitled to \$1,500, we cannot, in the face of the fact of allowance, assume otherwise. The fact that the allowance is in a lump sum, without detail of items, affords no reason for its reversal.

[7] 4. In view of the lack of rule requiring the trustee's selection of attorney to be approved by the court in advance of the rendering of service, and in the light of the judge's finding of fact that it has been the general practice, though without any rule on the subject, to allow attorneys to file papers in their own name "on claim for services rendered," the objections grouped under subdivision (c) are not well taken.

5. From the fact that the judge did not refer the matter back to the referee for an accounting, we infer that it was thought the petitioner was not prejudiced, in view of the lessened award, by the alleged undue limitation of inquiry on the part of the referee, and the lack of fullness of proof as to the value of claimants' services. The objection of lack of detail in the claim was largely addressed to the discretion of the court.

6. It is not clear that the award made by the district judge was prejudicial to petitioner in respect to the criticisms grouped in subdivision (f) above.

We have considered all the assignments of error, although without discussing all, and content ourselves with saying that we find no reversible error. This conclusion makes it unnecessary to consider the question of estoppel before referred to.

The order of the District Court is affirmed.

KISKADDEN v. STEINLE.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1913.)

No. 2,252.

1. BANKRUPTCY (§ 455*)—APPEALS—DECISIONS' REVIEWABLE.

An order made on the petition of a trustee to reconsider a claim previously allowed is one allowing or rejecting a claim, and reviewable on appeal, under Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), where the amount of the claim is sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. CORPORATIONS (§ 216*)—LIABILITY OF STOCKHOLDER—LAW GOVERNING.

Whether a stockholder of a bankrupt corporation, who obtained his stock in exchange for property worth less than the par value of the stock, is liable to the corporation or its creditors for the difference in value, is a question governed by the local law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. § 216.*]

3. BANKRUPTCY (§ 282*)—CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—ENFORCEMENT BY TRUSTEE.

Under the law of Ohio, as settled by decision, that partners who organize a corporation, to which they transfer the partnership property in exchange for stock, are to be treated as original subscribers for the stock, each of whom has paid on the stock issued to him a sum equal to the actual value of his interest in the property transferred, and is a debtor to the corporation for the unpaid balance, such liability may be enforced by the trustee in bankruptcy of the corporation for the benefit of general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. § 282;* Corporations, Cent. Dig. §§ 879, 880, 883, 884; Dec. Dig. § 232.*]

4. BANKRUPTCY (§ 154*)—CLAIM PROVABLE—SET-OFFS.

Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that, in case of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid, does not apply in case of a creditor of a bankrupt corporation, who is also a stockholder and indebted to the corporation for an unpaid balance on his stock subscription.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154;* Set-Off and Counterclaim, Cent. Dig. § 123.]

5. BANKRUPTCY (§ 326*)—CORPORATIONS—CLAIMS BY STOCKHOLDER—EQUITABLE SET-OFF.

In such case, however, the claim of the creditor stockholder should not be allowed until his indebtedness to the bankrupt has been collected by plenary suit, and in the event it is found uncollectible the amount may be applied on his claim as an equitable set-off.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of the Fostoria Undermuslin Company, bankrupt. From an order denying his petition for the disallowance in part of the claim of Carl F. Steinle, Alexander Kiskadden, trustee, appeals. Reversed.

The trustee sought to have a claim of Steinle re-examined and diminished, which had been allowed December 4, 1909. The claim was for \$16,549, with interest from October 23, 1909. The claim was based upon five promissory notes, two for \$6,500 each and three for \$1,000 each, bearing date March 26, 1909, and falling due on different dates between that time and October 26th following, with 6 per cent. interest. The notes were executed by the C. C. Anderson Manufacturing Company (whose name was changed to the Fostoria Undermuslin Company) to the order of A. V. Bauman, and were indorsed by Bauman, Henry Hughes, and C. O. Frick. Bauman discounted the paper and turned the money over to the Fostoria Company. When the notes matured, the company was unable to pay them, and they were taken up by Bauman and held by him until November 2, 1909, when they were assigned to Steinle. The facts alleged in support of the right to have the claim diminished were, in substance, that Bauman subscribed for 300 shares, of the par value of \$100 each, of the capital stock of the company, but did not fully pay for the shares, and so is indebted to the company for the balance remaining due upon his subscription; that Bauman was the real owner of the notes and the claim, but that, if it should be found that they were in fact owned by Steinle, since he obtained the notes after maturity, the claim in his hands was subject to a set-off to the extent of such balance.

In June, 1904, C. C. Anderson and Bauman formed a copartnership for the purpose of manufacturing muslin underwear, acquiring a factory, with goods and stock, and conducting the business at Fostoria, Ohio. They also purchased and removed to this factory certain equipment and goods of a company in Saginaw, Mich. In October, 1904, they incorporated a company under the laws of Ohio, with an authorized capital stock of \$100,000; Anderson and Bauman each subscribing for 44 shares, J. J. Anderson for 10 shares, and Anna Rose G. Bauman and Helen May Anderson for 1 share each, these five persons being also the incorporators and directors. The company, through these directors, thereupon purchased the partnership property, business, and good will of Anderson and Bauman, and assumed the firm's obligations for the consideration of 602 shares (\$60,200 par value) of what was characterized as "the fully paid and nonassessable stock" of the newly incorporated company. This was to include the shares subscribed, "and the issue of which was in full satisfaction of the obligations assumed by them and each of them by said subscription." In the summary of the evidence it appears that the real estate turned over to the corporation was purchased by Anderson and Bauman for \$5,000; that the purchase of the articles at Saginaw was from a company that had gone into liquidation, which, after disposing of part of its property to others, sold the remainder to Anderson and Bauman for \$7,500. The referee found that the property and articles of every kind turned over by the copartnership to the company in payment of the 602 shares of stock cost the firm from \$27,500 to \$32,500. The company sold 200 shares of its so-called treasury stock to Henry Hughes, one of the indorsers of the notes in dispute, at \$67.50 per share. This price was made and accepted on the representation of Anderson and Bauman that they had invested \$40,000 in the property turned over to the company, and the declared purpose was to sell the stock to Hughes at a price "that would let him in on the same basis as Anderson and Bauman," because "Hughes had originally intended to join the partnership." The referee found that the fair and reasonable value of all of the property, which Anderson and Bauman sold to the company, "did not exceed the sum of forty thousand (\$40,000) dollars," and that the overvaluation of the property "was not due to error of judgment on the part of C. C. Anderson and A. V. Bauman and other directors of the corporation at the time of the transaction. * * *

Of the 602 shares of stock received for the sale of the property, Bauman received 300 shares (\$30,000 par value), and is still the owner of the stock.

The finding of the referee respecting these shares is as follows: "That at the time of the issue to him of the said three hundred shares of stock" of the company "Bauman was aware of the overvaluation of the property of Anderson and Bauman, and that his half interest in the partnership, for which he received the three hundred shares of stock of the par value of one hundred (\$100) dollars each, was worth not to exceed twenty thousand (\$20,000) dollars."

The referee ordered Steinle's claim of \$16,549 to be reduced in the sum of \$10,000, letting it stand as "allowed against the bankrupt" for \$6,549, with interest. The court below reversed the referee's order, denied the petition of the trustee to disallow the claim, and dismissed the petition with costs. The case was brought to this court upon appeal prayed and allowed within 10 days of the date of the order made by the court below.

McCauley & Weller, of Tiffin, Ohio, for appellant.

King & Ramsey, of Sandusky, Ohio, and H. C. De Ran, of Fremont, Ohio, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). We shall consider the case under the objections urged on behalf of appellee: (a) The case is not appealable; (b) no stock liability exists against Bauman; (c) such liability cannot be set off against the claim of Steinle.

[1] *The Appeal*. The object of the proceeding before the referee was to have the claim of Steinle, as previously allowed, reconsidered and in substantial portion disallowed. This involved a controversy of fact concerning the value of the copartnership property and the nature of the sale to the company, which resulted in the issue of 602 shares of the corporate stock in payment for the property; and it also embraced Bauman's part in the transaction, his half interest in the partnership property, and the 300 shares received by him of such 602 shares of the stock. The reversal in the court below of the order of the referee operated to restore and allow the claim as originally proved. It follows, we think, that the trustee instituted a proceeding in bankruptcy, which was appealable to this court under section 25a(3) (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]). *Matter of Loving*, 224 U. S. 183, 187, 32 Sup. Ct. 446, 56 L. Ed. 725; *Cooper, Trustee, v. Miller*, 203 Fed. 383 (C. C. A. 6th Cir.)

[2] *Alleged Stock Liability*. No opinion was handed down in the court below, and we have no means of ascertaining the views of the learned trial judge, except as they were stated in the arguments of counsel, and as they appear in their briefs. The claims that no liability of Bauman exists in respect of the 300 shares of stock received by him, and that, if there be any such liability, it cannot be set off against the claim of Steinle, present questions of some difficulty. However, since the promissory notes were past due when obtained by Steinle, it is not disputed that they were received by him subject to any defense of the company to which they would have been open in the hands of Bauman. If the facts are accepted, as in substance found by the referee, that the overvaluation of the partnership property was

not due to error in judgment of Anderson and Bauman and the other directors of the corporation at the time of the transaction, and that Bauman then knew that the portion of the property he was transferring to the company was \$10,000 less in value than the par value of the stock he was receiving, we are met with the question whether proof of the claim must be allowed and payments made upon it out of the bankrupt's assets ratably with the claims of the general creditors, who confessedly are not indebted to the estate, without regard to the unpaid portion of the Bauman stock. Could Bauman have retained the notes and maintained this position? As pointed out in the statement, the corporation was organized under the laws of Ohio. Whether Bauman is liable for the unpaid portion of the stock he received is a local question, and is governed by the pertinent rule of decision of the Supreme Court of Ohio. *Black v. Zacharie & Co.*, 3 How. 482, 511, 11 L. Ed. 690; *Thompson v. Fairbanks*, 196 U. S. 516, 523, 25 Sup. Ct. 306, 49 L. Ed. 577; *Detroit Trust Co. v. Pontiac Savings Bank*, 196 Fed. 29, 33, 115 C. C. A. 663 (C. C. A. 6th Cir.); *In re Jassoy Co.*, 178 Fed. 515, 516, 101 C. C. A. 641 (C. C. A. 2d Cir.); *Shaw v. Goebel Brewing Co.*, 202 Fed. 408 (C. C. A. 6th Cir.); *Mishawaka Woolen Mfg. Co. v. Westveer*, 191 Fed. 465, 466, 112 C. C. A. 109 (C. C. A. 6th Cir.).

[3] It has been laid down by the Supreme Court of Ohio (*Gates, Adm'r, v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705), upon facts in effect kindred to those found by the referee here, that each partner will be regarded as an original subscriber for so much of the stock as is issued to him, and credited on his subscription for only the actual value of his interest in the partnership property transferred to the corporation in payment of the subscription, holding in the second paragraph of the syllabus, in which all the judges concurred:

"The balance left, after applying this credit, will be deemed a debt due from him to the corporation, and, therefore, corporate assets."

The way in which this conclusion of the court was reached may in part be indicated by a portion of the opinion (57 Ohio St. 78, 48 N. E. 287, 63 Am. St. Rep. 705):

"This attempt by McLain and his associates to dispose of their property at a fictitious or inflated value, to a corporation of their own creation—one designed and brought into existence chiefly for that purpose—should be regarded as a fraud upon the subsequent creditors of the concern, although no evil intent accompanied the transaction and the difference between the actual and the inflated value of the property so conveyed should be deemed unpaid subscription upon the stock issued in this way, whenever necessary to protect the rights of the corporate creditors."

This language is in harmony with the first paragraph of the syllabus, and we understand the decision still to express the law of Ohio on this subject. It is not claimed in the present case that the court below undertook to review the evidence offered before the referee, or to determine that such evidence did not sustain the referee's findings of fact. The claim is that the court relied on certain decisions, like *In re Jassoy*, *supra*, where the court followed a decision of the Court of Appeals of

New York, in which it was held that the liability of a person in a situation similar to that of Bauman does not exist in favor of the corporation; also *Sternbergh v. Duryea Power Co.*, 161 Fed. 540, 88 C. C. A. 482 (C. C. A. 3d Cir.), where it was held (under a statute of Pennsylvania expressly authorizing corporations to take patent rights and issue stock therefor to the amount of their value, and providing, further, that the stock so issued "shall be declared and taken to be full-paid stock, and not liable to any further calls or assessments"), the facts adduced did not present a "case of an uncollected or unpaid assessment or of a subscription," and, since the "trustee acquired no higher rights than the bankrupt possessed," recovery was denied; also *In re Alleman Hardware Co.*, 181 Fed. 810, 812, 814, 104 C. C. A. 320, 324 (C. C. A. 3d Cir.), where it was found, reversing the court below, that:

"* * * The value of the consideration of the stock was fairly debatable, and the corporation enjoyed, used, and did its entire corporate business for several years on the property conveyed to it, and where the property cannot be restored or the contract rescinded, and where no person here interested was in any way induced to act or was misled or wronged by the maintenance of that status, we think the corporation has no such right or claim against Gitt as prevents his unquestioned debt from participating in this distribution,"

—and again, following the settled rule that the rights vested in a trustee in bankruptcy are simply those of the bankrupt, the court held that proof of the claim should be allowed.

It is to be observed of all those cases that they are not in accord with the rule of the Supreme Court of Ohio as expressed in the *Gates Case*: That the balance due upon the stock shall be "deemed a debt due from him [the person so receiving the stock] to the corporation." It is scarcely necessary to say that the balance of Bauman's unpaid subscription cannot be regarded as "a debt due from him to the corporation," without according to the trustee in some form of action the right to recover such balance. Hence we cannot apply the rule recognized by the Supreme Court of the United States, in a number of decisions, to the effect that a contract made for the accomplishment of a legitimate and necessary object and in good faith between a corporation and its stockholders to dispose of its stock at less than its par value is binding on the company, although it may (or may not under certain circumstances) be treated as a fraud in law on its creditors and so not binding upon them, as, for example, in *Scoville v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968; *Sawyer v. Hoag*, 17 Wall. (84 U. S.) 610, 619, 21 L. Ed. 731; *Potts v. Wallace*, 146 U. S. 689, 703, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Camden v. Stuart*, 144 U. S. 105, 113, 12 Sup. Ct. 585, 36 L. Ed. 363; *Clark v. Bever*, 139 U. S. 97, 112, 11 Sup. Ct. 468, 35 L. Ed. 88; *Handley v. Stutz*, 139 U. S. 417, 437, 11 Sup. Ct. 530, 35 L. Ed. 227.

Nor does the rule expressed in the class of cases like *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782, have any relevancy to a case governed as this one is by the rule of the *Gates Case*; for the very point is that Bauman's debt was due, if at all, to the corporation, and is recoverable by its trustee for that reason. It is to be noticed and kept in mind that, aside from

those who took part in transferring the partnership property, it is not claimed that credit was ever extended to the corporation by any one having knowledge of the scheme for issuing nonassessable stock in payment for property worth materially less than the par value of the stock. Of course, as respects persons who might have given credit with knowledge of the scheme, a different question would be presented. This is recognized in the Gates Case, 57 Ohio St. 78, 48 N. E. 285, 63 Am. St. Rep. 705; also by this court in Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co., 75 Fed. 554, 560, 23 C. C. A. 302. We therefore hold that, upon the hypothesis of the referee's findings, the balance of \$10,000 found to be due from Bauman would be recoverable by the trustee (certainly ratably with other similar obligations of stockholders as far as necessary to meet corporate debts) in an appropriate suit brought for the benefit of the bankrupt estate.

[4] *The Right of Set-Off.* Can Bauman's liability be enforced by the trustee through the exercise of the right of set-off in a case like this? At first blush it would seem that the language of section 68a of the Bankruptcy Act, in connection with the rule in the Gates Case, would admit of the set-off claimed here; for section 68a extends to "all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor," and, as stated, the Ohio rule treats such liability as a debt due to the corporation. However we think the true interpretation of section 68, cls. "a" and "b", and of such rule is that, after the corporation becomes insolvent, any sum due upon a stock subscription is impressed with the character of a trust in favor of all the creditors alike, except only such as may have given credit to the company with knowledge of the scheme of stock issue. Hence to apply such an unpaid subscription as a set-off to an ordinary claim held by the subscriber against the corporation would be to appropriate the rights of the other creditors in the subscription debt to the exclusive benefit of the person owing it; or, on the other hand, it might, as respects his costockholders, subject him to the payment of more than his ratable share of the bankrupt's debts. It cannot be said, then, that the debts in question are in their nature both mutual and in the same right; nor that after the bankruptcy there was any reason for enforcing stockholders' liability or Bauman's ratable share thereof except for the equal benefit of all the creditors.

In *Sawyer v. Hoag*, supra, 17 Wall. at page 622, 21 L. Ed. 731, when passing upon a provision of the Bankruptcy Act of 1867 (14 Stat. p. 526, § 20), similar to section 68 of the present act, Justice Miller said:

"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim."

To the same effect are *Scammon v. Kimball*, Assignee, 92 U. S. 366, 367, 23 L. Ed. 483; *Scovill v. Thayer*, supra, 105 U. S. 153, 26 L. Ed. 968; *Babbitt v. Read* (C. C.) 173 Fed. 712, 715; *In re Howe Mfg. Co.* (D. C.) 193 Fed. 524, 527; 1 *Loveland on Bankr.* (4th Ed.) p. 661, and note 4; *Collier on Bankr.* (8th Ed.) p. 796, and notes. And the rule that "unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of its creditors" is stated in *Fogg v. Blair*, 139 U. S. at page 125, 11 Sup. Ct. 476, 35 L. Ed. 104, to be "the settled doctrine of this court"; and, further, in *Scovill v. Thayer*, 105 U. S. 156, 26 L. Ed. 968, it was held:

"Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

We have still to consider an important case recently decided by the Supreme Court of Ohio. It is *Niles, Assignee, v. Olszak* (87 Ohio St. —, 100 N. E. 820, decided December 17, 1912, which holds:

"A stockholder in a savings and loan association organized under the laws of this state is entitled, when the association becomes insolvent, to set off, as against its assignee for the benefit of creditors, a claim for money which he has on deposit with the association against his liability for the unpaid part of his stock subscription."

That case is the nearest approach to this one of any other decided by the Supreme Court of Ohio, and so dispenses with the need of referring to other decisions of the court. We think the learned judge announcing the opinion pointed out facts which render the decision inapplicable here, when he said:

"The stock was not issued under the pretense of being or purporting to be fully paid, when in fact it was not paid for. There was no contrivance to release the debt for the stock, and substitute a loan therefor. It is not a case in which a corporation had held itself out to the public as having a larger paid-up capital than it actually had. * * * The statute prescribes * * * that no such association shall commence business until at least *one-half of each subscription has been fully paid up*. There is no claim that this was not done, and the presumption is that it was done. The finding of facts shows that the association was duly organized under the statute. There is no claim that it ever pretended that any more than 50 per cent. of each subscription had been paid in, or that any one ever gave credit on the faith that all of its stock had been paid in full. * * * It is common knowledge that many of the subscribers to the stock of such savings associations make their deposits therein with the intention and understanding that such deposits shall be made and used for the purpose of paying for the stock. * * *

Thus it may be fairly inferred that all creditors of the savings bank were chargeable with knowledge that only 50 per cent. of its capital stock had been paid in, and that it was understood that the deposits should be applied to the payment of the balance due on the subscriptions. This in principle agrees with what we have already pointed out as recognized by the same court in the *Gates Case*, and by this court in *Rickerson Roller Mill Co. v. Farrell Foundry & Machine Co.*,

respecting the rights of persons who extend credit to a corporation with knowledge of the arrangement under which its stock subscriptions have been made. It may well be that as to all such persons the unpaid subscriptions do not constitute a trust fund, in the sense that it is not open to set-off.

Furthermore, any suit rightly to enforce payment of unpaid stock subscriptions would have to be of a plenary character (*In re Haley*, 158 Fed. 74, 85 C. C. A. 404 [C. C. A. 6th Cir.]; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, 347, 82 C. C. A. 421 [C. C. A. 2d Cir.]); and it does not appear that Bauman is a party to the present suit, although he appeared as a witness and so had notice of it. We are thus led to believe that the set-off was not permissible.

[5] What, then, should be done with the claim of Steinle? We have felt bound under the present record to assume that Bauman is solvent. If the claim be allowed and permitted now to share in the assets, according to the undisputed statement of counsel for appellee, Steinle would receive a sum nearly equal to the amount found by the referee to be due from Bauman upon his subscription. Still, if Bauman could meet his unpaid balance, not to speak of the liability of any of his costockholders, no ultimate loss to the other creditors would ensue. If, on the other hand, Bauman should not be able to pay anything remaining due on his subscription, Steinle (who stands no better than Bauman) would profit at the expense of the other creditors. In the latter event, however, the reasons for denying the set-off (or at least its equivalent in the nature of an equitable defense) against the Steinle claim would cease; for nothing would be gained by suit upon the subscription, and so nothing could be lost by the general creditors by applying whatever sum is really due from Bauman toward payment of the Steinle claim. *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 615, 616, 14 Sup. Ct. 710, 38 L. Ed. 565.

Since it would be obviously inequitable to permit the Steinle claim to share ratably in the assets before properly disposing of the question of Bauman's obligation and his ability to pay it (*In re Wiener & Goodman Shoe Co.* (C. C.) 96 Fed. 949, 950, and *In re Duryea Power Co.* (D. C.) 159 Fed. 783, 784, the underlying principles of which we regard as applicable), we are constrained to hold that the order of the court below allowing the claim should be reversed, with costs; that all proceedings upon the Steinle claim be stayed, and all dividends that would accrue on such claim, if allowed, be withheld and preserved, until the Bauman debt and its availability be finally settled. If such debt be collected by the trustee, Steinle's claim shall be allowed in full; if by reason of his insolvency Bauman's debt is not collectible in whole or in part, Steinle's claim shall be accordingly reduced and the remainder allowed. An order will be entered reversing the cause, and remanding it for further proceedings, not inconsistent with this opinion.

COOPER v. MILLER.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1913.)

No. 2,258.

1. BANKRUPTCY (§ 440*)—REVIEW—MODE—APPEAL.

Where an order appealed from involved both the rejection and the allowance of claims each for more than \$500, and a controversy of fact concerning the financial condition of the bankrupt at the time claimant received certain disputed payments, and whether claimant had reasonable cause to believe that such payments would, if enforced, effect a preference, the order was reviewable by appeal, authorized by Bankruptcy Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and not by a petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 164*)—CLAIMS—PREFERENCES.

Where claimant, shortly after he became president and manager of a hotel company, and within four months prior to bankruptcy, knew that the company was insolvent, and with such knowledge loaned to it \$4,000 with which to pay taxes, etc., and thereafter he received payments on such debt prior to bankruptcy, such payments constituted a preference, which the trustee was entitled to recover; claimant being also precluded from proving the balance of the debt against the estate until the preferential payments had been returned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

Appeal from, and Petition to Review, an Order of the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Petition by A. R. Cooper, trustee in bankruptcy of the New Galt House, against W. Scott Miller, to expunge certain claims because of an alleged preference. From a decree affirming a referee's order denying the claimant's right of subrogation and lien, but reversing so much of the order as disallowed a certain balance as a general claim, etc., the trustee appeals, and files a petition for review. Reversed and remanded on the appeal, and petition to revise dismissed.

Gifford & Steinfeld, of Louisville, Ky., for appellant.

Sheild & Campbell and Camden R. McAtee, all of Louisville, Ky., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. The only question contested is whether the trustee can treat as a voidable preference, and so recover of Miller, \$2,056.50 which he, as president and manager of the bankrupt company, within four months of the bankruptcy, paid out of its funds to himself on account of a loan previously made by him to the company. The New Galt House Company, a corporation, was ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judged bankrupt and the trustee was elected in April, 1911. Miller became president and manager of the company April 1, 1910. He owned over 300 shares of its capital stock, and, while president, appears to have assisted the company by loans of money in different amounts to the extent of \$10,000. Certain taxes of the city of Louisville were assessed against the property of the bankrupt as of September 1, 1909; one sum being for \$3,073.68, and the other for \$32.90, aggregating \$3,106.58. When these taxes became due the company was unable to pay them, and Miller was unable to borrow money in its name. He borrowed \$4,000 in his own name, and gave the money to the company to pay the taxes and "other debts," and on June 29, 1910, the company paid the taxes. December following, Miller, in his official capacity, executed a demand note in the name of the company in his own favor individually for the amount of the taxes so paid, and in April, 1911, made proof in bankruptcy of the note, claiming that the taxes were paid at the instance and request of the officers of the corporation to avoid accumulation of penalties and interest, crediting the company with two payments made upon the note, one January 9, 1911, of \$1,406.50, and the other January 13, 1911, of \$650, or \$2,056.50, stating that all interest had been paid to April 1, 1911, and leaving a balance due of \$1,050.08. As to this sum he asserted a lien upon the property of the bankrupt, claiming subrogation to all rights of the city of Louisville for collection of such taxes.

It would seem that this proof of claim, and also of two other claims, one for \$4,000 and another for \$6,000, had been formally allowed by the referee; but, as the court below remarked, the record is confusing as to the two claims last mentioned. However, it is not important to consider any of the claims, except the one concerning the taxes and the effect of the two payments mentioned as having been made on account of the sum advanced by Miller for that purpose. On petition and amendment thereto of the trustee to re-examine and disallow this latter claim as respects the alleged lien, the referee disallowed the balance of \$1,050.08 as a preferred claim, and ordered appellee to return the payments (amounting to \$2,056.50), which were received by him, as stated, from the company on account of the total taxes paid; holding in substance that Miller was a volunteer, and entitled only to the rights of a general creditor as to the \$4,000 loaned to the company at the time the taxes were paid, that the orders previously made allowing that claim, and also the additional claim of Miller for \$6,000, be set aside, and the claims disallowed, and, further, that Miller could "have no claim against the estate allowed until such return is made."

[1] The court below affirmed the order of the referee denying the right of subrogation and lien, but reversed the other order, and directed the referee to enter an order allowing the balance of \$1,050.08 as a general claim in addition to another one found to have been previously allowed as a general claim in favor of Miller for \$6,893.42. Within ten days an appeal was prayed and allowed, but only to the order reversing the referee; and since that order distinctly involved both rejection and allowance of claims each for more than \$500, also a controversy of fact touching the financial condition of the bankrupt at

the time Miller received the payments in dispute, and also the existence or not of reasonable cause on his part to believe that such payments would, if enforced, effect a preference (section 60b of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445)], as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]), we think the case is rightly pending here upon appeal, under section 25a(3) of the Bankruptcy Act. *Matter of Loving*, 224 U. S. 183, 188, 32 Sup. Ct. 446, 56 L. Ed. 725; *Kiskadden, Trustee, v. Steinle*, 203 Fed. 375 (C. C. A. 6th Cir.). The trustee also filed a petition to revise in matter of law, but this is inconsistent with the appeal, and must be dismissed for that reason. *Barnes v. Pampel*, 192 Fed. 525, 113 C. C. A. 81 (C. C. A. 6th Cir.); *Martin v. Globe Bank & Trust Company*, 201 Fed. 31 (C. C. A. 6th Cir.).

[2] We thus reach the question stated at the beginning of this opinion. The sums of money which the referee ordered Miller to return to the bankrupt estate were received by him, as stated, on January 9 and 13, 1911. Miller testified that when he became connected with the company, April 1, 1910, he thought it was insolvent, because upon examination he found that it—

“owed \$25,000 more than they had represented. Q. You found they were insolvent when you went in there? A. Yes; I didn't know it at the time. I found that out later. I want to correct that statement.”

After stating later that he “thought there was a chance to pull it out,” he testified that in June and July, 1910, he thought the company was insolvent. Again he was asked:

“What were the assets and liabilities of the company at the time you took charge? A. I don't know exactly, but I think it was about \$165,000”—

meaning, as he stated, “debts hanging over it, mortgages, etc.”

He explained, further, that the property and assets of the company had not been increased, stating:

“I didn't buy any furniture. I didn't buy anything. It took all my time to fix the plumbing up and the elevators. I didn't buy anything, except something to eat.”

This was succeeded by the following questions and answers:

“Then the assets at the time Mr. Cooper took charge as receiver, and the time that you went in as president of the company, were the same? A. Yes. Q. How about the debts? Did the debts increase any during that year? A. Yes; they increased. Q. How much? A. Well, I think along about \$7,000 or \$8,000.”

Thus Miller was well situated to gain knowledge of the company's financial condition, but not to escape the effect of that knowledge when receiving the money. While the intent of the company is not, by reason of the amendment, important here, yet the company was chargeable with the knowledge of its president, and both the company and Miller must have known that the debtor could not pay its other creditors a percentage of their claims similar to the rate he was paying himself, and, consequently, that the enforcement of the transfer would inevitably give to him a preference over the other creditors of the

same class. It also appears that there was a heavy mortgage upon the property; but we do not discover that the company could pay the interest accruing under the mortgage, any more than it could meet its current taxes. The learned trial judge said, among other things, in his opinion:

"The property covered by the mortgage was not sufficient by several thousand dollars to discharge the mortgage debt. The bankrupt's personal property brought several thousand dollars, from which the general creditors may receive a small dividend only. There is no possibility of a surplus for the bankrupt corporation, or all the holders of its capital stock. They inevitably lose all. * * *"

The dual relation of Miller to the company, as its official head and as creditor, we think, justifies the inference that his admissions of the company's insolvent condition meant that he understood the fair value of its property to be less than its debts (section 1, par. 15, of the Bankruptcy Act); and hence it is unnecessary to attempt to determine the full effect of the last amendment to section 60b.¹

We are constrained to hold that the trustee is entitled to recover of Miller the sums so received by him, with interest, and that, in view of section 57g of the Bankruptcy Act, Miller's claims as a general creditor shall not be allowed unless and until he shall return the money so transferred to him. We cannot from the present record safely estimate or state the amounts of such claims, but they can be readily ascertained and fixed below.

The order covered by the present appeal must be reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

¹ The learned judge who decided the present case considered this amendment in *Re Sam Z. Lorch & Co.* (D. C.) 199 Fed. 944, 947. See, also, *In re F. M. & S. Q. Carlile* (D. C.) 199 Fed. 612; 1 *Loveland on Bankruptcy* (4th Ed.) § 492; 3 *Remington on Bankruptcy*, Supplement, § 1401½.

UNITED STATES v. EXPLORATION CO., Limited, et al†
(Circuit Court of Appeals, Eighth Circuit. January 13, 1913.)

No. 3,808.

1. APPEAL AND ERROR (§ 327*)—PARTIES—APPELLEES.

One made a party defendant merely because he was a conduit through which title to lands in controversy passed to the real defendants, and who as shown by the record had no interest in the suit, need not be joined in an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.*]

2. LIMITATION OF ACTIONS (§ 100*)—SUITS TO CANCEL PATENTS—LIMITATION—CONSTRUCTION OF STATUTE.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), providing that suits by the United States to cancel patents to lands thereafter issued shall only be brought within six years after the date of the issuance of such patents, is subject to the long-established equitable rule that in suits for fraud, where the fraud has been concealed, limitation does not begin to run until its discovery by the party defrauded, and cannot be invoked in bar of a suit to cancel patents to lands fraudulently acquired through dummy entries, where the perpetrators and beneficiaries of the fraud, by means of secret conveyances purposely withheld from record, have concealed it until after six years from the date of the patents, and where the suit is commenced within six years from the time the fraud was or could have been discovered by the officers of the government.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 823, 480-493; Dec. Dig. § 100.*]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by the United States against the Exploration Company, Limited, and Philip L. Foster. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 190 Fed. 405.

B. D. Townsend, Sp. Asst. Atty. Gen., of Washington, D. C. (Harry E. Kelly, U. S. Atty., of Denver, Colo., on the brief), for the United States.

Henry McAllister, Jr., of Denver, Colo. (Joel F. Vaile and William N. Vaile, both of Denver, Colo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the District of Colorado, dismissing upon demurrer a bill of the United States filed for the purpose of having set aside and declared null and void certain patents for coal lands.

[1] Appellees move to dismiss the appeal for the reason that Alexander Burrell was a party defendant in the court below, and is not made a party on this appeal. We do not think the record shows that Burrell had any interest in the subject-matter of the suit. There is a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 28, 1913.

general allegation in the bill that the defendants, including Burrell, claimed some interest in the lands in controversy; but this allegation must be construed as to Burrell with reference to the specific allegation that he was simply a conduit through which the title to the lands passed to one Smith, and that he took no beneficial interest therein. Taking the allegations of the bill to be true, no relief could be granted thereunder against Burrell. The motion to dismiss, therefore, will be denied.

The bill was dismissed in the court below for the reason that the statute of limitations (Acts March 3, 1891, cc. 559, 561, § 8, 26 Stat. 1093, 1099 [U. S. Comp. St. 1901, p. 1521], and Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]) had barred the action. The statute referred to, so far as material, reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The bill charged that the Exploration Company was a corporation organized and existing under the laws of Great Britain, and that neither said Exploration Company nor any of its officers or stockholders were qualified by law to enter, purchase, or hold any of the coal lands of the United States under any of the public land laws; that, notwithstanding this, the Exploration Company, through its duly authorized officers and representatives, devised a scheme to defraud the United States of the title, use, and possession of a large quantity of valuable coal lands situate in the state of Colorado, including the lands particularly described in the bill; and that this scheme to defraud was to be accomplished by means of what are known as "dummy" entries. The bill sets forth in detail the false and fraudulent affidavits and other means by which the officers of the United States were induced to issue patents. Six of the patents in suit were dated October 16, 1902, and three were dated September 16, 1902. The fraud was discovered in 1909, and the bill filed March 3, 1911.

Anticipating the defense of the statute of limitations, above quoted, the bill charged that it was a part of the conspiracy that the frauds perpetrated upon the United States should be, and that they in fact were, concealed from the United States until after six years had elapsed from the date of the issuance of the patents, for the express purpose of defrauding the United States of its equitable remedy, namely, a cancellation of the patents. The bill also charged that this purpose of concealment was accomplished by affirmative acts of fraud consummated by and on behalf of the defendants during the period of concealment. These subsequent fraudulent acts included (a) the execution of conveyances by the "dummy" entrymen, which conveyances were in fact executed at the time applications were made to enter the lands, but the dates of which were left blank, and afterwards false dates inserted; (b) the execution of several mesne conveyances to secret trustees, through which the title was finally merged in the defendant Exploration Company; (c) the withholding from the records

and from the knowledge of the United States of these conveyances, which, if known, would have disclosed the true facts in the premises. Other fraudulent devices to conceal the transaction are also alleged.

[2] The question presented for decision is concisely stated in appellant's brief, as follows:

"If the United States is defrauded of public lands by means of 'dummy' entries, and the perpetrators and beneficiaries of the fraud by subsequent and affirmative acts of fraud conceal the original fraud from the knowledge of the government until after six years have elapsed from the date of the issuance of the patents, will a court of equity permit the wrongdoers to enjoy the fruits of their fraud, by pleading the statute of limitations as a defense, when the delay in the institution of suit was deliberately induced by fraud practiced upon the government for the express purpose of gaining the benefits of the statute?"

This is an equitable action in a court of equity, and the statute of limitations was passed with direct reference to this class of actions, so there can be no controversy over the binding force of the statute. It is not ambiguous, and its construction is not difficult in ordinary actions of fraud to set aside patents for land. The real question before us is whether the enactment of the statute repealed the equitable rule, enforced by courts of equity, that, when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it. The existence of this rule cannot be questioned. In *Bailey v. Glover*, 88 U. S. (21 Wall.) 342, 347, 348 (22 L. Ed. 636), Mr. Justice Miller, in delivering the opinion of the court, said:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. *Booth v. Lord Warrington*, 4 *Brown's Parliamentary Cases*, 163; *South Sea Co. v. Wymondsell*, 3 *Peere Williams*, 143; *Hovenden v. Lord Annesley*, 2 *Schoales & Lefroy*, 634; *Stearns v. Page*, 7 *How.* 819 [12 L. Ed. 928]; *Moore v. Greene*, 19 *How.* 69 [15 L. Ed. 533]; *Sherwood v. Sutton*, 5 *Mason*, 143 [Fed. Cas. No. 12,782]; *Snodgrass v. Bank of Decatur*, 25 *Ala.* 161 [60 *Am. Dec.* 505]. * * * And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

In *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 136, 7 *Sup. Ct.* 430, 433 (30 L. Ed. 569), Mr. Justice Harlan said:

"Be that as it may, it is an established rule of equity, as administered in the courts of the United States, that, where relief is asked on the ground

of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Meador v. Norton*, 11 Wall. 442, 458 [20 L. Ed. 184]; *Prevost v. Gratz*, 6 Wheat. 481 [5 L. Ed. 311]; *Michoud v. Girod*, 4 How. 503, 561 [11 L. Ed. 1076]; *Veazie v. Williams*, 8 How. 134, 149, 158 [12 L. Ed. 1018]; *Brown v. Buena Vista County*, 95 U. S. 157 [24 L. Ed. 422]; *Rosenthal v. Walker*, 111 U. S. 185, 190 [4 Sup. Ct. 382, 28 L. Ed. 395]; 2 Story, Eq. § 1521a; *Angell on Limitations*."

In *Linn & Lane Timber Co. v. United States*, 196 Fed. 593, 116 C. C. A. 267, the Circuit Court of Appeals of the Ninth Circuit enforced the rule referred to in the above citations, where the same statute as is here involved was pleaded in bar of the action.

It will be found from an examination of the cases cited that the rule enunciated by them did not arise from the construction of any particular statute of limitations, but was a rule of equity jurisprudence established soon after the enactment of the Limitations Act of 1623 (St. 21 James I, c. 16). This act contained no exception in regard to actions for fraud, where the fraud had been concealed; but the courts of equity in England established the rule upon the ground that:

"As fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate, because, until discovery, the title to avoid it does not completely arise." *Hovenden v. Lord Annesley*, 2 Schoales & L. 634.

The rule was considered by Mr. Justice Story in *Sherwood v. Sutton*, 5 Mason, 143 (1828) Fed. Cas. No. 12,782. In this case the statute of limitations of New Hampshire had been pleaded as a bar to an action for fraud and deceit in the sale of a vessel. There was a replication that there was a fraudulent concealment of the deceit until within the six-year period of limitation provided by the statute. On motion in arrest of judgment the replication was held good. The statute of New Hampshire was substantially a transcript of St. 21 James I, c. 16, and contained no special exception as to actions founded upon fraud where the fraud had been concealed during the period of limitation. The learned justice, after reviewing the English decisions, said:

"The inference deducible from this view of the cases is that the construction adopted by these courts, that the concealment of the fraud avoids the bar of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute. I do not stop to inquire whether it is to be deemed an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud. The authorities present some diversity of judgment in this respect. Perhaps the true mode of considering it would be that it is a continuing fraud during the whole period of its concealment, thus knitting it to the original wrong."

Counsel for appellees admit the existence of the rule stated above, but insist that it can only be invoked where the statute of limitations provides that the period of limitation shall commence to run from the cause of action or from the accrual of the cause of action, and that where, as in the present case, the period of limitation commences to run from a fixed date, namely, the date of the patent, that the Legislature has thereby repealed this equitable rule; or, in other words, the rule cannot be enforced by a court of equity in respect to the present statute. It must be admitted that whether a period of limitation com-

mences to run from a fixed date, or whether it commences to run from the accrual of the cause of action, affects in no way the reason upon which the rule is based. Take the present statute: It fixes the date of the patent as the time from which the six-year period shall run. Let us suppose that the statute had fixed the accrual of the cause of action as the time from which the six-year period of limitation should run. It will be seen that in the absence of the rule of concealed fraud the date in both cases would be the same, for the reason that the date of the patent would be the date of the accrual of the cause of action. Still it is claimed that because Congress fixed the date of the patent as the time from which the period of limitation should run, and not the time of the accrual of the cause of action, both dates being identical in the absence of the rule as to concealed fraud, that Congress thereby intended to, and did, abrogate in its entirety an old and undisputed principle of equity jurisprudence.

We should hesitate to impute to the lawmaking power such an intention for many reasons: First, there is nothing in the language of the statute which evidences any such intention; second, it would impute to Congress a desire to deprive the United States, in cases of concealed fraud, of a remedy to cancel patents obtained by fraud; third, it would make of a statute enacted to prevent fraud a formidable instrument for the making of fraud successful; fourth, there is no reason why the equitable rule in regard to concealed fraud should not be applied where the statute of limitations fixes a date certain, as well as where the statute provides that the limitation period shall run from the accrual of the cause of action; fifth, it would render it possible for one who had defrauded the United States of land to prevent an inquiry in regard to the same by the commission of additional fraud; sixth, it would permit one to set off one fraud against another; seventh, it would allow one to take advantage of one's own wrong, which is not to be thought of in a court of equity. The truth is that the rule in regard to concealed fraud is so instinct with justice and common sense that it has been adopted by statute in the following states: Alabama, California, Connecticut, Iowa, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Carolina, Washington, Wisconsin, Oklahoma, and Utah.

We will now consider the cases which are cited in support of the contention of counsel for appellees.

United States v. Winona, etc., Railroad, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789, is cited as a case which construed the statute now under consideration, and it is claimed that it was therein determined that it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentees were, the patent, under the statute, after six years from its date, would become conclusive as a transfer of the title, provided only that the land was public land of the United States and open to sale and conveyances through the land department. This is practically the language used by Mr. Justice Brewer, at page 476 of 165 U. S., at page 371 of 17 Sup. Ct. (41 L. Ed. 789), in the opinion. An examination of the case, however, demonstrates beyond controversy that the limitation portion

of the act of 1891, as amended in 1896, was not before the court in any respect. Just following the language above stated, Mr. Justice Brewer said:

"It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the government, the grantor therein, should not be heard to question them."

The limitation portion of the statute was not before the court for construction, and certainly no question of concealed fraud. The court did apply that portion of the statute which protects bona fide purchasers. The case is no authority whatever in support of the position of counsel for appellees.

United States v. Chandler-Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, was a case where the United States sought to annul a patent for the reason that the land had been reserved for public purposes prior to the issuance of the patent. The Supreme Court decided that, whether this was true or not, the statute now under consideration barred a recovery by the United States. There was no question of concealed fraud in the case, and we see no reason why, in the absence of concealed fraud, the statute should not be enforced according to its terms.

Louisiana v. Garfield, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92, is a case in which the statute involved in this action was in no wise in issue. The court there expressed a doubt as to whether the statute now being considered applied to approvals which are given the effect of patents, as well as to patents; but the court said that the doubt could not be resolved in that case, as it raised questions of law and fact upon which the United States would have to be heard.

Alexander H. Mall & Co. v. Ullrich (D. C.) 37 Fed. 653, was a case in the Northern district of Ohio, in which Judge Welker, in a memorandum, decided that section 5120 of the Revised Statutes (bankrupt law) provided an absolute bar where the petition was not filed within two years from the date of the discharge of the bankrupt. Such statutes stand in the same position as statutes relating to the time in which appeals may be taken, and the case is not applicable to the question now before us.

United States v. Maillard et al., Fed. Cas. No. 15,709, was decided by Blatchford, District Judge, in 1871. Judge Blatchford held that, where a statute does not make a fraudulent concealment of the existence of the cause of action an exception to the running of the statute, the court has no right or power to make such exception, either directly, or by the indirect method of saying that the cause of action does not accrue in the case of a fraudulent concealment until the discovery of the fraud. In so deciding, the learned judge refused to follow Mr. Justice Story in *Sherwood v. Sutton*, supra, but followed the Supreme Court of New York. *Troup v. Smith's Executors*, 20 Johns. 33. In view of the fact that this case was decided in 1871, and that *Bailey v. Glover*, supra, was decided in 1874, we see no reason for citing it.

Pickett v. McGavick, Fed. Cas. No. 11,126, decided by Parker, Dis-

strict Judge, in 1876, was another suit to set aside the discharge of a bankrupt, and it was there held that the two years provided by statute in which a suit could be brought to set aside the discharge ran from the date of the discharge, irrespective of when the fraud was discovered. In *re Brown*, Fed. Cas. No. 1,983, decided by Choate, District Judge, in 1879 is to the same effect. In regard to these two cases, they may have been correctly decided; but we make the same observation in relation to them that we did as to *Mall v. Ullrich*, *supra*.

United States v. Smith (C. C.) 181 Fed. 545, wherein District Judge Dean held that the period of limitation contained in the statute under consideration began to run from the date of the issuance of the patent, and not from the discovery of the fraud, was disapproved of on appeal in *Linn & Lane Timber Co. v. United States*, *supra*.

United States v. American Lumber Co., 85 Fed. 827, 29 C. C. A. 431, is also cited. The Circuit Court of Appeals of the Ninth Circuit, which decided this case, in *Linn & Lane Timber Co. v. United States*, above mentioned, shows that it is no authority to support the position of counsel for appellees.

We are therefore clearly of the opinion that the decree appealed from must be reversed, and the case remanded to the United States District Court for the District of Colorado, with instruction to overrule the demurrer and allow appellees to plead to the bill.

And it is so ordered.

UNITED STATES v. AMERICAN SMELTING & REFINING CO. et al.†

(Circuit Court of Appeals, Eighth Circuit. January 13, 1913.)

No. 3,809.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by the United States against the American Smelting & Refining Company and others. Decree for defendants, and the United States appeals. Reversed.

B. D. Townsend, Sp. Asst. Atty. Gen., of Washington, D. C. (Harry E. Kelly, U. S. Atty., of Denver, Colo., on the brief), for the United States.

Horace N. Hawkins, of Denver, Colo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. This case involves the same questions as have been determined in No. 3,808, *United States of America v. Exploration Company, Limited*, et al., 203 Fed. 387, and for the reasons stated in the opinion in that case the decree herein must be reversed, and the case remanded to the United States District Court for the District of Colorado, with instruction to overrule the demurrer and allow appellees to answer the bill.

And it is so ordered.

† Rehearing denied April 26, 1913.

LINN & LANE TIMBER CO. et al. v. UNITED STATES.

UNITED STATES v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

Nos. 1,972, 1,973.

LIMITATION OF ACTIONS (§ 100*)—SUIT TO CANCEL PATENTS—LIMITATION.

The limitation of six years prescribed by Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), for suits by the United States to annul patents to lands, in case of suits based on fraud, where the fraud has been purposely concealed, does not begin to run until it is discovered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

On petition for modification of decree. Decree amended.

For former opinion, see 196 Fed. 593.

John Lind, A. Ueland, and W. M. Jerome, all of Minneapolis, Minn., and John M. Gearin, of Portland, Or., for appellants Linn & Lane Timber Co.

John McCourt, U. S. Atty., of Portland, Or.

Vaile, McAllister & Vaile, of Denver, Colo., amici curiæ.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. This case came on for rehearing upon motion of the district attorney of the United States for an amendment of the decree of this court rendered on May 20, 1912, the decision wherein is reported in *Linn & Lane Timber Co. v. United States*, 196 Fed. 593, 116 C. C. A. 267.

The motion is based upon the expression of the views of this court in that part of the opinion in which additional ground was found for sustaining the conclusion of the court below as to the lands which were patented on August 12, 1902; that court having found that as to those lands the suit was not barred by the statute of limitations. This court sustained the court below in that conclusion, principally upon the ground that the Linn & Lane Timber Company and C. A. Smith were one and the same; the corporation belonging to him, and organized by him for no other purpose than to conceal therein the title to the lands which were conveyed to it. The additional ground which this court found for sustaining the court below was that the fraud complained of in the bills had been concealed by the defendants, and had not been discovered by the plaintiff until long after the date of the patents, and that the suits had been commenced within the period of six years after such discovery of fraud.

It is now urged that upon the opinion of this court so expressed, the United States, which also appealed from the decree of the court below, was entitled to a decree setting aside all the patents involved in the suits, including those for which patents issued on July 9, 1902,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and in support of that view we are referred to the recent decision of the Circuit Court of Appeals for the Eighth Circuit in *United States v. Exploration Co., Ltd.*, 203 Fed. 387, which is in line with the views of this court so expressed.

Upon a careful reconsideration of the authorities we are of the opinion that the fraud of the defendants, as alleged in the bills and shown by the facts, was sufficient to toll the statute of limitations as to all the lands involved in the suits. The fraud not only antedated the patents, but after the patents were issued fraudulent conveyances were made, and concealed and kept from record, obviously for the purpose of covering up the prior fraudulent transactions.

We find it unnecessary to express an opinion upon the question whether the court below was in error in holding that the suits were not brought as to the defendant Smith until July 27, 1908, the date of the order directing substitution of service upon him, and that as to him the suits were not begun on May 25, 1908, when subpoenas ad respondendum were issued as against him as well as the other defendants, and placed in the hands of the United States marshal for service.

The decree of this court will be amended in accordance with the motion. The causes will be remanded to the court below to enter decrees for the United States as to all the lands sued for in both suits.

NOWELL et al. v. INTERNATIONAL TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,141.

EQUITY (§ 447*)—BILL OF REVIEW—SUFFICIENCY—NEWLY DISCOVERED EVIDENCE.

A bill in the nature of a bill of review set out certain alleged newly discovered evidence, on which it was sought to set aside a decree in a suit by receivers of a mining corporation against controlling stockholders therein, in which it was found that the defendants had sold and agreed to convey to the corporation certain mining claims, and had received the consideration therefor, but had fraudulently altered the records and withheld the most valuable of the claims, and which decree required a specific performance of their contract. *Held*, on a consideration of such evidence, that it was insufficient to impeach the decree, but was entirely consistent therewith, and that the bill was properly dismissed for want of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091-1094; Dec. Dig. § 447.*]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Edward E. Cushman, Judge.

Suit in equity by Thomas S. Nowell, the Nowell Mining & Milling Company, and the Alaska Nowell Gold Mining Company against the International Trust Company, Henry Endicott, William Endicott, Wallace Hackett, C. R. Corning, R. McM. Gillespie, and S. W. Fairchild. Bill dismissed on demurrer, and complainants appeal. Affirmed.

See, also, 89 C. C. A. 318, 162 Fed. 432.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The appellants, as complainants in the court below, filed a bill in the nature of a bill of review to impeach and set aside the final decree rendered in that court, which had been affirmed on appeal to this court in *Nowell v. McBride*, 162 Fed. 432, 89 C. C. A. 318. That was a suit begun on January 18, 1906, by the receivers of the Berner's Bay Mining & Milling Company, in which suit Henry Endicott intervened by petition as a stockholder of that company. The suit was brought against Thomas S. Nowell and his sons and the Nowell Mining & Milling Company. The bill in the receiver's suit alleged in substance that Thomas S. Nowell and Willis E. Nowell represented to the stockholders and creditors of the Berner's Bay Company the advantage to that company of purchasing 15 certain mining claims, the title to which they represented that they held, and that they would sell the same to the company in consideration of \$1,500,000 of the capital stock, and they proposed that the capital stock be increased from \$1,000,000 to \$2,500,000, and that an additional bonded indebtedness of \$300,000 be incurred by the company to provide a fund for working the company's mining properties; that in pursuance of that offer it was agreed that a special meeting of the stockholders of the company should be called to accept the same, and Thomas S. Nowell caused notice to be given that such meeting would be held on June 24, 1896, naming the 15 mining claims in the notice; that the meeting was held, and it was then and there voted to increase the stock, and to increase the bonded indebtedness, and to deliver to Thomas S. and Willis E. Nowell the \$1,500,000 of such increased capital stock, and that the company did issue as a purchase price for said mining claims to Thomas S. Nowell and Willis E. Nowell the said shares of capital stock; that, of the group of 15 claims, 3 claims, known as the "Johnson group," constituted the principal value; that after the sale, by the insertion in the offer of sale recorded in the minutes of the stockholders' meeting of the words "last twelve," the true intent and meaning of the transaction was wrongfully and fraudulently changed and altered, and that thereby the claims known as the "Johnson group" were omitted from the offer; that during the times of said transaction all the books and records of the corporation were in the custody of Thomas S. Nowell and Arthur L. Nowell. The petition of intervention of Henry Endicott, one of the stockholders and bondholders of the Berner's Bay Mining & Milling Company, contained similar allegations as to the alterations of the records of the company, and alleged that on June 3, 1896, Thomas S. Nowell proposed to him to convey the 15 claims to the company in exchange for \$1,500,000 of the increased capital of the stock, if he, Henry Endicott, would purchase \$27,948.35 worth of the then outstanding bonds of that company which were in default, and he alleged that pursuant to said proposition he did purchase the bonds described in the offer. The proof was that he purchased \$42,000 worth of said bonds.

On the trial of the issues raised upon the bill, Thomas S. Nowell testified, disclaiming all knowledge of the interlineations and alterations of the records, and denied that any proposition was ever made at the stockholders' meeting to sell the 15 mining claims to the corporation. He did not deny, however, that he had written a letter to Endicott in which he proposed to sell the 15 mining claims to the company, including the 3 in controversy; nor did he deny that he had sent the original notice calling the stockholders' meeting to consider his proposition to sell those claims, in which the Johnson claims were mentioned. Nor did he deny that he had stated to Endicott, six months after the meeting, that the reason why the claims in controversy had not been conveyed to the Berner's Bay Company was that patents had not then been obtained for them. On the issues and the testimony the court found that the allegations of the bill were sustained, and decreed that the 3 Johnson claims be conveyed to the Berner's Bay Company.

It is now alleged in the third amended bill in the present case that at the time of giving his testimony in the receiver's suit the memory of Thomas S. Nowell had become impaired; that there were then in existence certain records, letters, and letter books which would have refreshed his memory, had they been accessible to him; that on October 30, 1905, Wallace Hackett, a director and bondholder of the Berner's Bay Company, wrongfully and fraudulently and without authority obtained possession of the books, docu-

ments, and files of the Berner's Bay Company, by removing them from the place where they were stored in Cambridge, Mass., together with personal books, writings, and documents and files of Thomas S. Nowell which were stored with them, and that the appellants did not discover until September, 1910, that Hackett had removed any more than two certain letterpress copy books, marked "R" and "S," belonging to Thomas S. Nowell, which, in pursuance of an order of the court below, were deposited in court; that Hackett and others, conspiring with him, thereafter continued to conceal and suppress three other and different letterpress copy books belonging to Thomas S. Nowell, which were not produced until some time later. The court below sustained a demurrer to the third amended bill for want of equity, and thereupon the suit was dismissed.

John P. Hartman, of Seattle, Wash., and George M. Nowell, of Boston, Mass, for appellants.

L. P. Shackleford and Shackleford & Bayless, all of Juneau, Alaska, for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The question here presented is whether or not the court erred in sustaining a demurrer to the third amended bill for want of equity. The bill presents the newly discovered evidence which is relied upon to show that the decree in *Nowell v. McBride* was erroneous. That evidence consists of two letters written by Thomas S. Nowell shortly after the stockholders' meeting of June 24, 1896, together with the testimony of one William Payson, who was present at that meeting, and two letters written by William Endicott, and the recitals contained in two agreements which were thereafter executed. It is alleged, also, that if Thomas S. Nowell had had the opportunity to inspect the records which it is alleged were concealed and suppressed, the inspection thereof would have enabled him to recall the reason why the plan to offer the said Johnson group to the Berner's Bay Company had been changed prior to the stockholders' meeting of June 24th, and why it was finally decided by the stockholders of the company that he should not include the Johnson group in said offer. And the true reason is alleged to be that the said Johnson group had not been paid for, that \$25,000, the purchase money to the original owners, remained unpaid, and that the financial condition of the Berner's Bay Company did not warrant its assumption of the obligation to pay that sum, and that the creditors of the company and the associates and creditors of Thomas S. Nowell were unwilling to furnish the sum of \$25,000. We may pause here to say that there is nothing in the records which are referred to in the bill or in the exhibits thereto to indicate that such was the reason why the Johnson group was excluded from the transaction. Nor does that reason seem to be adequate. It does not seem to have been regarded by Thomas S. Nowell a sufficient reason for not offering to sell the Johnson group to the company, or for not embodying that proposition in a notice of the meeting which was called to accept the offer. As the result of that meeting, Thomas S. Nowell received the full amount of stock and bonds which he proposed to take as the

consideration for the transfer of the whole 15 claims. On the trial of the receiver's suit, Thomas S. Nowell did not deny that six months after the stockholders' meeting he stated to Henry Endicott that the reason why the Johnson group had not been conveyed was that a patent had not been obtained for them, a reason which we held to be insufficient.

We may find light upon Thomas S. Nowell's attitude toward this matter by referring to the two letters which are found in an exhibit to the bill, and which are relied upon by appellants as affording ground to impeach the decree in the receiver's suit. On July 17, 1896, about four weeks after the date of the stockholders' meeting, Thomas S. Nowell wrote to Willis E. Nowell, his son, as follows:

"I propose to pay the Johnson drafts the coming week, so that if Fred can carry out my suggestion with Johnson beyond that, and have the mines deeded to the company, it will be all right, and if not, it will be all right, because I shall make the payments, and then the deeds can be made direct to the B. B. Company after the payments are made. I am very glad that I decided not to have the Johnson mines deeded to the company, so as to be on the safe side."

That letter, as we read it, is quite in harmony with the conclusion which was reached by the court in the receiver's suit. The writer is glad that he "decided not to have the Johnson mines deeded." The letter shows that Thomas S. Nowell considered that the whole matter was in his own hands, that he controlled the meeting at which no stockholder other than members of his own family and his attorney and his stenographer were present, and that he caused the alterations of the records to be made to carry out his own individual purposes. It indicates that after that meeting he recognized his obligation, and still contemplated having the mines deeded to the company. The other letter, of date August 11, 1896, was written by Thomas S. Nowell to F. D. Nowell in regard to the Johnson properties. It contains the following:

"I hope to telegraph to the credit of Johnson to the Bank of British Columbia \$25,000 within the next week. * * * I have answered you fully in regard to the Johnson mines, and when Willis received the papers showing the transaction I have made, and that we really control three-fifths of the entire Berner's Bay interests. In view of the liberal recognition that my friends have given me here, I think it will be unwise not to fulfill what I have already agreed to put into the company on the last deal. Mr. Plummer thinks that I am very mean in recognizing the people that have helped me to carry matters along, and in view of this fact, if I should do what you suggest in regard to the Johnson mines, why it might augment that sentiment here."

In this letter Mr. Nowell says that he thinks it will be unwise not to fulfill what he has already agreed to put into the company on the last deal. What had he agreed to put into the company on the last deal? Evidently he referred to the Johnson group of claims. He had agreed to put them into the company on the last deal; but, instead of doing so, he had held them out. These letters disclose a remarkable attitude of mind on the part of Thomas S. Nowell. We do not say that they indicate that he had a fraudulent purpose; but they do indicate that he regarded the Berner's Bay Company as his own creature, to do

with as he would, that, notwithstanding his proposition to convey the Johnson group, he was at liberty to convey it or withhold it as he saw fit, with or without the consent of the other stockholders, and without notifying them of his purpose to do so.

In this connection we may refer to the following significant allegations which are found in the bill:

"That although the stockholders of the said Berner's Bay Mining & Milling Company had accepted, at their meeting of June 24, 1896, an offer of the last 12 mining claims named in the recorded and true call to said meeting, and that although the proposed recapitalization of the said company had been carried out after the acceptance of the offer of the said twelve mining claims, the said Thomas S. Nowell was still desirous of securing a conveyance of the said Johnson group to the said company, and that during a period of several months subsequently to June, 1896, the said Thomas S. Nowell was making continued efforts to effect some arrangement with the then owners of the said Johnson group which should result, and was intended to result, in a conveyance of the same to the said company; * * * that the said Thomas S. Nowell did not cease his efforts to secure a conveyance of the Johnson group to the said company by a pledge of its mortgage bonds as security for the payment of the said purchase price therefor until it was found impossible so to do, whereupon it was found necessary that the said Nowells should pay out of their own resources the said purchase price of \$25,000, and take title to the said Johnson group themselves."

Here is, indeed, a remarkable admission, and it amounts to this: That the Nowells recognized their moral obligation to convey the Johnson group to the Berner's Bay Company, but did not convey it, because they themselves had to pay for it.

Attached to the bill as an exhibit is a copy of the motion made in this court in the receiver's suit, while the same was pending here on appeal, for leave to insert the affidavit of William M. Payson. The motion is supported by the affidavit of George M. Nowell, and it states that the reason why Payson was not called as a witness was that George M. Nowell had received from a conversation with him the impression that he knew nothing about the matters in controversy as to the stockholders' meeting of June 24th, and therefore could not testify. The affidavit is presented here to show additional evidence that the decree in the receiver's suit should be set aside. There is no showing of diligence to obtain Payson's testimony on the trial of that case, and the excuse which is offered for its omission is not worthy of consideration. But let us, nevertheless, look at what is said in Payson's affidavit. It is that he was an attorney at law, acting for Thomas S. Nowell and his various associates in organizing a number of corporations, among which was the Berner's Bay Company; that the record of the stockholders' meeting of June 24th was written by him in the record book, and is a true statement of what was done at such meeting; that the record was written out in Boston prior to the meeting, and was carried to Portland, Me., where the meeting was held; that at the conclusion of the meeting the record was signed by Barrows as clerk of the corporation; that Arthur L. Nowell, C. O. Barrows, and himself, and no one else, was present at the meeting; that he was at Mr. Thomas S. Nowell's office before the meeting, and at that time they discussed a draft of an offer that included all the

properties named in the call, and that Nowell said, "The Johnson properties are not to go in;" and that the witness then replied that the form of offer would have to be changed, "and I think I then changed it to include the last 12 properties named in the call." And Payson deposed to having recently found in a drawer in his safe a typewritten copy of the recorded call, attested by Arthur L. Nowell, in which the names of the Johnson properties were bracketed in pencil. Payson referred elsewhere to the proxies that were given by the other stockholders.

Now, all that Mr. Payson says in his affidavit may be true, without affording any ground whatever to impeach the decree of the receiver's suit. It may have been, and the two letters of Thomas S. Nowell above referred to and Payson's affidavit tend to indicate that such was the case, that the alterations in the notice and the offer were made before the meeting, and not after; that Thomas S. Nowell, shortly before the meeting, and without consulting any one, decided to hold out the Johnson group of claims, and instructed Mr. Payson to prepare the records of the meeting accordingly; and that his son, Arthur L. Nowell, holding the proxies of the other stockholders, accepted, without their knowledge or consent, the altered proposition, all of which, if true, would go to show that, as to Henry Endicott and the other stockholders, the transaction was just as fraudulent as it would have been if the records had been fraudulently altered after the meeting. There is nothing in all this evidence so offered which, taken to be true, tends in any degree to impeach the decree in the receiver's suit, or to show that from and after June 24, 1896, the Berner's Bay Mining & Milling Company was not in equity the owner of the Johnson group of claims, which it paid for in pursuance of Thomas S. Nowell's offer to sell the same. Whether the alterations were made before or after the meeting, it is clear from the evidence in the receiver's suit that Henry Endicott and the other stockholders were not advised of them, that they believed that Nowell's proposition had been accepted, and Henry Endicott, relying thereon, and to carry out his part of the agreement, purchased \$27,948.35 worth of the then outstanding bonds of the company which were in default, and bonds in addition thereto to the amount of \$42,000.

The other items of evidence which are set forth in exhibits to the bill are presented for the purpose of showing that Henry Endicott, William Endicott, and Wallace Hackett, stockholders of the Berner's Bay Company, recognized the title of Thomas S. Nowell to the Johnson group of claims long after June 24, 1896. The first of these is a letter from William Endicott to Thomas S. Nowell, of date September 13, 1900, in which Endicott referred to certain possible purchasers of the company's mining claims who had expressed the opinion that there was no development to justify their paying much money for them, and said:

"I was afraid yesterday that they would decline altogether; but Mr. Agassiz is to be in town on Friday, and Col. Livermore will talk it over with him, and see if he is willing to go in on the basis of putting up cash to pay the receiver's certificates and the Alaska debts, not to exceed \$150,000, and to develop the property, including the Johnson, and to have 51% of the new company—the 49% to be made sufficiently large to fund the bonds and floating

debt and to furnish \$500,000 in shares for the Johnson mines. * * * If we hear from you that you will put in the Johnson, we shall not hesitate to trade."

Also a letter, of date July 18, 1905, from William Endicott to Thomas S. Nowell, in which it is said:

"If the property is what you believe it to be, what you can receive for the Johnson will be quite a fortune in itself. As to your debts, it may relieve you somewhat if I make the following proposition," etc.

And the writer proceeds with an offer by which Nowell can be relieved of the debt he owed the writer of \$825,510.67. Also an agreement made February 6, 1902, between certain corporations and the majority of the holders of the mortgage bonds of the Berner's Bay Company, in which the Nowell Mining & Milling Company is described as "the owners of what is known as the Johnson properties, located near the Northern Belle Gold Mining Company's property in Alaska," which agreement was signed by Henry Endicott and Wallace Hackett as holders of the mortgage bonds. Also a memorandum of an agreement between the holders of first mortgage bonds of the Berner's Bay Company, parties of the first part, Wallace Hackett, Trustee, party of the second part, and Thomas S. Nowell, Frederick D. Nowell, and Willis E. Nowell, parties of the third part, made on February 26, 1903, in which it is recited that certain named mining properties shall be maintained in their integrity together with the group of mines "known as the Johnson group, and organized into a corporation under the name of the Nowell Mining & Milling Company, which said Nowell Mining & Milling Company is the exclusive property of the parties of the third part." The purport of the agreement was that the owners of the Johnson properties would add the same to the properties of the Berner's Bay Company, so that the same might be formed into one corporation for the purpose of selling to purchasers.

Now, all of the evidence afforded by these exhibits is in line with the proof that was brought before the court in the receiver's suit. It goes to sustain our conclusion in that case, where we said:

"As to the delay of the intervener Endicott in asserting his rights, his testimony is that he did not discover the fraud until some six months after the stockholders' meeting, and that at that time, in a conversation with Thomas S. Nowell, the latter informed him that the reason why the mines had not been conveyed was 'that they could not convey them, for they had not procured the patent yet.' Endicott testified, further, that thereafter he made search for Nowell's letter to him of June 3, 1896, concerning the proposed sale of the 15 mining claims to the company, but that he could not find it until 1900, and that thereafter Nowell was making endeavors to sell the Berner's Bay and Johnson property together, and that he (Endicott) was more anxious to realize on such deal than to delay the consummation of the same by litigation over the title of the Johnson properties. But he testified that, on finding the letter, he sent a copy thereof to Nowell, and informed him 'that we consider we have at least a moral claim on the Johnson property.'"

It is alleged that the decree in the receiver's suit is void for want of jurisdiction, that the District Court at Juneau decided that the appointment of F. D. Nowell on February 12, 1898, as receiver of the property of the Berner's Bay Mining & Milling Company was void, and that this court affirmed that decision in *Nowell v. International*

Trust Company, 169 Fed. 497, 94 C. C. A. 589, and that therefore, in January, 1906, there was no legal receiver to institute the receiver's suit in question. We did not decide in *Nowell v. International Trust Company* that the appointment of the receiver was void. We reviewed a record in which it appeared that in an action brought by Decker Bros. to recover \$154.65 for goods sold and delivered to the Berner's Bay Mining Company and to protect the plaintiffs against liabilities on certain checks and drafts that they had signed, the complaint alleged the propriety of the appointment of a receiver on the ground that the output of the mines for the six months prior to the commencement of the suit was insufficient to meet current expenses, and that creditors were threatening suit, and that the property of the defendant company was in danger of being wasted and exhausted, and that if the property were sold at forced sale there would not be realized a sum sufficient to pay its indebtedness. We held that upon the allegation of the complaint no proper case was made for the appointment of a receiver in the first instance, and that upon the payment of the claim of the plaintiffs in that action, F. D. Nowell, who had been substituted as receiver, should have reported that fact to the court and obtained his discharge. We said:

"During the whole of the time from his (F. D. Nowell's) appointment as receiver until the appearance of the International Trust Company in the suit, a period of nearly eight years, there was no controversy before the court."

And we held that, if the corporations defendant to that suit chose to submit to the situation and to conduct their mining operations all those years through the medium of a receiver, they should be held responsible for the expense of the receivership. It appeared in that case that on December 9, 1905, the Berner's Bay Company and the corporations connected with it answered the complaint of Decker Bros., alleging that the receiver had issued under the orders of the court receiver's certificates to the amount of nearly \$400,000 for money which he had borrowed and used in the administration of the property and the operation of the same; that on March 5, 1906, the International Trust Company intervened, setting up its mortgage, which was a deed of trust, and obtained leave to commence an independent suit for the foreclosure of the mortgage as a prior lien; that on April 11, 1907, the court ordered that the two suits be consolidated. We may assume, nothing in the record appearing to the contrary, that the court extended the receivership to the foreclosure suit. That record shows, further, that on January 3, 1906, W. B. Hoggatt was appointed coreceiver with F. D. Nowell, and in the order appointing him he and his coreceiver were directed to institute the receiver's suit for the recovery of the Johnson group of mines. At that time the pleadings presented ample grounds for the appointment of a receiver, and the order appointing Hoggatt and the order that he bring the suit were clearly within the jurisdiction of the court, notwithstanding that the appointment of a receiver in the first instance may have been voidable.

The demurrer to the bill in this case was properly sustained.

The decree is affirmed.

WOLVERTON, District Judge, concurs.

WISCONSIN STEEL CO. v. MARYLAND STEEL CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,863.

1. CONTRACTS (§ 27*)—PROPOSAL AND ACCEPTANCE—IMPLIED AGREEMENT.

Defendant was having three engines built, and, when the work was stopped by a strike in the works of the contractor, made a written contract with plaintiff to complete two of the engines for a stated per cent. above cost. After the work was commenced, defendant's manager, who was in plaintiff's shops, said to the foreman that he was going to send them the third engine to complete, and was referred to the manager. It appeared that he did not see the manager, but the latter was informed by the foreman of the proposal, and when, a few days later, the uncompleted parts of the third engine were received, plaintiff accepted the same and built the engine with the others. *Held*, that defendant's proposal, taken in connection with the acts of both parties following, constituted a contract for the completion of the third engine, on the same terms as the other two.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121-132; Dec. Dig. § 27.*]

2. CONTRACTS (§ 4*)—PROPOSAL AND ACCEPTANCE—IMPLIED AGREEMENT.

Acts and circumstances that show, according to the ordinary course of dealing and the common understanding of men, a mutual intent to contract, may be taken in law as the basis for implying a contract in fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 4-6; Dec. Dig. § 4.*]

3. EVIDENCE (§§ 354, 376*)—BOOKS OF ACCOUNT—ADMISSIBILITY.

A machine works employed in its shops 4,500 men, and in order to know the amount paid out in wages on each piece of work it adopted a system under which each workman filled out a daily time card, showing the amount of time he was employed on each job, and from such cards the bookkeepers made proper charges in the book accounts kept with each piece of work in terms of money, based on the wages paid the workman. *Held*, that such book entries, properly authenticated, were admissible in evidence against the person charged, and that the time cards were also admissible as corroborative evidence, without proof of the handwriting of the workmen making the same, both under the general law of evidence and under St. Wis. 1911, §§ 4186, 4187, 4189, the latter of which provides that, in case entries "are, in the usual course of the business, also made in other books or papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpoena who were engaged in the making of such entries," if the court shall be satisfied of their genuineness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483, 1628-1646; Dec. Dig. §§ 354, 376.*]

4. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT—ADMISSIBILITY.

That workmen's daily time cards, under the system of bookkeeping employed in a large machine shop, showed the time the workman was employed on each particular job, while the book entries made therefrom were in terms of money, and not of time, constitutes no objection to the admissibility of such books in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PAYMENT (§ 70*)—EVIDENCE—RECEIPTS FROM THIRD PARTIES.

Where a contract by which plaintiff agreed to build engines for defendant required defendant to deliver certain castings therefor f. o. b. at plaintiff's shops, receipts from the railroad company for freight paid by plaintiff on such castings are admissible in evidence in support of charges made against defendant for such freight.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 203, 204, 206-218; Dec. Dig. § 70.*]

In Error to the Circuit Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

Action at law by the Maryland Steel Company against the Wisconsin Steel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Maryland Company recovered judgment against Wisconsin Company for a balance alleged to be due for work done by Maryland Company at its shops on three engines for Wisconsin Company.

Work on two of the engines was admittedly covered by a written contract between these parties. Circumstances leading to the execution of this contract were these: Wisconsin Company had a written contract with Mesta Company of Pittsburgh for the three engines. A strike in the Mesta shops stopped the work. Wisconsin Company, in urgent need of the engines, tried to have Mesta Company sublet the work. Maryland Company declined to enter into any relations with Mesta Company, but made the following contract with Wisconsin Company:

"The work to be performed to this agreement is the complete machining of parts and assembling of same of two (2) low pressure Westinghouse blowing engines.

"It is agreed between the parties of this contract that the castings for said engines, including all parts to be machined, shall be delivered free on board cars Sparrows Point, the same to be machined as per blue prints and specifications submitted, and delivered f. o. b. cars Sparrows Point, Md.

"It is understood and agreed between the parties of this contract that the consideration for the work to be performed shall be cost, plus burden (afterwards agreed upon as 40% of cost), plus 10%; the 10% being profit over and above actual cost and burden, which it is agreed shall be paid the Maryland Steel Company, as their bills may be rendered from time to time, and shall be paid when the machined parts are delivered on board cars at Sparrows Point.

"It is understood and agreed between the parties of this contract that an inspector employed by the Wisconsin Steel Company shall be admitted to their works during working hours and allowed to inspect and pass on any parts of said work under way, and it is further agreed that any work rejected by said inspector, owing to imperfect workmanship, or other reason, shall be open to adjustment between the inspector and your general superintendent, or foreman of shop, and it is agreed that, if these two parties cannot agree, the third party shall be called into settle the dispute."

Thereupon Mesta Company agreed to indemnify Wisconsin Company against having to pay more for the two engines than the Mesta contract price.

Maryland Company made and delivered the three engines, and claimed pay for the third engine under an alleged parol contract of the same tenor as the written contract. Wisconsin Company then for the first time realized that it had failed to take indemnity from Mesta Company for the third engine, and denied the alleged parol contract.

At the trial plaintiff undertook to show (1) the existence of the alleged parol contract and (2) the actual cost to plaintiff of machining and assembling the parts of the three engines. (For the additions of 40 per cent. burden and 10 per cent. profit are merely matters of calculation.) The jury by their general verdict, and also in answer to a special question, found that the parol

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

contract had been duly made. One of defendant's contentions is that there was no evidence to warrant this finding.

To prove cost, plaintiff introduced, over defendant's objections, various books, cost sheets, and workman's time cards.

Some of these objections are based on the following sections of the Wisconsin statutes:

"Sec. 4186. Whenever a party in any cause or proceeding shall produce at the trial his account books and swear that the same are his account books, kept for that purpose; that they contain the original entries of charges for goods or other articles delivered, or work and labor or other services performed or materials found, and that such entries are just, to the best of his knowledge and belief; that said entries are in his own handwriting and that they were made at or about the time said goods or other articles were delivered, said work and labor or other services were performed or said materials were found, the party offering such book or books as evidence, being subject to all the rules of cross-examination by the adverse party that would be applicable by the rules to any other witness giving testimony relating to said book or books, if it shall appear upon the examination of said party that all of the interrogatories in this section contained are satisfactorily established in the affirmative, then the book or books shall be received as presumptive evidence in proof of the charges therein contained.

"Sec. 4187. Whenever the original entries mentioned in the preceding section are in the handwriting of an agent, servant or clerk of the party the oath of such agent, servant or clerk may in like manner be admitted to verify the same, and said books shall be testimony in the same manner as the books mentioned in the preceding section: Provided that such books mentioned in this and the preceding section shall not be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money to third persons, or charges for rent."

"Sec. 4189. Any entries made in any book by a person authorized to make the same, he being dead, may be received as evidence in a case proper for the admission of such books as evidence. Entries in a book or other permanent form, other than those mentioned in sections 4186 and 4189b, in the usual course of business, contemporaneous with the transactions to which they relate and as part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpoena of the trial court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of the business, also made in other books or papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpoena who were engaged in the making of such entries; but before such entries are admitted the court shall be satisfied that they are genuine and in other respects within the provisions of this section."

Frank H. Scott, Edgar H. Bancroft, Redmond D. Stephens, John E. MacLeish, and George N. B. Lowes, all of Chicago, Ill., and John A. Aylward, of Madison, Wis., for plaintiff in error.

Victor Elting, of Chicago, Ill., and John M. Olin, of Madison, Wis., for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge (after stating the facts as above). [1] Respecting the contract for the third engine, Lee, plaintiff's master mechanic, testified that Wells, defendant's manager, while going through

plaintiff's shops and looking over the work being done on the two engines, said, "Lee, I'm going to send you that high pressure engine to build;" that Lee answered, "All right, send it along;" that, as Wells was leaving, Lee called him back and asked, "Have you seen Mr. Martin (plaintiff's manager) about this?" that Wells replied, "No, but I am going to;" that Lee informed Martin of Wells's intention to send the castings (then at the Mesta plant) of the third engine to be machined and assembled by plaintiff; that within a week or so castings of the third engine began to arrive, intermingled with castings of the other engines; that plaintiff accepted these castings and built this engine along with the others.

[2] Defendant contends that the above-stated conversation between Lee and Wells did not constitute a contract. In and of themselves the words did not. Though defendant, through Wells, made a proposal, Lee not only had no authority to accept for plaintiff, but notified Wells, in substance, that he could not bind plaintiff without Martin's approval. But, in our judgment, the words, in connection with the relations of the parties and the act of defendant in sending the castings and the act of plaintiff in accepting the castings for machining, completed the contract. When defendant sent the castings, the jury were warranted in finding that this was done in pursuance and in renewal of the proposal made to Lee, and that the proposal, in view of the relations of the parties and the status of the work on the two engines, meant and was intended to mean that plaintiff should do the work on the third engine along with the work on the other two and on the same terms. And when plaintiff accepted the castings and undertook the work, the jury were warranted in finding that plaintiff, though nothing was said between the parties at that time, accepted by its acts the proposal of defendant as effectually as words could have done so. Acts and circumstances that show, according to the ordinary course of dealing and the common understanding of men, a mutual intent to contract, may be taken in law as the basis for implying a contract in fact. 15 Am. & Eng. Ency. of Law (2d Ed.) 1078, and cases cited.

[3] Plaintiff had a large shop, employing over 4,500 workmen at the time in question. In order to know how much was paid in wages in the execution of every job, whether for itself or others, plaintiff employed a cost system at the bottom of which were workmen's time cards. On registering in, a clerk saw to it that each workman got his own card; on registering out that each deposited his card in a locked box. If a workman failed to deposit his card, his time, which should have been accounted for on the card, would not appear in the pay roll. These cards were before the workmen at their respective places, and it was their duty, and their practice in pursuance of that duty, to note in writing on their cards the amount of time given to each separate piece of work. From these cards, bookkeepers prepared the pay rolls, and also sheets which distributed to each job each workman's time upon that job, not in terms of time as reported on the card, but in terms of dollars and cents on the basis of wages paid. Then upon

plaintiff's account books these items were charged against each job and against the parties who were having the job work done.

"Regular entries in due course of business are admitted as exceptions to the hearsay rule. Wigmore on Ev. c. 51. To bring entries within the exception, there must appear, according to the general law of evidence, a practical necessity for their introduction and a circumstantial guaranty that the transactions actually took place as recorded. The practical necessity is apparent in large mercantile and manufacturing businesses, where a transaction that has been participated in by numerous employes in the course of their employment is duly recorded as an original entry in permanent form by one who is charged with that duty in pursuance of an established system. Wigmore, § 1730." *Feuchtwangner v. Manitowoc Malting Co.*, 187 Fed. 713, 109 C. C. A. 461.¹

Plaintiff's books, in which original entries (based on the cards) in permanent form were made in pursuance of a duty, were properly admitted in accordance with the foregoing rule. The 4,500 workmen could not keep plaintiff's books of account. The limit of practicability was for them, under an orderly system, to furnish the data in the aggregate from which bookkeepers regularly employed for that purpose could make up the separate accounts.

Workmen's time cards and other parts of the system (apart from the books) were properly admitted, in our judgment, if for no other reason, because they tended to furnish the "circumstantial guaranty" of the correctness of the book entries.

But we are of the opinion that the books, time cards, and other parts of the system were admissible under the Wisconsin statutes as well as under the general law of evidence. These statutes, indeed, impress us as intended for a statutory ratification of the general law above stated. The books and entries were identified in accordance with sections 4186 and 4187. And the time cards and other parts of the system were admissible, without direct proof of the handwriting of the workmen, under the last sentence of section 4189. These entries

¹ See *Firemen's Ins. Co. v. Seaboard A. L. Co.*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517; *Donovan v. R. R. Co.*, 158 Mass. 450, 33 N. E. 583; *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190; *Diamant v. Colloty*, 66 N. J. Law, 295, 49 Atl. 445, 808; *Cockran v. Rutter*, 76 N. J. Law, 375, 69 Atl. 954; *Corkran v. Taylor*, 77 N. J. Law, 195, 71 Atl. 124; *Madunkeunk Co. v. Allen Co.*, 102 Me. 257, 66 Atl. 537; *Wells Whip Co. v. Tanner's M. F. Ins. Co.*, 209 Pa. 488, 58 Atl. 894; *Pelican Lumber Co. v. Johnson*, 44 Tex. Civ. App. 6, 98 S. W. 207; *Pittsburgh, etc., R. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. Rep. 316; *Reyburn v. Queen City Co.*, 171 Fed. 609, 96 C. C. A. 373; *Cooke v. People*, 231 Ill. 9, 82 N. E. 863; *Richardson Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496; *Mahoney v. Hartford Ins. Co.*, 82 Conn. 280, 73 Atl. 766; *Hitchner Co. v. Penn. R. Co.* (C. C.) 158 Fed. 1011; *Ryan Car Co. v. Gardner*, 154 Ill. App. 565. And compare: *Dohmen v. Blum's Estate*, 137 Wis. 560, 119 N. W. 349; *Stickle v. Otto*, 86 Ill. 161; *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314, 12 C. C. A. 129; *Rumsey v. N. Y. & N. J. Tel. Co.*, 49 N. J. Law, 322, 8 Atl. 290; *San Francisco Teaming Co. v. Gray*, 11 Cal. App. 314, 104 Pac. 999; *Carlton v. Carey*, 83 Minn. 232, 86 N. W. 85; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656; *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023; *Kent v. Garvin*, 1 Gray (Mass.) 148; *Putnam v. Grant*, 101 Me. 240, 63 Atl. 816; 1 *Greenleaf on Evidence*, § 118 (Note); *Corr v. Sellers*, 100 Pa. 169, 45 Am. Rep. 370.

related to the same transaction as the book entries; they were made in the usual course of the business, by men whose duty it was to make them, and on papers provided as parts of a system of records. The only condition of their admissibility is that "the court shall be satisfied that they are genuine and in other respects within the provisions of this section." On proof of how the cards were prepared, how furnished to the workmen, how taken up, how preserved, and how produced at the trial, the court might well hold, preliminarily, that they were genuine. And since the presence of the workmen to prove their handwriting upon the cards is expressly dispensed with, it should not be inferred that other witnesses must be produced who could testify to the handwriting of 4,500 workmen. If, from other proof above indicated, the court has properly become satisfied that the cards are genuine, proof of handwriting, by others, when the workmen themselves are excused, would be superfluous. Not only superfluous, but impracticable, for it might well be more difficult to find witnesses qualified to verify 4,500 handwritings than to produce the men themselves. Therefore the "other respects" in which the cards must meet the provisions of the section are that they relate to the transactions in suit and were made contemporaneously therewith. In *Dohmen v. Estate of Blum*, 137 Wis. 560, 119 N. W. 349, the court held that the plaintiff's own books of account were admissible under sections 4186 and 4187, or not at all, and denied plaintiff's contention that his books were nevertheless admissible under section 4189, saying:

"The books could not come within both sections. Section 4189 renders competent only 'entries in a book or other permanent form other than those mentioned in sections 4186 and 4189b.'"

But the court had nothing before it involving the construction or application of the last sentence of section 4189, which, it seems to us, if it is to have any force whatever, must apply to scratch books or papers like salesmen's slips and workmen's cards, from the information on which the first entry is made on the permanent record.

[4] A further objection to plaintiff's system of records was that the information on the workmen's cards was not entered on the books in terms of time, but in terms of money. If a salesman's slip, showing the sale of a handkerchief, for example, were written in French, we see no valid objection to putting down the information in English. The essence of the matter is whether the information has been correctly set down. The bookkeeper identifies his books, and testifies that the entry was made in regular course of business and is just and accurate to the best of his knowledge. For purposes of verification, a retranslation of the English into French would furnish as good a basis of comparison as English with English or French with French. And so here, the entry in terms of money could be readily retranslated into terms of the workman's time.

Foremen at plaintiff's plant, who had general duties of superintendence, received salaries which were included in burden or overhead expense. Certain subforemen were paid wages for time along with the workmen. Defendant insists that the wages of these subforemen should not have been included in the labor cost. Evidence showed that

such a subforeman was an experienced mechanic, looked after certain machines and the operations thereof, advised the operatives with reference to the doing of the work, and ran machines, when operatives were in difficulties, until the operatives came to understand the trouble. We find that from all the evidence bearing on the matter the jury were justified in concluding that the wages of such subforemen were properly included in labor cost.

Witnesses who explained plaintiff's system of records were permitted to testify that there had never been "any controversy over any bills rendered under this system to customers heretofore." We deem this testimony proper as incidental proof of the trustworthiness of the system.

One Fife, a cost man of the Mesta Company, was at plaintiff's shop and checked up the work on defendant's engines. Written reports of his checking were admitted in evidence. They were not admitted, however, as independent documents, but only in connection with his testimony on the subject. This, we think, was unobjectionable.

[5] Freight receipts were admitted in evidence. It appears from the record that some of the papers were "delivery" receipts, not "freight" receipts. Plaintiff insists that the delivery receipts disclose the amounts paid by plaintiff for freight on defendant's castings as clearly as do the freight receipts. But we will not go into that matter, because court and counsel all treated the papers as being of the same class. Nor will we set forth the evidence to show that the receipts were the genuine receipts of the railroad companies. The only question of law in this connection, which was pressed upon the attention of the court and ruled upon, was the admissibility of genuine receipts to prove plaintiff's payments of freight upon defendant's castings.

As a general rule a receipt of a stranger to the suit is not admissible against a party as proof of the fact of payment. But there are exceptions. One is the receipt of a person who is pointed out in the contract of the party against whom the receipt is offered. 23 Am. & Eng. Ency. of Law (2d Ed.) 981, 982, and cases cited.

In the contract sued upon in this case it was agreed that the castings should be delivered f. o. b. cars at plaintiff's station. This meant that, if the shipper did not pay the freight in advance (as quite generally the shipper does not), the consignee should pay it and charge it to the shipper's account. So the contract, in view of defendant's failure to prepay the freight, designated the railroad companies as parties to whom plaintiff should make payments on defendant's account.

On review of the entire record, we find not only that no errors were committed in the trial, but that any other verdict and judgment would have been a miscarriage of justice.

The judgment is affirmed.

BARTLETT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,839.

INDIANS (§ 15*)—LANDS—RESTRICTIONS ON ALIENATION—POWER OF CONGRESS.

It is not within the power of Congress to impose restrictions on the alienation of land allotted to an Indian after the restrictions imposed by prior laws have expired and both the equitable and legal title has become vested in the allottee, and acts general in their terms should not be construed as intended to apply to such cases.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States against H. U. Bartlett and Theo. G. Lashley. Decree for the United States, and defendants appeal. Reversed.

George S. Ramsey and C. L. Thomas, both of Muskogee, Okl., for appellants.

John B. Meserve, Asst. U. S. Atty., of Muskogee, Okl. (William J. Gregg, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. From the facts in this case it appears that one Moses Wiley, a duly enrolled three-quarters blood Indian, was, on the 30th day of June, 1902, allotted 160 acres of land, 40 acres of which was selected as a homestead. The remaining 120 acres of said allotment, not being a part of his homestead, is the land involved in this case. The patent to the land was issued to Wiley on March 10, 1903. On January 26, 1912, nearly nine years after the patent, Wiley and his wife conveyed the 120 acres, being his allotment other than the homestead, to one H. U. Bartlett, which deed was filed for record in the office of the register of deeds of Creek county, in the state of Oklahoma, on the 30th day of January, 1912, and duly recorded. On the 29th day of January, 1912, H. U. Bartlett and wife conveyed said lands by quitclaim deed to Theo. G. Lashley, which deed was, on the 30th day of January, 1912, filed for record in the office of the register of deeds of Creek county, Okl., and duly recorded.

On August 10, 1912, the United States filed its bill in equity in the United States District Court for the Eastern District of Oklahoma, seeking to have the said deeds from Moses Wiley and wife to H. U. Bartlett, and from H. U. Bartlett and wife to Theo. G. Lashley, canceled, annulled, and set aside, and the title quieted to said lands in Moses Wiley. Appellants filed a demurrer to the bill, which was overruled, and, appellants electing to stand upon their demurrer, a de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cree was entered as prayed in the bill, from which appellants prosecute this appeal.

Counsel for the government, in their brief, concede that under the terms of the act of Congress, under which the allotment was made to said Moses Wiley, the lands in question were impressed with a five-year period of restriction against alienation; that said five-year restricted period expired by limitation on the 8th day of August, 1907; that these lands were free from restrictions for the period of time intervening between the 8th day of August, 1907, and the 27th day of July, 1908. They claim that on the 27th day of May, 1908, Congress passed an act reimposing restrictions against the alienation of this land by said Moses Wiley, and they say:

"The single issue presented by this appeal, and the sole question before the court for its determination, is as to whether or no the surplus allotment of a Creek Indian of the three-quarter blood was alienable by the allottee on and after the 27th day of July, 1908."

The lands in question were allotted to Moses Wiley under an act of Congress of June 30, 1902 (32 Stat. 500, c. 1323). So much of that act as is applicable to the consideration of the question before us is found in section 16 of the act, and the applicable portion reads as follows:

"Sec. 16. Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

From this it clearly appears that the restriction upon the lands in question were limited to the period of five years from the date of the approval of the supplemental agreement. It is claimed by the government under act of May 27, 1908, a restriction against alienation was reimposed. So much of Act May 27, 1908, c. 199, found in 35 Stat. 312, as is applicable here, is found in the first section, as follows:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: * * * and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. * * *"

It is contended on the part of appellants that the foregoing act of May, 1908, is inapplicable, as it expressly provided that the act should

not be construed as imposing restrictions removed from land by or under any law prior to the passage of that act; that, as the restrictions in this case had expired prior to the passage of the act, they came within the exception, for, as is argued, the restriction being imposed by an act of Congress, and limited to a period of five years, when that period expired the restriction was removed by the law which imposed it. It is unnecessary for us to pass upon the correctness of this statement, however, for we are of the opinion that it was not the intent, nor within the power, of Congress, to reimpose a restriction upon the alienation of lands, against which none at the time existed. True it is that the Supreme Court, in *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, held that it was within the power of Congress to continue or extend the period of restriction against alienation during the period of an existing restriction against alienation. The Supreme Court, however, in that case, expressly referred to the fact that the title to the allotment was still held by the United States in trust for the Indian; that, while the land was held by the United States in trust for the Indian allottee, it was competent for Congress to extend the trust period, and prohibit alienation during such extended period. We find nothing in that case holding that, after the trust period had expired and both the legal and equitable title had fully vested in the allottee, such allottee being a citizen of the United States, Congress could thereafter reach out and withdraw the land from alienation and taxation by the state and local municipalities. As soon as the title, both legal and equitable, to the land in question became vested in Moses Wiley, it was subject to taxation by the state and county authorities, and Moses Wiley had full dominion over the same, notwithstanding in many respects the government still retained a guardianship over him.

Suppose, for instance, Moses Wiley had received title to land by inheritance from a white ancestor? Could it be said that, because of the guardianship of the United States over him, Congress could deprive him of his full property rights in and to such land, and also withdraw the same from state or municipal taxation? It seems clear to us that it could not; and, if not, we fail to see upon what principle it can be said it can draw to itself control over the alienation of land, the title to which, both legal and equitable, it has conveyed to the Indian. In *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, it was held that the United States, though retaining its guardianship over the Choctaw Indians, could not maintain an action to set aside conveyances made by Choctaw Indians to lands against the alienation of which no restriction was imposed.

The only case brought to our attention wherein it has been held that the government, by virtue of its guardianship alone, could lawfully restrain an Indian from alienating lands to which he had the full title in fee, and in which the United States had no legal or equitable interest, is the case of *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, in the opinion of which there is an expression to the effect that the government may impose such restriction. The question, however, was not involved in that case, and the expression to that ef-

fect is mere obiter. The opinion in that case covered a number of cases, and was reviewed by the Supreme Court in 224 U. S. 415, 32 Sup. Ct. 425, 56 L. Ed. 820, under the title of *Heckman v. United States*, in 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, under the title of *Mullen v. United States*, in 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841, under the title of *Goat v. United States*, and in 224 U. S. 471, 32 Sup. Ct. 549, 56 L. Ed. 847, under the title of *Deming Investment Co. v. United States*; and the judgment was reversed, in so far as it held that the United States could maintain an action to set aside conveyances made to lands after the restriction had terminated.

We are of opinion that, as the restriction against alienation of the lands in question expired, and the full title in fee vested in *Moses Wiley*, prior to the passage of the act of May 27, 1908, the United States has no such interest in the lands as entitles it to maintain this action.

The judgment is therefore reversed, and the cause remanded to the court below, with directions to sustain the demurrer and dismiss the bill.

ROUX v. COMMISSIONER OF IMMIGRATION AT PORT OF
SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,164.

ALIENS (§ 54*)—PROCEEDINGS FOR DEPORTATION—FAIRNESS OF HEARING.

Under the rules of the Department of Commerce and Labor, of November 30, 1911, governing hearings in case of aliens arrested for deportation as being unlawfully in the United States, which carefully provide that the alien shall be advised of his right to have counsel and his reply entered on the record, that if he selects counsel the latter shall have the right to be present, and to introduce evidence, and that any written argument filed by him shall be forwarded with the record to the Department, a woman so arrested, who did not speak English, and whose friends, although she was told of her right to have counsel, were advised by the inspector that it was not necessary, and led to believe that the case was not serious, in consequence of which she did not employ counsel, and as a result of the hearing was ordered deported, was not accorded the full and fair hearing intended by the rules; and the order based thereon is invalid.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Petition by Alexandrine Roux against the Commissioner of Immigration at the Port of San Francisco for a writ of habeas corpus. Writ denied, and petitioner appeals. Reversed.

This case comes here on appeal prosecuted by Alexandrine Roux from a judgment denying her release upon writ of habeas corpus; she being held by appellee for deportation as being an alien unlawfully within the United States, in that she has been "found employed by, in, or in connection with, a house of prostitution, or resort habitually frequented by prostitutes or where prostitutes gather."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petition for the writ shows, among other things, that petitioner has for more than three years last past continuously next preceding the filing of the petition and the date of her arrest been an actual resident and denizen of and in the city and county of San Francisco, state of California, and has not within said time changed her said residence or domicile; that petitioner lawfully came into the United States from the republic of France about ten years ago, landing at New York about January 2, 1902, and thereafter came to San Francisco, which was more than three years ago; that about October 1, 1911, the Commissioner of Immigration at San Francisco unlawfully and by force arrested and imprisoned petitioner and now holds her in custody, and threatens to and will deport her, unless stayed by an order and judgment of this court; that petitioner is not a prostitute, but is a reputable woman, but is accused on the ground that she is employed by, in, and in connection with, a house of prostitution solely and exclusively as a cook, in alleged violation of section 2 of the act of Congress of March 26, 1910 (Act March 26, 1910, c. 128, 36 Stat. 264 [U. S. Comp. St. Supp. 1911, p. 502]); "that at the hearing held by said Commissioner of Immigration your petitioner was denied the right to have an attorney or legal counsel to represent her at every or any stage of the proceedings; that she was advised that it was not necessary to have the services of an attorney or legal adviser to defend her; that, on the contrary, your petitioner by and through said Immigration Commissioner, his subordinate officers and employes, was forced to submit to an inquisition and compelled to answer the interrogatories of said officers, without being allowed the right of counsel, or any attorney to represent her;" that said charge was and is untrue, and that petitioner was ready to prove that she had resided within the United States, at San Francisco, for the period of time claimed by her; that she did not come within the provisions of the law invoked for her deportation; and that the provisions of said act of March 26, 1910, in so far as they apply to petitioner, are unconstitutional and void.

Petitioner further alleges that she was not given a full or fair or any legal hearing before the Commissioner of Immigration, was denied the right of appeal to the Secretary of Commerce and Labor, and that such hearings as were had were merely private investigations made without petitioner's consent, and without her presence or her being represented by counsel. Wherefore she prayed that a writ of habeas corpus issue.

On October 24, 1911, the petitioner was brought before Inspector F. Watts on a warrant of arrest and made a statement under oath, P. Lohse acting as interpreter, from which it appears that her name is Alexandrine Roux, a widow; that she has two daughters, one being with her in San Francisco, and the other in France; that she lives in San Francisco, 1842 Mason street, with her daughter; that she first came to the United States about ten years ago; that she has been back to France, departing therefor April 13th, but returned again to the United States, arriving in New York August 29, 1911; that she has always worked for a living, her occupation being a cook, and has "always worked in houses of prostitution, because the wages there are a good deal higher than in other places," and she needed the money, but that she has never practiced prostitution, and did not know that the law prohibited aliens from working in or around houses of prostitution; that she had been working in Madam Nana's house only three weeks as cook and chambermaid.

At the end of the statement petitioner was informed by the inspector as follows: "By order of the Secretary of Commerce and Labor, in a telegram dated October 21, 1911, you have been arrested on the charge that you are an alien employed by, in, or in connection with, a house of prostitution. You have the right to be represented by counsel and to see all the evidence against you. You will also be enlarged upon furnishing satisfactory bond in the sum of one thousand dollars. Do you desire to avail yourself of the right of counsel?" To which she replied: "As soon as my friends come, I will be able to decide."

A continuation of the hearing was had at Angel Island, October 30th, before Inspector Ainsworth. The petitioner produced two witnesses in her behalf, namely, A. Esmiol and William M. Pellan. Esmiol had known petitioner

about nine years, and testified that her present occupation was a cook in a sporting house; that she had been a cook in such houses for about five years; and that he knew her to be a good woman, "a thorough good and honest woman." Pellán had known the witness ten years, and testified that she was cooking in a sporting house, but that she was "a correct woman in every way." Thereupon the record in the case was transmitted by the Commissioner to the honorable Secretary of Commerce and Labor, with a recommendation that a warrant of deportation issue. Upon the proofs thus rendered, the honorable Secretary of Commerce and Labor found that petitioner was in the United States in violation of the act of Congress approved February 20, 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1911, p. 499]), as amended by the act of May 26, 1910, and she was directed to be deported.

In the case at bar the cause went to a special examiner to take testimony and report as to the facts. Rosalie Roux, the daughter of petitioner, there testified that she and Mr. Lombard went to see the inspector, Mr. Watts (this after the petitioner had made her statement, but upon the same day); that she had a conversation with him (Watts); that she asked him if it was necessary for her to get a lawyer; and that he told her, "No;" and so she did not bother to get a lawyer. If she had, she could have taken one there. The witness further stated that the inspector told her to take two witnesses with her, and that that was all that was necessary, and that that was all she did.

Lombard testified that he spoke to Mr. Watts and asked him what was necessary to be done; that he asked the inspector what was the trouble, to which he answered, "I cannot give you much information," but he asked him (Lombard) a few questions and asked a question also of the daughter of the lady. He said: "Well, the case is not much; that is all right; don't trouble yourself. She can go out on bail for \$1,000; \$1,000 bail will get her out of here, and all she has to do is to take two witnesses along at the first meeting of the commissioners." And that he further stated: "The two witnesses only have to tell what they know about the lady; if the lady is all right, it will only be a matter of a few days." Further on the witness testifies that he wanted to know if really the case needed a lawyer, and that he (Watts) said: "Oh, well, it is no use; that case is all right; you don't need no lawyer." On cross-examination the witness' rendition of what the inspector said was: "Never mind about a lawyer; there is hardly anything to it. * * * And that he said further: "You just come, you and your wife; you don't need any other witnesses." The witness then says that he (witness) advised the daughter not to procure a lawyer.

The petitioner further testified that at the time she made her first statement to Inspector Watts Lohse, the interpreter, stepped with her to one side, and told her that there was no necessity of having a lawyer. Lohse denies that such a conversation took place. Inspector Watts was not called by reason of his absence in the East.

Marshall B. Woodworth, of San Francisco, Cal., for appellant.

John L. McNab, U. S. Atty., of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). Two questions are presented by this record and insisted upon by counsel for petitioner: First, whether petitioner was awarded a full and fair trial before the inspectors, for her first hearing was had before Inspector Watts and her subsequent hearing before Inspector Ainsworth; and, second, whether she was deportable under the act of February 20, 1907, as amended by the act of March 26, 1910, upon the charge preferred against her.

Rule 22 of the Department of Commerce and Labor, clauses (b) and (c) of subdivision 4, provides:

"(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.

"(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written statement submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

Rules of November, 30, 1911.

These provisions indicate the solicitude of the Department of Commerce and Labor that the alien shall have a fair and altogether impartial and unbiased hearing, free from restraint or any undue influence in the manner of his defense to any charges made against him upon which he may be deported. Was the petitioner accorded such a hearing before the inspectors?

It is unquestioned that petitioner was duly apprised of her right to be represented by counsel at the hearing, and to inspect all the evidence adduced against her. She replied that as soon as her friends came she would be able to decide. Later in the day her daughter came, accompanied by Lombard, and they made it their purpose to inquire whether it was necessary that petitioner should procure counsel in her defense. They were told by the inspector that it was not necessary to get a lawyer; that it was no use; that the case was all right; and that they did not need a lawyer; to "never mind about a lawyer; there is hardly anything to it. * * * You just come, you and your wife. You don't need any other witnesses." This latter to Lombard. Moved by this advice, Lombard advised petitioner that it was not necessary for her to have a lawyer, and none was secured. These witnesses were reputable, namely, the daughter and Lombard, and their testimony is in no way contradicted or discredited. Later two witnesses, Esmiol and Pellán, were produced and their testimony heard. Thus petitioner complied with the suggestion of the inspector to bring two witnesses.

Rule 22 but reflects how essential it may be for the accused to have counsel:

"He [counsel] shall be permitted to be present during the further conduct of the hearing to inspect and make a copy of the minutes of the hearing."

And:

"At the close of the hearing [it is further provided] the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

The honorable Secretary of Commerce and Labor is the adjudicating officer who determines upon the record whether deportation shall follow, and the only representation that the accused can have before that officer is through the argument of counsel. If, therefore, she is deprived of counsel in the hearing before the inspector and of the opportunity to be heard before the honorable Secretary of Commerce and Labor, it is manifest that she is not accorded the full and fair trial that the rules of the Department of Commerce and Labor are intended to secure.

Now, we are not impressed that there was any intimidation exerted on the part of the inspector to prevent the petitioner from employing counsel, but we do think that he overpersuaded her, and thereby induced and unduly influenced her not to employ counsel, and that by reason thereof she had none. She was led to believe, or at least such is the natural and indubitable inference to be drawn from the language of the inspector, that the case against her was a weak one; he saying:

"There is hardly anything to it."

The effect is the same, whether she was overpersuaded from employing counsel or otherwise induced to forego the privilege; she did not employ any. The inspector should have advised her at all times that she was entitled to counsel, and should have refrained from saying anything that would have a tendency to induce her not to employ one.

We conclude, therefore, that the petitioner was not awarded the full and fair trial that the law and rules of the Department of Commerce and Labor accord her. In support of these views, see *United States v. Williams* (D. C.) 185 Fed 598.

This renders it unnecessary to discuss the second point.

It follows that the judgment of the District Court should be reversed and the cause remanded, with directions to discharge the petitioner from custody.

EMPIRE STATE SURETY CO. v. NORTHWEST LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,184.

1. INSURANCE (§ 539*)—EMPLOYER'S LIABILITY INSURANCE—TIME FOR NOTICE OF INJURY—NOTICE "AT ONCE."

In a provision of a policy of employer's liability insurance requiring the assured, on the occurrence of an accident as to which a claim might be made under the policy, to "at once" give notice thereof to the insurer, the words "at once" are synonymous with "immediately," and mean, within the intendment of the policy, within a reasonable time, having in view all of the circumstances of the case; and whether notice is so given is a question of fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.*]

For other definitions, see Words and Phrases, vol. 1, pp. 610-611; vol. 4, pp. 3403-3410.]

*For other cases see same topic & § NUMBER in Dec. & Am Digs. 1907 to date, & Rep'r Indexes 203 F.—27

2. INSURANCE (§ 668*)—EMPLOYER'S LIABILITY INSURANCE—ACTION ON POLICY—DEFENSES—FAILURE TO GIVE NOTICE.

A lumber company holding an employer's liability policy, which required it to give notice to the insurer "at once" on the occurrence of an accident which might give rise to a claim under the policy, had an employé injured at a logging camp in charge of a foreman, who took the injured man to a hospital, where he remained 11 months, and then commenced an action against the company. Neither the superintendent in general charge of the mill and the camps, nor the other officers of the company, who were at a distance, had any knowledge of the injury until service of the summons, and they then notified the insurer, which defended the suit under a stipulation that it should be without prejudice to its right to object to want of notice. There was a judgment which the company paid and then brought suit on the policy. *Held*, that the court could not say as matter of law that the notice was not given in compliance with the requirement of the policy, but that the question was properly submitted to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; C. H. Hanford, Judge.

Action at law by the Northwest Lumber Company against the Empire State Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action instituted by the Northwest Lumber Company against the Empire State Surety Company to recover on a policy of liability insurance. The lumber company prevailed, and the surety company prosecutes a writ of error in this court.

The policy of insurance upon which the action is prosecuted contains the following clause: "Assured on the occurrence of an accident in respect of which claim can be made under this policy shall at once given written notice thereof to the company at New York or to the company's duly authorized agent. Assured shall give like notice with full particulars of any claim made on account of an accident so reported, and, if steps are taken to enforce such claim by suit or otherwise, assured shall also deliver to the company all papers and information pertaining thereto immediately upon receipt thereof, whereupon the company shall at its own cost undertake on behalf of and in the name of assured the settlement of such claim or the defense of such suit and the prosecution of any appeal which it may undertake."

The lumber company was engaged in getting out logs, and had a crew of men working under a foreman named Dan Williams. Among the crew was one John Hall, who was injured, in that his leg was broken. This occurred November 4, 1908. Hall instituted an action against the lumber company in the superior court of the state of Washington to recover. He served summons and a copy of the complaint therein October 26, 1909, and later recovered judgment for \$10,000.

Trial was had in the case at bar before a jury. When the testimony was fully submitted, the court was requested to direct a verdict of nonsuit, which was denied. The testimony given at the trial, so far as pertinent, is contained in the bill of exceptions, which recites:

"That on the 4th day of November, 1908, one John Hall, an employé of the plaintiff, who came within the terms of the policy, working in one of the three logging and loading camps maintained by the plaintiff at or near Kerriston, Wash., was injured by having his leg broken, and that he was there working under Dan Williams, a foreman of the gang or camp where the said Hall was injured, all being foreigners and speaking the English

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

language very little. That the company maintained three logging camps for getting out logs and loading the same on cars, a general sawmill plant where it operated its mills, or did its sawing, and a logging railroad for carrying lumber and logs, and that over all was a superintendent named John McRea, who had general charge and control of all the affairs at Keriston, Wash., and general affairs of the plaintiff were in charge of its general secretary and treasurer, L. G. Horton, at Seattle. That about 11 months after the injury the said John Hall brought an action for damages in the superior court of King county, Wash., which was prosecuted, and a judgment recovered in the sum of \$10,000, which cause was afterwards appealed to the Supreme Court of the state, and there affirmed, and thereafter with the costs paid by the plaintiff. That the plaintiff's superintendent aforesaid and the secretary testified that, until suit was brought by said Hall, they had no personal knowledge of the occurrence of the accident whereby the said John Hall was injured, the other officers of the company having no knowledge of the affair, and made no report thereof to the defendant, or any agent thereof, and gave no notice of the accident or anything pertaining thereto, until the service of the summons and complaint in the case brought by Hall in said superior court on the 26th day of October, 1909, whereupon notice was at once given to defendant, and, when the notice was given, the defendant reserved its rights in an agreement made between the parties to this action regularly introduced in evidence as exhibit —, which agreement is as follows:

“Nov. 15th, 1909.

“Northwest Lumber Company, White Building, Seattle, Wash.

“Gentlemen:—In regard to the case of Hall against you pending in the superior court of this county on summons and complaint served Oct. 26th last, I beg to say that in accordance with our understanding I will defend this action as the representative of the Empire State Surety Company, but with the understanding that it will not prejudice your rights, or that of the surety company, respecting the matter as to whether notice of this accident has or has not been given. The matter of notice referred to in the policy which you hold insuring you will be a matter of future adjustment, and without in any way affecting my appearance as attorney in the case or your consenting to my appearance as your attorney in this case and upon the record.

“If this is agreeable to you, please indicate it by your approval hereon, and that will be satisfactory to all parties.

“Yours very truly, [Signed] John P. Hartman.

“The foregoing is read and approved the date first herein stated.

“[Signed] Northwest Lumber Co., G. B. Barclay, Pres.’

—and the said agreement had not been thereafter altered or amended at any time. That after the accident to the said John Hall, whose leg was broken, he was taken in charge by the said foreman, Dan Williams, and from there conveyed first upon the logging road to a railroad, and thence to a hospital in Seattle, about 40 miles distant from the place where the accident occurred, and all being in King county, Wash., in which hospital he remained about 11 months. Thereupon the defendant offered testimony tending to show that it had no knowledge or information in any way of the accident to John Hall occurring November 4, 1909, until after the service of summons and complaint in his case as aforesaid. That because it did not have immediate notice of the accident it was greatly prejudiced and damaged, in that it could not prepare for the trial of the case, as it was bound to under the terms of the policy if notice was immediately given, that it was unable to prepare to defend and defend the case and to obtain testimony, and that prejudice resulted against the defense because of the want of notice, all of which the witness claimed was prejudicial to the interests of the defendant, and all of which the witness claimed was caused by want of compliance with the terms of the policy insuring against loss, for which this suit is brought, and upon cross-examination plaintiff showed that all eyewitnesses were at the trial for Hall save one, whose whereabouts was

unknown, which trial was held in the state court of Washington about April 11, 1910, which witnesses were all called for the said Hall."

John P. Hartman, of Seattle, Wash., for plaintiff in error.

George Donworth, Ovid A. Byers, Alpheus Byers, and Elmer E. Todd, all of Seattle, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above).

[1] The question is presented upon this record whether the court should have determined as matter of law that notice was not given by the lumber company to the surety company as required by the policy of insurance. The surety company claims that notice was not so given. The particular clause under which the controversy arises reads:

"Assured on the occurrence of an accident in respect of which claim can be made under this policy shall at once give written notice thereof to the company at New York or to the company's duly authorized agent."

The words "at once" are synonymous with "immediately," and doubtless mean, within the intendment of the policy, within a reasonable time, having in view all the circumstances of the case. The purpose of the notice is manifestly to give the surety company opportunity to inform itself about the case and properly prepare for its defense. In the nature of things it ought to be given as soon after the accident as circumstances will permit, as ordinarily it is less difficult to assemble the evidence relating to the facts at issue when the transaction is recent than when it is allowed to rest for considerable time. The Supreme Court of New Hampshire (*Ward v. Maryland Casualty Co.*, 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514), in determining the meaning of the word "immediate" used in a like sense as the words "at once" in the present policy, has held that it signifies due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, and that whether the notice is so given is a question of fact. This case has the express approval of the federal Supreme Court. *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 346, 22 Sup. Ct. 833, 46 L. Ed. 1193.

[2] It is self-evident that a party cannot give notice of an accident in respect of which a claim can be made until he himself is informed of it or has knowledge concerning it, and he could not be expected so to do. The clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not. The assured is, however, charged with an active, not merely a passive, duty in the exercise of reasonable care and diligence in the management, supervision, and ordering of his business, so that he may be readily informed of accidents out of which claims for damages may arise. He should adopt such measures and promulgate and require the enforcement of such rules and regulations as are reasonably calculated to insure his obtaining prompt and definite information, and, when he has acquired information of the fact, then his policy requires that he shall give notice "at once" to the surety company. *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291;

Woolverton v. Fidelity & Casualty Co., 190 N. Y. 41, 82 N. E. 745, 16 L. R. A. (N. S.) 400.

In the case at bar there is testimony tending to show that neither John McRea, the superintendent of the lumber company and in general charge and control of the affairs at and about Kerriston, near which place the accident occurred, nor L. G. Horton, the secretary and treasurer of the company, residing at Seattle, who was in charge of the general affairs of the company, had any personal knowledge of the occurrence of the accident whereby Hall was injured, and that the other officers of the company, having no knowledge of the affair, made no report of it to the defendant, or to any agent thereof, and gave no notice of the accident or anything pertaining thereto, until the service of the summons was had in the action instituted by Hall to recover from the lumber company October 26, 1909, whereupon notice was at once given to the surety company.

It does not appear what rules and regulations the lumber company had devised to obtain prompt information of the occurrence of accidents of the kind. It does appear, however, that Hall was working under Dan Williams, who was foreman of the gang or camp where Hall was injured, and that he was taken in charge by the foreman and conveyed to a hospital in Seattle, 40 miles distant, where he remained for about 11 months. It is claimed that Williams was an agent of the lumber company for giving notice to it of the accident, and that, therefore, the company was bound by his knowledge. This is really the crux of the controversy here.

It does not appear that Williams was specially charged by instructions, or by rule, or otherwise, with the duty of giving information to the lumber company of the happening of such accidents, and we are left to determine the question from the mere fact that Williams was foreman of the gang or camp where Hall was injured. The Mandell Case, *supra*, is in point. A driver for Mandell, who kept stables, ran over a man and injured him. Mandell's stables were in South Boston, where his teams were kept, and his own stand was in the city proper. He visited the stables at some time daily, but had a foreman who started the teams in the morning and looked after the stand when he was not there. Mandell directed where the teams were to go and what they were to do, and had oversight over his own business. The court held that he was not chargeable with knowledge of the accident because his servants had such knowledge, and that "neither his drivers, stablemen, nor foreman were his agents for the purpose of giving notice to the company." This is in effect concurred in by the Supreme Court of New York in the Woolverton Case, *supra*. In the latter case, however, the knowledge of the accident was communicated to the officer at the head of the freight department, the company being engaged in the freighting of goods by means of vehicles drawn by horses, and it was held that the knowledge of such agent was the knowledge of the company. In this connection the court says:

"While we thus hold that the plaintiff was chargeable for the delay and neglect of its agents or servants in failing to apprise it of an accident, of the occurrence of which they had acquired knowledge or information, this prin-

ciple must be confined to those agents whose duty it was, either by express regulation of the plaintiff, or by their supervision and control in the natural and proper conduct of business over the subordinate servants by whom the accident had been caused, to transmit such knowledge to their superiors or the company, on which question the notice posted in plaintiff's stables was not conclusive. * * * Nor should the master be charged with the knowledge or information of a coservant of the same grade or rank as the one causing the accident."

The Supreme Court of Minnesota seems to be in conflict with the holding of these cases, the court saying, in *Northwestern Telephone Exch. Co. v. Maryland Casualty Co.*, 86 Minn. 467, 469, 90 N. W. 1110, 1111:

"Appellant is a foreign corporation, and, instead of undertaking the trouble and expense of having agents of its own to look up the facts surrounding occurring accidents, it chose to exact from the telephone company an agreement to be furnished that information, and, having contracted to furnish it, respondent's foreman and men in charge of work when an accident happens are the company's representatives and agents for that purpose, and the duty rests upon them to report to the proper officers of the company."

The terms of the policy in that case were:

"The assured, upon the occurrence of an accident, shall give immediate notice thereof, in writing, with full particulars, to the home office at Baltimore, Md., or to its duly authorized agents."

We are impressed, however, that the doctrine of the Massachusetts and New York cases is the sounder, and that we cannot say as a matter of law, the mere fact appearing that Williams was the foreman of a gang or camp in which Hall was working, and nothing else, that there was imposed upon him the duty of informing the lumber company of the fact, or that his employment in such a capacity carried with it the obligation or responsibility of apprising his employer or principal of all accidents occurring about the work within his knowledge. It must be conceded that it is a peculiar circumstance that neither McRea nor Horton should have learned of an accident of such grave nature for more than eleven months after its happening, but the jury has found on that subject, and its finding is conclusive upon this court. On the other hand, it does not appear that the surety company has been prejudiced in its rights by reason of any delay in being informed or notified of the accident, and it is altogether probable that justice has been done in the premises.

But one other question remains. The court gave an instruction as follows:

"The jury, therefore, are required to determine from the consideration of the evidence in the case whether that condition of the policy has been met by the plaintiff. That notice was given is undoubtedly true, as shown by the evidence. The question is, was it given at once, and that is a question for the jury to determine from a consideration of all the circumstances in the case whether the plaintiff acquired its rights under this policy by giving prompt notice of the happening of the injury. The degree of promptness, of course, depends upon all the circumstances of the case. When did the accident happen, and when did the plaintiff in the case become informed of it so as to be in a position to give notice? because it could not give the notice until it did know it. But in law it would be presumed to know what would have been known in the exercise of intelligence and vigilance such as business men conducting important business affairs usually do have when

they are attending to their business properly, when they have efficiency to their service. If that notice was not given at once, as I have defined this phrase, the plaintiff has failed to make out a case, and your verdict should be for the defendant."

It is urged that this instruction does not state the law applicable; but, without discussing it in particular, it would seem that the instruction was quite as favorable to the plaintiff in error as it could reasonably ask.

The judgment of the District Court will be affirmed.

ROSS, Circuit Judge, dissents.

UNITED STATES v. BOOTH-KELLY LUMBER CO. et al

BOOTH-KELLY LUMBER CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,175.

PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENTS—FRAUDULENT ENTRIES—EVIDENCE CONSIDERED.

Evidence considered, in a suit by the United States for the cancellation of patents to public lands entered under the stone and timber act on the ground of fraud, in that the entries were made for the benefit of defendant lumber company, which paid the government price and all fees and expenses and gave each entryman a bonus on receiving a deed to his land, and *held* sufficient to sustain the allegations of the bill and to entitle complainant to a cancellation of all of the patents.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

Cancellation of patents to public lands, see note to *Hartman v. Warren*, 22 C. C. A. 38.]

Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by the United States against the Booth-Kelly Lumber Company, Stephen A. La Raut, Alice La Raut, Ethel M. La Raut, and Lucy La Raut. From the decree, both the United States and defendant Lumber Company appeal. Reversed on appeal of the United States, and affirmed on defendant's appeal.

On May 24, 1910, the United States brought a suit in the court below to cancel five patents of land which had been issued under the Timber and Stone Act, on the ground that the initial applications of the patentees had been fraudulently made by them for the use and benefit of the Booth-Kelly Lumber Company, and with the understanding at the time when they were made that the entrymen should each convey the land so entered by him to said company. The bill alleged that that company paid and advanced all of the fees, costs, and expenses and purchase price of said land, and paid to each entryman \$100, and received from each a deed. The entrymen were Edward Jordan, Stephen A. La Raut, Alice La Raut, Ethel M. La Raut (now Ethel M. Lewis), and Lucy La Raut, and they were made codefendants with the Booth-Kelly Lumber Company. A decree was taken *pro confesso* against Jordan. On September 21, 1910, all the other defendants answered the bill, denying that the Lumber Company furnished any of the purchase money.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fees, costs, or expenses of acquiring the land, and denying the allegations of fraud on the Timber and Stone Act. The answer alleged that on or about July 22, 1902, the Lumber Company purchased the land entered by Jordan for the sum of \$550, which was actually advanced and paid to and for his use and benefit, and received a warranty deed from him therefor, relying upon the final receipt for said land, and believing that all the proceedings anterior thereto were bona fide, etc.; that on May 7, 1907, Stephen, Alice, Ethel, and Lucy La Raut, by virtue of the patents issued to them, were seised and possessed of full legal and equitable ownership of the land granted by said patents, and that on said day the Lumber Company purchased the land described in said patents, and each of the patentees received therefor the sum of \$600, which sum was actually advanced and paid to and for each of them, relying upon the patents, etc. And there is in the answer this allegation by the Lumber Company: "That this defendant is informed and believes, and therefore alleges, that after the said entries mentioned in said bill were made by said several entrymen, charges were made and filed with the complainant's officials in the Interior Department, whose duty it was to investigate and determine the same, that said entries were fraudulent in character, and were made for the benefit of this defendant, and that said charges were fully investigated by the Interior Department for the purpose of ascertaining the truth or falsity of said charges, and to determine whether patents should be issued upon said entries, or whether the same should be canceled, and that such proceedings were had in said matters that said several entries were fully investigated, by complainant's officials charged with that duty, and testimony and affidavits were taken upon said investigation, and the complainant and said entrymen were duly represented at said hearing and investigation, and that upon a full investigation and hearing upon said charges, and with full knowledge of all the facts, it was found and determined by the said officials that said entries were not fraudulent, and that the irregularities in said entries, if any, were not of sufficient gravity to require or justify the cancellation of said entries, and ordered that patents issue upon said entries for said land, and that patents were thereupon issued therefor, as alleged in said bill of complaint." After a replication had been filed, and at the beginning of the taking of testimony before an examiner, on December 19, 1910, the Lumber Company, Lucy La Raut, and Ethel M. La Raut obtained permission to amend their answer, "so as to admit that the defendant the Booth-Kelly Lumber Company is the holder of the legal title to the lands entered by and patented to Ethel M. La Raut and Lucy La Raut, but denying that it is the equitable owner of said land, and alleging affirmatively that said Ethel M. La Raut, now Ethel M. Lewis, and Lucy La Raut, ever since said patents were issued to them, have been and now are the equitable owners of said land, and that the deeds made by them to the Booth-Kelly Lumber Company were intended to be and were in fact mortgages to secure the payment of certain advances made and to be made to them by said company, to enable them to enter and pay for said land and for other purposes." On the issues so made, and the testimony, the court below entered a decree canceling the patent which had been issued to Jordan and dismissing the bill as to the other entries. From that decree both the complainant and the Lumber Company have appealed.

A. C. Woodcock, of Eugene, Or., and Albert H. Tanner, of Portland, Or., for appellant Booth-Kelly Lumber Co.

John McCourt, U. S. Atty., of Portland, Or.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The evidence shows that some months prior to the date of the entries, and some time during the years 1901 and 1902, the Lumber Company had the land in controversy cruised; that the company was acquiring lands in the vicinity of these lands during those years; that at that time

and until 1907, R. A. Booth was the manager of the company; that between January, 1902, and January, 1903, J. H. Booth was secretary of the company and was the receiver of the United States land office at Roseburg, Or.; that John F. Kelly was the vice president of the company, and that he, under the direction of R. A. Booth, attended to the purchase of lands for the company; that George Kelly, a director of the corporation, had charge of its sawmills and was manager to succeed R. A. Booth in 1907; that at the time of the entries in controversy the company had sawmills at Saginaw, Coburg, Wendling, and Springfield, Or., and that they owned and acquired large tracts of land in the vicinity of those mills; that R. A. Booth is the brother-in-law of Stephen, Ethel, and Lucy La Raut, and that Alice La Raut is Stephen La Raut's wife; that at the time when the entries were made Stephen and Ethel La Raut and Edward Jordan were in the employment of the Lumber Company, and they "were very poor at that time"; that D. H. Brumbaugh was a cruiser in the employment of the Lumber Company, and that at the request of John F. Kelly he showed the entrymen and entrywomen their respective claims. The records of the land office show that all the entries were filed in February, 1902, that the final proofs were made on May 7 and May 8, 1902, that the patents issued on August 3, 1904, and that upon the request of John F. Kelly the patents were delivered by the officers of the Roseburg land office to Frank E. Alley.

As to the main issue in the case, which is whether the lands in controversy were entered pursuant to an understanding or agreement between the applicants and the Lumber Company whereby the latter was to acquire the same, the oral testimony is conflicting. Jordan testified, and the court below found, that he had such an understanding and agreement, and that he entered the land at the instance of one of the officers of the Lumber Company, upon the promise of the payment of \$100 to him for his service in so doing. Mrs. Applestone, a daughter of Alice La Raut, testified that her mother told her that she had taken up a claim for R. A. Booth, and was to be paid \$100 for her claim, that she was paid that sum, and that Mr. Booth was to pay her expenses, and did so. She testified, also, that her stepfather, Stephen La Raut, took up his claim for the same reason that her mother did, but she was unable to say whether it was he or her mother who told her so, and that her mother told her that R. A. Booth had asked her, her stepfather, and Ethel to take up claims, and that her mother said that her stepfather had received \$100 for doing so. She testified, further, that her mother got \$50 more eight or nine months before the time when the witness gave her testimony. There was no contradiction of this testimony by either Stephen La Raut or his wife. They were not called as witnesses, nor were their depositions taken. Mrs. Applestone was apparently a disinterested witness, and no reason is suggested why her testimony should not be given full credence. Ethel and Lucy La Raut testified in the main in harmony with the testimony of R. A. Booth to the effect that the four entries of the La Rauts were made under an agreement with R. A. Booth, who was

their relative, and the then manager of the Lumber Company, by which the Lumber Company was to pay the government price for the land and all the expenses incident to the entries, and keep an account thereof, the repayment of which to the company Mr. Booth guaranteed, and in pursuance of which and as security therefor he took to himself the deeds to the lands which they entered. And there was testimony that in 1910, when Stephen La Raut and his wife desired to remove to Alberta, Canada, they sold their claims to the defendant company for \$50 each in addition to the \$100 they had each received, a price which was satisfactory to them, and that the other two claims still belong to Ethel and Lucy La Raut; the company holding the title as security. The court below found that the Lumber Company acquired by purchase the claims of Stephen La Raut and wife, and that it holds the title to the other two claims only as security for advances made to Ethel and Lucy La Raut.

From the conflicting parol testimony which the record presents, we turn to the evidence shown by contemporaneous entries in the books and records of the Lumber Company, and to facts and circumstances established thereby which do not depend upon human memory for support, and which cannot be contradicted. The following facts are undisputed: The La Rauts, together with Jordan, who was in the employment of the Lumber Company, made their applications for timber claims at the same time, and the company paid their traveling expenses to and from Roseburg and all incidental expenses. The company paid for all the publications of notice, and charged the expense thereof to its stumpage account, and made no charge therefor at any time in its books against the individual entrymen. The company paid the purchase price of the lands and all the fees, traveling expenses, and other expenses incidental to final proof. The final proofs were made in May, 1902, and in July following each of the entrymen executed and delivered a deed of the land. Jordan's deed, and probably all of the deeds, were executed to the company. The deeds from the La Rauts having been subsequently destroyed, the testimony leaves it uncertain whether they were executed to the company or to R. A. Booth. At the time when those deeds were executed, each entryman received the sum of \$100. The deed from Jordan was not recorded until September 6, 1907. The La Raut deeds were never recorded, but in the latter part of 1904 or early in 1905, at about the time of the investigation by the government of land frauds in Oregon, those deeds were returned to the makers and destroyed. Ethel and Lucy La Raut made other deeds in 1907, at which time they were each paid \$25. On February 3, 1910, Stephen La Raut and his wife made a deed of their lands to the company, and were each paid \$50. The entrymen of the claims in controversy never saw the lands, excepting at the time when they viewed them prior to making their entries, and it is admitted that they never made any effort to dispose of them, never inquired about the value of them, or the amount of timber thereon, and made no inquiry as to the expenses of the entries or the payment of taxes thereon, or assumed any control or ownership of the lands. The Lumber Com-

pany on its books charged itself with all expenses in relation to these lands from and after the time when it caused the same to be cruised, shortly before the entries were made. When the final proofs had been taken, and the lands had been paid for, individual accounts were opened under the name of each of the entrymen, in which were charged the payment of the purchase price of \$400 for the land, and a payment of \$100 to each entryman, and each account was balanced by a credit of \$500 to stumpage, and none of them was ever afterward reopened. Each account begins with the entry of the payment of the purchase money of \$400 on May 8, 1902. The accounts with the La Rauts all end on July 31, 1902, with the "charge to stumpage, \$500." The account under the name of Ethel La Raut may serve as a sample of all.

Ethel La Raut.

1902

| | | | |
|----------|--|----------|----------|
| May 8. | J. 108 Check..... | \$400 00 | |
| July 31. | J. 200 Check..... | 100 00 | |
| July 31. | J. 199 Charge to stumpage for lots 9, 10, 15, 16, Sec. 28, Tp. 21—2 West..... | | \$500 00 |
| | | \$500 00 | \$500 00 |

But the expenses of the entrymen in going to Roseburg, lodging there, and returning, the recording fees, and the publication notices were not entered in these individual accounts, but were entered in the books of the company under the heading "Brumbaugh land claims," and were carried into the stumpage account under the item "Cruising." The lands so deeded by the entrymen in 1902 were immediately carried into the general land account of the company. Thereafter the company paid taxes thereon, together with its taxes on other lands, in a sum total. No explanation is made of the fact that the deeds so taken were not recorded. No satisfactory reason is given why the deeds were destroyed. No explanation is given of the fact that for a year and a half after the destruction of the deeds neither Booth nor the Lumber Company had any conveyance from the La Rauts.

The theory that R. A. Booth advanced the costs and expenses and purchase price for the entries in order to assist his relatives who were in poor circumstances, and that he thereafter advanced money to them for the same reason and took the deeds as security illy comports with certain significant facts that appear in the record. One of these is the contemporaneous payment to Jordan and the four members of the La Raut family of the identical sum of \$100 each at the time when their deeds were taken. Another is that neither Ethel La Raut nor Lucy La Raut explained why she received the \$100. Lucy testified that she did not need it, or use it, and that when she received it she loaned it to her father, who paid her interest on it. Another is that not another payment appears by the books of the company to have been made to any of the La Rauts until the time when the company received new deeds from each. When the second deeds were obtained from Ethel and Lucy in 1907, they were each paid \$25. When the deeds were obtained from Stephen La Raut and his wife in 1910,

they were each paid \$50. None of these payments was charged against the La Rauts personally, nor were the old accounts under their names, which had been balanced and closed, reopened; but these payments were each charged in the stumpage account of the Lumber Company. In short, there is nothing in the books of the company to show that any of the La Rauts owed the Lumber Company or R. A. Booth at any time after their accounts were closed, or that the company paid out any moneys to their account, or that the company held any of the conveyances as security, or that R. A. Booth guaranteed the repayment to the Lumber Company of the moneys which it had so advanced. Another important fact is that at the time when the second deeds were obtained from Stephen La Raut and his wife, according to the decided weight of the testimony, their claims were each worth at the lowest estimate \$4,000, and probably \$5,000. A most significant fact, also, is the change which was made in the answer of the defendants when the government began to take its testimony before the examiner. The original answer had then been on file three months. The original answer denied:

"That the entire or any expense attending the making of said entries or purchase, including the payment of said purchase money or the said fees of register or receiver, or all other expenses or disbursements, or any expenses or disbursements, were paid or borne by the said defendant corporation."

It is not claimed, nor can it be, that the answer was prepared by counsel or sworn to in ignorance of the facts. The complaint had drawn the attention of the defendants sharply to the charges which were made as to the alleged fraud in acquiring the lands in controversy. The answer was complete in every detail, and one of its allegations was that the charges made in the bill had been the subject of investigation by officials of the Interior Department, who had fully investigated them for the purpose of ascertaining the truth or falsity of said charges. Another allegation was that the Lumber Company had purchased the lands relying upon the patents, and had paid Jordan \$550, and each of the other patentees \$600, therefor. The answer was sworn to by A. C. Dixon, the manager of the Lumber Company. He testified that R. A. Booth had told him the facts in regard to these claims, and had informed him that he had caused the company's money to be advanced to pay the expenses and purchase price thereof, and that he had guaranteed the repayment of the money to the company. Dixon testified that he was fully advised of the facts, and that he had stated the facts to the attorneys who prepared the answer. He admitted that the answer was read to him; but he testified that without paying attention to the details, or discussing the various points embodied in it, he had signed it, supposing it was a mere matter of form. But he could not explain why the answer was prepared in the way in which it was, nor was any witness called to explain it.

These facts and circumstances, while perhaps they do not amount to a demonstration of the truth of the allegations of the bill, result in a very decided preponderance of the evidence in favor of that conclusion, and they are sufficient in our judgment to overcome all the presump-

tions that attend the issuance of the patents, and are sufficient to meet the requirement of the rule that in a suit to set aside a patent the testimony on which it is done must be clear, unequivocal, and convincing, and must be more than a bare preponderance of the evidence, which leaves the issue in doubt. The findings in the court below were made upon evidence which had been taken before an examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses.

As to the land patented to Jordan, the decree is affirmed. As to the other lands in controversy, it is reversed, and the cause remanded, with instructions to enter a decree for the United States in accordance with the prayer of the bill.

FRONEBERGER v. FIRST NAT. BANK OF CHARLOTTE.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1913.)

No. 1,133.

1. EXECUTION (§ 275*)—SALES—VALIDITY.

Where the purchaser at a sale under an execution stifles bidding, the sale is voidable, but not void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. § 275.*]

Fraud or other wrong in acquisition of real property as creating constructive trust, see note to Cunningham v. Pettigrew, 94 C. C. A. 485.]

2. TRUSTS (§ 365*)—CONSTRUCTIVE TRUSTS—ENFORCEMENT—LACHES.

Laches will defeat enforcement of a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

3. TRUSTS (§ 365*)—CONSTRUCTIVE TRUSTS—ENFORCEMENT—LACHES.

Bill brought in 1911 to declare a bank, which in 1869 bought land under execution, to be trustee for the benefit of the debtors' creditors, on the ground that the bank stifled bidding at the sale, is barred by laches; the fraud having been discovered as early as 1877.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

Appeal from the District Court of the United States for the Western District of North Carolina, at Salisbury; James E. Boyd, Judge.

Bill by Lewis B. Froneberger against the First National Bank of Charlotte. Decree dismissing the bill, and complainant appeals. Affirmed.

Lewis B. Froneberger, a citizen of Tennessee, on December 2, 1911, filed in the court below his bill against the First National Bank of Charlotte, wherein he charges substantially: That prior to October 14, 1869, D. Froneberger, C. Froneberger, and R. Froneberger, under the firm names of D. & R. Froneberger & Co., D. & C. Froneberger, and D. Froneberger & Co., were engaged in mercantile and manufacturing enterprises, were the owners in possession of large and valuable tracts of land situate near Shelby, N. C., were largely indebted, and were unable to pay the same. That actions were brought by creditors, judgments secured, executions issued, and the lands and personal property of these partners were exposed for sale. That the First National Bank of Charlotte, among others, secured judgment against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

D. Froneberger, and on October 14, 1869, the sheriff sold under execution the lands and personal property of the partners to the bank for \$12,500, when the same was at the time reasonably worth \$40,000, and that it secured the same at such inadequate price by unlawfully, fraudulently, and collusively suppressing bidding at the sale. That afterwards Crews, a creditor, issued another execution and caused the lands to be again exposed for sale, became the purchaser thereof, and then instituted action against the bank, the first purchaser, to secure possession, which action was tried in 1877 in a state court of competent jurisdiction, and certain issues submitted to the jury on trial were found for the plaintiff, to the effect that the bank, by its president, did fraudulently suppress the bidding at the sale at which the bank purchased the lands at \$12,500, and that its cash value at the time was \$40,000. That complainant has purchased for valuable consideration and had transferred to him certain specified judgments against these debtors, aggregating \$35,818.45, exclusive of interest. That the bank has sold the lands and personal property, and realized immense profit therefrom.

It is thereupon charged that the bank, by reason of its fraudulent conduct in obtaining the property at such sale, became and is a trustee for the creditors of said firms to the extent of the price realized by it out of the sale of the property, or, at least, to the extent of \$27,500, the difference between \$12,500, its purchase price, and \$40,000, cash value of the property when sold. The bill then sets forth the reasons for the delay in its filing, to the effect that two of the Fronebergers became voluntary bankrupts in 1872; that most of the creditors were nonresidents of the state and had no knowledge of the fraud; that in 1898 and 1899 he first discovered facts and information that led him to believe that the sale was fraudulent and void, which facts and information he communicated to the nonresident creditors; that they declined to institute proceedings themselves, but entered into negotiations with him for the sale and transfer of their judgments and equities in the premises; that these negotiations were continued and not consummated until 1905; that complainant, himself a nonresident of the state, was hampered in his investigations, and, although diligent, did not succeed until within a week before suit brought in obtaining such full knowledge and evidence of the fraud as satisfied his solicitors that he could sustain such legal proceeding.

The prayer of the bill is that the bank be decreed to be a trustee for creditors and an accounting be had. On September 11, 1912, an amendment, by leave of court and with the consent of the defendant bank, was made to this bill, alleging in effect that the creditors who had assigned their judgments to complainant were, at the time such assignments were made, nonresidents of the state of North Carolina, and therefore competent to sue in the federal court if no such assignments had been made by them. To the bill a demurrer was filed, alleging substantially that on its face is shown want of equity; that the matters alleged touching the purchase by Crews at the second sale under execution, the suit instituted by him, and the matters alleged to be shown by the record thereof are irrelevant; that the judgments purchased by complainant were dormant, stale, and barred by limitation; that the same and all equities arising thereunder had been abandoned by their original owners; that complainant's cause of action, if any he had, had accrued to him more than three years prior to the institution of suit; that the judgment creditors had been guilty of laches and want of diligence; that complainant, since the assignments to him, had, after full knowledge of the facts, been guilty of laches; and that the trustee in bankruptcy of D. Froneberger and the judgment creditors were necessary parties.

The court below sustained the demurrer, and this appeal was taken.

A. H. Price, of Salisbury, N. C. (Jerome & Price, of Salisbury, N. C., on the brief), for appellant.

Charles W. Tillett, of Charlotte, N. C. (Tillett & Guthrie, of Charlotte, N. C., on the brief), for appellee.

Before GOFF, Circuit Judge, and DAYTON and SMITH, District Judges.

DAYTON, District Judge (after stating the facts as above). [1] In *Crews v. Bank*, 77 N. C. 112, involving this very same purchase of lands, it is distinctly decided that the purchase of these lands by the bank was, by reason of the fraudulent conduct of its officer in suppressing bidding, a voidable sale, and not one absolutely void. The court in that case says:

"The only question before us at present is: Was the sale at which the defendant (bank) purchased void? or did the deed of the sheriff pass the legal estate subject to any equities which may exist between the parties? If the deed is void, and may be collaterally impeached, the plaintiff is entitled to the judgment he demands; otherwise, he is not entitled to recover in this action in its present form, although he may be entitled to have the sale vacated. *Hill v. Whitfield*, 48 N. C. 120, decides that the sheriff's deed to defendant conveyed the legal estate; and such seems to have been assumed as the law in *Rich v. Marsh*, 39 N. C. 396 [45 Am. Dec. 520], and in several other cases of a similar character. The reason is plain. If the sale has been made by the officer with the forms prescribed by law, the title passes by mere force of law, and only a court of equity or a court of law exercising its equitable jurisdiction can avoid it. At the utmost, the sale was only voidable at the instance of a party injured. *Spencer v. Champion*, 13 Conn. 11; *Estill v. Miller*, 3 Bibb [Ky.] 177; [*Hawley v. Cramer*], 4 Cow. [N. Y.] 717. In many cases it would work an obvious injustice to declare the sale void because the purchaser had stifled competition and obtained the property for less than its value. What he paid has gone to the payment of the debts of the defendant in the execution, which were a lien upon the land; and if the sale is set aside at all, it should be set aside altogether, and the purchaser put in the condition in which he was before or be subrogated to the place of the creditors *pro tanto*."

[2, 3] This, in our judgment, is a clear exposition of sound principles governing sales of this character. By it is expressly determined that judicial sales, where the purchaser has stifled bidding, are not void, but only voidable. It necessarily follows that they are not subject to attack by those who have been negligent in asserting the right to do so within the time set forth in the statutes of limitations. Section 395 (9) Revisal 1905. In *Modlin v. Railroad Co.*, 145 N. C. 218, 58 S. E. 1075, this limitation is held to be three years from the time the cause of action accrued, which is defined to be the time when the fraud is discovered, or by reasonable diligence could be discovered. It is very clear that such fraud was discovered and published to the world in the proceedings in this case of *Crews v. Bank*, *supra*, finally determined by the Supreme Court of the state in 1877, and therefore the right to avoid the sale to the bank by direct attack had long since been barred by limitation before institution of this suit.

But it is earnestly contended by complainant that all this is irrelevant, because this bill does not seek either to set aside the sale or to recover damages for the wrong done, both of which causes of action may be conceded to be barred, but, on the contrary, seeks to have the sale and sheriff's deed upheld, and declared to have constituted the bank a trustee for creditors to the extent of the profits derived by it over and above the purchase price paid, or, at least, to the extent of the difference between such purchase price and the true value of the property at the date of sale. We are not prepared to concede that a trust relation can be decreed in the premises. In support of the contention we are cited to 1 Perry on Trusts, 360, § 215, where it is said:

"If at a sale of an estate of a debtor upon execution, any one announces for the purpose of preventing competition that he is bidding or purchasing for the debtor, or if, upon the sale of the property of a deceased person, a bidder announces that he is purchasing for the benefit of children or heirs, or if, at a mortgagee's sale, a person announces that he is purchasing for the mortgagor, and thus prevents competition, the purchaser will be held to be a trustee for the benefit of the parties interested in the property. So if any one, professing to act for another, purchases for himself, he will be held as a trustee. But in such cases there must be some proof of fraud and deceit practiced by the purchaser; the mere breach of a parol agreement will not create a constructive trust in such cases; and if the conduct of the purchaser is not fraudulent, and produces no injury, a trust is not raised. If the parties for whom the purchaser pretends to buy have no interest in the property, they cannot establish a trust."

A clear distinction is to be drawn between cases where one secures a suppression of bidding for one interested in the property and one bidding for himself who induces others not to bid against him. In the first instance there is a fraudulent misrepresentation of his character and purpose as a bidder, if he in fact is purchasing the property for himself; in the other there is no misrepresentation, and in cases of constructive trust, in which classification this one must fall, if at all, this fraudulent misrepresentation is the vital element. Such trusts do not arise by agreement or from intention, but by operation of law; and fraud, active or constructive, is always the essential element—such fraud as warrants the application of the doctrine of equitable estoppel. When one openly seeks to purchase at judicial sale a property for himself at less than its value by persuading others not to bid against him, he does a wrong which may lose him the benefit of his purchase or subject him under proper conditions to answer for damages; but in such case there are no *cestuis que trustent* to claim benefit of his purchase, he having bought avowedly for himself. This is clearly shown by the numerous authorities collated in 39 Cyc. 176, 177, 180.

But, even if a constructive trust could be established here, it is to be remembered that, contrary to cases of direct trusts, the general statutes of limitations are ordinarily held to be applicable; that, where a suit in equity is brought to force upon one the character of a trustee of a constructive trust, the court will, by analogy, apply ordinarily the limitation applicable to actions at law. 39 Cyc. 607. It will always, as regards such trusts, take into consideration lapse of time and laches on the part of plaintiff. At the time this suit was instituted more than 40 years had elapsed since the sale was made—more than 34 years since the case of *Crews v. Bank* had been finally decided by the Supreme Court of the state in which the fraud had been ascertained and made known. *Crews* was a member of one of the creditor firms, whom plaintiff by assignment now represents and seeks relief for. Any reasonable diligence would have led to the ascertainment of the fraud many years ago by these creditor firms, and no grounds exist why laches should not be imputed to them and their assignee, and the statute of limitation applied.

It follows that the court below did not err in sustaining the demurrer to and dismissing the bill. Its decree will therefore be affirmed.

UNITED STATES v. REGAN.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 95.

ALIENS (§ 58*)—CONTRACT LABORER—ASSISTING IN IMPORTATION—ACTION FOR PENALTY—PROOF REQUIRED.

Act Cong. Feb. 20, 1907, c. 1134, §§ 4, 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), make it a misdemeanor for any person to assist in the importation of a contract laborer, and declare that for every violation of such provision the violating party shall forfeit \$1,000, which may be sued for and recovered by the United States as debts of like amount are recovered in the courts of the United States. *Held* that, though an action to recover such penalty is a civil action, the offense being a misdemeanor, the government, when suing only for the penalty, is bound to satisfy the jury of defendant's guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*

Importation of contract labor, see note to United States v. Parsons, 66 C. C. A. 133.]

In Error to the District Court of the United States for the Southern District of New York; James L. Martin, Judge.

Action by the United States against James B. Regan. Judgment for defendant, and the United States brings error. Affirmed.

Henry A. Wise and A. S. Pratt, Asst. U. S. Atty., both of New York City.

Max D. Steuer and J. A. Leve, both of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The United States brought this action of debt against James B. Regan, proprietor of the Knickerbocker Hotel, New York, to recover a penalty of \$1,000 for assisting the importation of a contract laborer, viz., one Foreau, a citizen of France, to be employed as a pastry cook in the hotel, under sections 4 and 5 of the act of February 20, 1907 (34 Stat. 900, c. 1134 [U. S. Comp. St. Supp. 1911, p. 503]), which read:

"Sec. 4. (Importing contract labor a misdemeanor.) That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. (Penalty for violations—Suits by informer.) That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

At a former trial a judgment for the government was reversed and the case sent back for a new trial. In the opinion then handed down we held, among other things, that the evidence offered by the government must satisfy the jury beyond a reasonable doubt that the defendant was guilty of the offense charged. 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073. Upon this trial the court so charged, and the jury rendered a verdict for the defendant. The government seeks to raise this question again on the ground that the action is a civil action, and in respect to procedure and proof is to be treated as such (United States v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777; Hepner v. United States, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. [N. S.] 739, 16 Ann. Cas. 960), although it is admitted the defendant is protected by constitutional guaranties; e. g., that of the fourth amendment, securing the people "against unlawful searches and seizures" (Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746), and of the fifth amendment, that "no one shall be compelled in any criminal case to be a witness against himself" (Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150). We remain of the opinion that under this act, which makes the offense a misdemeanor, the government, even when proceeding against the defendant for the penalty only, must furnish the degree of proof required in a criminal case. It was in our opinion so held in Chaffee v. United States, 18 Wall. 516, 21 L. Ed. 908. There the government sought to recover of the defendants penalties aggregating \$800,000, and the jury rendered a verdict for \$235,680. The trial judge charged the jury:

"The proof in the outset may be defective. It may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset whether a case is established by the government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end all reasonable doubt must be removed; but here, at this stage, you need only say, 'Is the case so far established as to call for explanation?' * * * Without exception, where a party has proof in his power, which, if produced, would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense. The same rule is applicable in a case where a party once had proof in his power which had been voluntarily destroyed or placed beyond his reach.' If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants, in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or that either of them, could by their own oath, resolve all doubts on this point—if you believe this—then the circumstances of this case seem to come fully within the most necessary and beneficent rule."

This he did, relying upon the decision of the Supreme Court in *Clifton v. United States*, 4 How. 242, 246 (11 L. Ed. 957), in an action for forfeiture of property under a statute putting the burden of proof on the claimant, where Mr. Justice Nelson said:

"The burden of the case was upon the claimant, and it was in this stage and posture of it that the instructions were given which are the subject of the exception, and in which the court stated 'that the claimant knew from whom he had bought the goods, and what was their actual cost, and yet had not produced this testimony, or accounted for its absence; that to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, which is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge; and that, if the claimant had withheld testimony of his accounts and transactions with these parties (meaning the foreign houses from whom he had purchased the goods), the jury were at liberty to presume that, if produced, they would have operated unfavorably to his case.' The instructions had a direct reference to, and are to be construed as intended to bear upon, the matters of defense, probable cause having been shown, and upon the nature and species of the evidence relied on by the claimant in support of it; and in this aspect of the case, at least, without now referring to any other, we think they were not only quite pertinent to the question in hand, but founded upon the well-established rules and principles of evidence."

Mr. Justice Field, speaking for the Supreme Court, held the charge in the *Chaffee Case* erroneous, saying:

"The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The case of *Clifton v. United States*, 4 How. 242, 11 L. Ed. 957, cited by the court below, was decided upon a statute which cast the burden of proof upon the claimant in seizure cases after probable cause was shown for the prosecution, and, therefore, has no application. The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction."

Not a word was said by the court, nor by either counsel in the arguments as printed in the report, to the effect that the trial court erred in charging that the plaintiff was bound to convince the jury beyond a reasonable doubt, or that the case should be reversed because the defendant was denied his constitutional right not to incriminate himself. What was criticised by counsel and held erroneous by the court was the manner in which the trial court said belief beyond a reasonable doubt might be arrived at, viz., by a presumption. True, it was said this method would turn the defendant's right not to testify into an instrument for his sure destruction. It would, however, have been perfectly simple (if the Supreme Court thought that only a preponder-

ance of proof was required) to dispose of the case by saying that the whole foundation of the charge was wrong. It is incredible that, entertaining such a view, it would have sent the cause back for a new trial without the slightest intimation on the subject. In addition to this is the forfeiture case under the same statute of *Lilienthal v. United States*, 97 U. S. 237, 24 L. Ed. 901. The claimant there contended that proof beyond a reasonable doubt should have been required as in the *Chaffee Case*, *supra*. Mr. Justice Clifford, without the least intimation that such proof was not properly required in the *Chaffee Case*, distinguished it, saying:

"Suggestion was made during the argument at the bar that the court erred in not instructing the jury that they could not find that the property was forfeited unless the matters charged were proved beyond a reasonable doubt; but no such exception was taken at the trial, nor is any such complaint set forth in the assignment of errors; nor is there anything in the case of *Chaffee v. United States*, 18 Wall. 516, 21 L. Ed. 908, which conflicts in the least with the views here expressed, as is obvious from the fact that the two cases are radically different, the present being an information against the property, and the former an action against the person to recover a statutory penalty. Information in rem against property differs widely from an action against the person to recover a penalty imposed to punish the offender. But they differ even more widely in the course of the trial than in the intrinsic nature of the remedy to be enforced."

We cannot reconcile the contention of the government with these two decisions, and as this was the error principally relied on, and we discover no merit in the other assignments, the judgment is affirmed.

O'BRIEN v. ILLINOIS SURETY CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1913.)

No. 2,260.

1. DAMAGES (§ 78*)—BREACH OF CONTRACT—LIQUIDATED DAMAGES OR PENALTY.

Where a ground lease for 97 years contained provisions under which it might be previously terminated, and required the lessee to erect during the first year a fireproof modern building of specified size and character, and the lessee gave a surety bond in the penal sum of \$5,000, conditioned that he would erect the building described within the time specified, and in the construction thereof would comply with all building laws, and that no mechanics' or material liens should exist, the sum named in the bond was a penalty; and hence, on the lessee's failure to erect such a building, plaintiff was not entitled to recover the penal sum of the bond as liquidated damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

2. PRINCIPAL AND SURETY (§ 66*)—GROUND LEASE—ERECTION OF BUILDING—LESSEE'S DEFAULT—DAMAGES.

Where a ground lease for 97 years, providing that the tenant should erect a business building on the property during the first year, which building should belong to the landlord at the termination of the term, also contained stipulations under which a reversion might occur and the building become the property of the landlord at an earlier date, in which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case its erection would materially increase the rental value of the premises on re-entry by the landlord, and would also serve as security for the payment of rent and taxes which might be in default whenever the lease terminated, the lease having been terminated because of the lessee's default, and he having failed to erect any building on the property, the landlord's damage to the extent of the lessee's default at the time of the termination of the lease, and to the extent that the building, if erected and reverting, would indemnify him therefor, was not speculative, so as to preclude a recovery on the bond of the tenant's surety up to the penalty thereof.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.*]

3. APPEAL AND ERROR (§ 837*)—AMENDED PETITION—ALLEGATION OF FACTS ARISING SUBSEQUENT TO SUIT.

Where no objection to the filing of an amended petition, alleging material facts on which the action was sustained, arising after suit brought, was made either in the trial court or on appeal, and there was nothing to indicate that any statute of limitations had run pending the suit, defendant was not prejudiced by the court's treatment of the amended petition as the commencement of a new suit, and considering the facts alleged therein essential to establish a cause of action.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3262-3278; Dec. Dig. § 837.*]

4. LANDLORD AND TENANT (§ 49*)—GROUND LEASE—FORFEITURE—EFFECT—DAMAGES FOR PAST DEFAULTS.

Where a ground lease for long term not only required the lessee to erect a business building on the property during the first year, but also provided for a forfeiture and termination in case of certain defaults by the lessee, the lessor's subsequent notice of forfeiture and re-entry for the lessee's defaults, while terminating the lessor's right to further accruing rent, were not acts of rescission, but rather acts of enforcement, and hence did not preclude a recovery on the tenant's bond for damages arising from prior defaults.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 117-119; Dec. Dig. § 49.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Action by P. C. O'Brien against the Illinois Surety Company. Judgment for defendant, and plaintiff brings error. Reversed, and remanded for new trial.

O'Brien, as owner, leased to one Nolan, for 97 years from January 1, 1907, a vacant business lot in Cleveland. The agreed rent was \$3,600 for the first two years, and thereafter \$2,000 per year, all payments to be made quarterly in advance, and the lessee was also to pay all taxes imposed. Nolan also agreed to erect on the premises, within the first year, "a brick building, of fireproof construction, substantial and modern in all respects, not less than two stories in height, having a frontage of not less than 60 feet and a depth of not less than 50 feet, the front of said building to be of pressed brick, with stone trimmings." The lessor reserved the usual right of re-entry in case the lessee violated any of his agreements. It was further agreed in the lease that Nolan should give a bond to secure to O'Brien the erection of the building; and, accordingly, a bond was executed and delivered in the penalty of \$5,000 signed by Nolan, as principal, and by the Surety Company, the defendant in error, as surety, conditioned that Nolan would, within the time limited in the lease, erect the building therein described, that in the construction thereof all building laws would be observed, and that no mechanics' or material liens against the building should exist. The erection of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

building was not commenced as agreed; O'Brien notified the Surety Company that if the building was not erected he would look to it for indemnity; no one did anything about the building; and Nolan never paid any rent or taxes.

In January, 1909, O'Brien brought this suit against the Surety Company, alleging the facts above recited, but not alleging that the lease contained any covenant by the lessee to keep the building insured or in repair. Pending demurrers and amendments, and on March 11, 1909, O'Brien gave Nolan notice to cancel and forfeit the lease, and thereafter, the default continuing, O'Brien re-entered. He then included, in an amended petition in this case, an allegation of such notice and re-entry. The court below sustained the demurrer of the Surety Company, and, plaintiff not further amending, dismissed the complaint. The writ of error which challenges this result necessarily involves every element of plaintiff's right to recover.

Stearns, Chamberlain & Royon and Wm. A. Carey, all of Cleveland, Ohio, for plaintiff in error.

A. J. Hopkins, of Chicago, Ill., and Joseph H. Wenneman, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The court below properly held against plaintiff's theory that he was entitled to recover the sum named in the bond as liquidated damages. To meet the well-established principle that the penalty cannot be considered as a sum agreed upon for liquidated damages, when it appears that it was to secure the performance of each of several different conditions of varying degrees of importance and involving varying amounts of injury to the obligee (*Bignall v. Gould*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *Lansing v. Dodd*, 45 N. J. Law, 526), the plaintiff urges that the three things here contemplated were the erection of the building, the observance of the laws and the avoiding of the liens, and that these three things were successive, each being the only operative condition while it was active, and so that the rule just cited is avoided. It is sufficient to say of this contention that, whatever its merit otherwise might be, it is not applicable here. The first condition, the erection of the building, permitted a great variety of breaches, which might have ranged from the total absence of any building all the way down to some slight deficiency in form or size or trimmings. It is not to be supposed that the parties contemplated the payment of \$5,000 if the builder used plain brick, instead of pressed brick, on the front, and the payment of the same amount if there was no building at all. The sum named in the bond was clearly a penalty, intended to indemnify O'Brien against such damages as the law might declare owing to him for any breach of any condition of the bond.

[2] 2. Defendant urged that the building was to belong to the lessee, and the lessor had, during the term, no interest therein; that the lessor's sole measure of damages for its nonerection was the lessened value of the reversion falling in at the end of the stated term, which expectant diminution must be reduced to terms of present worth; and that, with a 97-year lease and a building of the character described, and without covenant to insure or to keep in repair, such damage was so speculative as to be incapable of computation; and, hence, in practical effect, that

the bond was wholly inoperative. We do not doubt that a building so promised constitutes, in effect, additional rent, payable at the end of the term, and that the present worth of such future subtraction from reversion value is the primary and ordinary measure of damages (*Doe v. Rowland*, 9 C. & P. 734; *Cooper v. Randall*, 59 Ill. 317); but the application thereof sought by plaintiff overlooks two considerations.

The first is this: The lease was not for an unalterable term of 97 years. It carried the seeds of an earlier ending, and when these seeds developed into cancellation, in March, 1909, the term was ended. March, 1909, became, by relation, both the agreed end of the term and the end of the agreed term; and it was necessarily within the contemplation of the parties that a reversion might occur and the building might become the property of the landlord at that earlier date, as well as at the end of the 97 years. Since the only purpose of construction is to arrive at the true intent of the parties, it may not necessarily follow that in every case of this character the lessor is entitled to the full value of the agreed, but nonexistent, building as of the date when such premature reversion occurs, although this would seem to be the rule announced by the Supreme Court of Ohio, in *Rock v. Monarch Building Company*, 100 N. E. 887 (decided December 17, 1912). We now only point out that such a reversion was clearly in the minds of the parties, and that the provisions of their contract must be construed as having due reference to that contingency.

The second consideration to which we referred is this: Whenever a building, to be erected by a lessee, will materially increase the rental value of the premises, and the lease reserves to the lessor such a periodical rent that his stipulated right of re-entry into the vacant premises may not be, of itself, ample indemnity for any default, it is clear that the building is intended to constitute, not only an additional rental payable at the end of the term, but also an additional security for the rent currently accruing. This intention is not alleged in the petition now under review, but we think the allegation unnecessary. Such intent stands out on the face of every such contract, and only under unusual conditions could it be lacking.

From these considerations, it is apparent that such building has a double character. It is a contingent, future, bonus rent, to fall in at the end of the maximum period, or at some uncertain earlier period, and, as such, it is more or less speculative. It is also a continuing, actual, and valuable security for each installment of rent as the same accrues, and in that capacity, and to that extent, is not, in the least, speculative. In a case like the present, and so far as concerns the lessee's completed defaults, the speculative difficulty disappears when the lease ends.

It follows that plaintiff was entitled to have this building in existence to serve as security for whatever payments of rent and taxes might be in default whenever the lease terminated, and to the extent that these were in default, in March, 1909, and to the extent that the building, if erected and reverting, would have made him good therefor, plaintiff is entitled to damages, and the surety on the bond is liable therefor, up to the penalty of the bond. How far, if at all, the surety

is entitled to have such damages minimized by prompt forfeiture and efforts at re-rental, or by proving that, pending the term the lease was in force, the value of the reversion has increased, are questions not involved; and there is, on this record, too uncertain a margin remaining in the penalty above defaulted rent and taxes to require that we decide the full theoretical extent of plaintiffs' right.

Our conclusion that damages are recoverable finds support in the opinion of Judge Sanborn in *American Bonding Co. v. Pueblo Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357 (C. C. A. 8th), and in the principle which was assumed, though not applied, in *Real Estate Co. v. McDonald*, 140 Mo. 605, 41 S. W. 913, and which was recognized and partially applied in *Longfellow v. McGregor*, 61 Minn. 494, 63 N. W. 1032, and in *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729. These cases all go on the theory that such buildings or improvements are security for the performance of other parts of the contract. *Chamberlain v. Parker*, 45 N. Y. 569, urged as holding to the contrary, is clearly distinguishable. The grant there involved was not of a leasehold, but of a fee, and there never would be any reversion, unless upon the happening of a specified and not very probable condition subsequent. The improvement to be made upon the premises by the grantee was the sinking of a well in search for oil, and the well would never be of any value to any one, even to the grantee, unless the search was lucky; and, even in that event, the value was wholly speculative. We quite agree that the damage to the grantor by the failure to sink the well would not support an action.

[3] 3. In what we have said, and in the point to be discussed, we treat the amended petition, showing that the lease had been canceled, as though it was the only petition before us. We see no substantial harm in so doing. It does allege facts which we treat as important in determining the existence of a right of action, and which did not occur until after the original petition was filed; but the point that no such amendment could be permitted, or that these supplemental allegations should be stricken out, was not made in the court below, nor is it made here. There is nothing to indicate that any statute of limitations had run pending the suit, or that the substantial rights of any one will be prejudiced if the amended petition is treated as though it commenced a new suit.

[4] 4. Defendant's real contention, with reference to this supplemental matter, is that thereby the plaintiff had rescinded its contract with Nolan, lost all right of action against him, and voluntarily terminated the existing, dependent action against the surety. This contention misconceives the nature of the lease and of the termination. The notice of proposed cancellation and the re-entry were not acts of rescission; they were acts of enforcement; they were pursuant to, and in execution of, the express provisions of the contract and the powers thereby conferred. They did put an end to the further accruing of rent, and so defeat any right to claim, against Nolan or the surety, damages which would rest solely and directly upon rent thereafter accruing; but as to the defaults which had occurred, and to the extent of the damages which, because of such defaults, then had accrued against Nolan and the surety, they had no destructive effect. *Anvil Co.*

v. Humble, 153 U. S. 540, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; Hayes v. Nashville, 80 Fed. 641, 26 C. C. A. 59 (C. C. A. 6th); American Co. v. Pueblo Co., supra.

We hardly need to say that we are reviewing a judgment entered on a demurrer, and that we have considered the contract in suit only so far as it appears by and is interpreted by the declaration; it will be for the trial court to give appropriate force and effect to any further facts that may appear.

The judgment must be reversed, with costs, and the record remanded for a new trial.

UNITED STATES et al. v. RUIZ.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1913.)

No. 2,254.

1. HABEAS CORPUS (§ 92*)—DEPORTATION PROCEEDINGS—CONCLUSIVENESS.

One seeking to enter the United States is entitled to a fair, though summary, hearing before the immigration officers, and, this having been accorded him, the determination of the Commissioner of Immigration, or the Secretary of Commerce and Labor on appeal, against his right to enter, is conclusive, though erroneous; but, if a fair hearing is denied the immigrant, he may obtain release on habeas corpus, on proving that he does not belong to one of the excluded classes, either by the same evidence as was introduced before the immigration officers, or by new and additional proof.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

2. HABEAS CORPUS (§ 85*)—RIGHT TO ENTER—HEARING BEFORE IMMIGRATION OFFICERS—FAIR TRIAL.

An alien, seeking to enter the United States, was assaulted by arresting officers, and, without being allowed to procure counsel, was taken before an immigration inspector, while still under the influence of the intimidation caused by the assault, and examined concerning his right to enter. He was unable to speak or read English, and the inspector acted as both prosecutor and interpreter. *Held*, that such facts sufficiently tended to show that he was not accorded a fair hearing before the immigration officers, to entitle him to a hearing on habeas corpus on the merits of his right to enter the United States.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

3. HABEAS CORPUS (§ 90*)—HEARING—SCOPE—ESTOPPEL.

Where the government's return to a writ of habeas corpus to review the right of an alien to enter the United States asserted want of jurisdiction to hear the matter anew, because of the conclusiveness of the findings of the executive officers, but on the hearing the government offered oral evidence in support of its own contentions, and treated the hearing as one de novo, it thereby waived its right to object to a determination of the merits.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 80; Dec. Dig. § 90.*]

4. HABEAS CORPUS (§ 29*)—EXCLUDED CLASSES—DEPORTATION.

Where an alien, held for deportation, was a native of Spain, but a naturalized citizen of the Republic of Panama, from whence he came to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the United States, a deportation warrant providing for his return to Spain was illegal, and insufficient to justify his detention on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. § 29.*]

5. HABEAS CORPUS (§ 117*)—DETENTION—ILLEGAL WARRANT—DISCHARGE—EFFECT.

An order, entered on habeas corpus, discharging an alien, who was not entitled to enter the United States, because the warrant under which he was held provided for his return to the wrong country, was not conclusive against the government's right to prosecute further proceedings against him for his deportation to the country from whence he came.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 119, 120; Dec. Dig. § 117.*]

Appeal from Circuit Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Habeas corpus by the United States, on relation of Alfred Ruiz, to procure relator's discharge from the custody of the United States Commissioner of Immigration at the port of New Orleans. From an order discharging relator on his own recognizance, the government appeals. Affirmed.

L. H. Burns, Asst. U. S. Atty., of New Orleans, La. (Charlton R. Beattie, U. S. Atty., of New Orleans, La., on the brief), for appellants.

J. A. Morales and H. J. Rhodes, both of New Orleans, La., for appellee.

Before SHELBY, Circuit Judge, and NEWMAN and GRUBB, District Judges.

GRUBB, District Judge. This is an appeal by the United States from an order of the District Court making absolute a writ of habeas corpus applied for by the relator, who sought to be released from the custody of the Commissioner of Immigration at New Orleans, by whom he was held under a warrant issued by the Secretary of Commerce and Labor for his deportation to Spain, upon the ground that he was an alien of one of the excluded classes, having introduced into this country a woman for the purpose of prostitution.

[1] The question which presents itself at the outset is that relating to the jurisdiction of the District Court in habeas corpus proceedings to release one detained for the purpose of deportation under the immigration laws. The law is well settled that one seeking to enter the United States is entitled to a fair hearing as to his right to do so before the executive officers, though the hearing may be a summary one; that, having had such a hearing, the decision of the Commissioner of Immigration, or of the Secretary of Commerce and Labor on appeal, against his right to enter, is due process of law, and is conclusive upon the immigrant, even though wrong. If a fair, though summary, hearing has been denied the immigrant, the District Court has jurisdiction to hear the matter, upon the merits, upon habeas corpus, and release the immigrant, if it be shown on the hearing before it, even by evidence not offered on the hearing before the executive officers, that he does not belong to any one of the excluded classes. As a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

preliminary to entering upon a trial of the merits, the District Court must first determine that the immigrant was denied a fair hearing before the Commissioner of Immigration, or before the Secretary upon appeal to him from the Commissioner. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] The first inquiry is, therefore: Was the relator denied a fair hearing before the executive officers? The hearing before the Commissioner of Immigration and the Secretary in this case was based on the examination of the relator before one Tresavuk, an inspector of the Bureau of Immigration. If the method of examination of the immigrant by the inspector was unfair, then the hearing before the Commissioner and Secretary were also unfair, since they were based upon that examination. The alleged unfairness of the examination of the relator is based upon the fact that it was taken immediately after an assault was committed upon him by the arresting officers, and in the presence of the immigration inspector, and while he was still, in a sense, under the influence of the intimidation caused by it; that he was not allowed counsel until after his examination was completed; that, being unable to speak or read English, an interpreter was necessary in the conduct of the examination, and that the inspector of immigration acted as the interpreter, as well as the prosecutor; and that certain documentary evidence which the relator offered in his own behalf on the examination, consisting of letters and a return trip railroad ticket to San Antonio, Tex., found on his person when arrested, was not transmitted with the record in the case to the Secretary for consideration by him upon the appeal. We incline to the view that there is enough shown in the record to cast sufficient doubt upon the fairness of the examination of the relator, conducted by the inspector, to justify the District Court in hearing the application upon the merits, and upon evidence other than that introduced on the hearing before the executive officers.

[3] There is an additional reason in support of the decision of the District Court making the writ absolute upon the strength of the evidence other than that which was before the Secretary. It is that both parties, upon the hearing in the District Court, treated the matter as being heard upon the merits and *de novo*; the government not only not objecting to the oral evidence offered by the relator upon this ground, but offering oral evidence in support of its contentions, as well. This was tantamount to a request that the District Judge decide the matter upon the new evidence submitted, without first determining the question as to whether the relator had been accorded a fair hearing before the executive officers of the government. It is true the return of the government to the writ asserts the want of jurisdiction in the District Court to hear the matter anew, because of the conclusiveness of the findings of the executive officers; but upon the hearing the government abandoned this position, and treated the hearing as one *de novo*, on which the merits, as deduced from the evidence then offered by the parties, were to govern the court's decision. Having by this course of conduct induced the court below to decide the application on the mer-

its in the first instance, it does not now lie in the mouth of the government to complain of the court's action in doing what it was so invited to do. We therefore sustain the action of the District Court in entering upon a hearing *de novo* and deciding the case upon the merits upon the evidence adduced on the hearing of the habeas corpus proceeding.

Did the evidence adduced in the court below justify the release of the relator? The District Judge concurred in the conclusion reached by the officers of the Department of Commerce and Labor that the evidence on the hearing of the writ was sufficient to show that the relator belonged to one of the classes excluded from entrance under the immigration laws, and we agree with his conclusion and that of the Department. The District Judge, however, held that the immigration laws contemplated the deportation of an alien who had illegally entered the country to the country whence he came when he illegally entered the country, regardless of the country of his nativity, and released the relator, because the warrant of deportation ordered him returned to Spain, the country found by the Department to be that of his nativity and citizenship, instead of to Panama, from which country he came to the United States after having been domiciled there for a period of many years. *United States v. Redfern* (C. C.) 186 Fed. 603-604. The Circuit Court of Appeals for the Sixth Circuit, in the case of *Frick v. Lewis*, 195 Fed. 693-701, 115 C. C. A. 493, held the contrary, and construed the words of the immigration law, "returned to the country whence he came," to refer to the country of the alien's nativity or citizenship.

[4] We find it unnecessary in the present case to pass upon the question whether permanent domicile, as well as nativity or citizenship, determines the country from which the alien came, since the relator, in his evidence on the hearing of the writ, testified that he was a citizen of the Republic of Panama, having sworn allegiance to that country. It is true that upon his examination before the inspector of immigration he is reported to have testified that he was a native and subject of Spain; but the circumstances under which that examination was held and the liability of error therein through the necessity of interpretation, especially as the interpreter and the inspector were the same person, lead us to adopt the evidence of the relator on the hearing of the writ. The government objected to this evidence upon the hearing of the writ, but only because it contended that no such ground for the issuance of the writ was presented in the petition, and not because it contended that the finding of citizenship by the Department was conclusive upon the court.

If the relator was a citizen of Panama at the time of his illegal entry into this country, and came from Panama to this country, the warrant of deportation should have directed that he be returned to Panama, instead of to Spain. Detention under a warrant directing the relator's deportation to a country to which the government had no right to cause him to be deported is an illegal detention and restraint of his liberty, against which a writ of habeas corpus is an available remedy. *Chin Yow v. United States*, 208 U. S. 8, 13, 28 Sup.

Ct. 201, 52 L. Ed. 369. As the relator has not shown a right to remain in this country, but only a right to complain of the place to which he is ordered to be deported, it may be that his release under the writ should not be unconditional, but should provide for his further detention for a reasonable length of time to enable the Department to take the necessary steps for his rearrest upon a proper warrant of deportation.

[5] This we understand to be the meaning of the decision of the Supreme Court in the case last cited, rather than, as was held by the District Court for the Southern District of New York, in the case of *United States v. Williams*, 187 Fed. 470, 471, that the writ of habeas corpus would not lie to release an alien not shown to have been entitled to remain in this country, but who was about to be deported to the wrong country.

In view of the fact that the record shows that the relator has already been released upon his own recognizance, all that seems necessary to the proper protection of the rights of the government in this case is that the order of the District Court making the writ absolute should be modified, so as to provide that such order should be without prejudice to the right of the government to institute and prosecute further proceedings looking to the deportation of the relator to the Republic of Panama, if it should be so advised, and that, as so modified, the order of the District Court be affirmed.

In re HOWARD LAUNDRY CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 132.

1. FIXTURES (§ 15*)—TRADE FIXTURES—LANDLORD AND TENANT.

Whether valuable machines placed on premises leased for a term of years were trade fixtures, and removable as between the landlord and the tenant's trustee in bankruptcy, depended on whether the various machines could be removed without substantial injury to the building; and this, notwithstanding a clause in the lease providing that all additions and improvements which might be made by either party to or upon the premises should be the property of the landlord, as such provision should be construed to apply to permanent additions to the building, and not to personal property which, for business purposes, is temporarily and detachably fastened to the floor or ceiling of the building.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

2. FIXTURES (§ 32*)—TRADE FIXTURES—REMOVAL—RESTORING CONDITION OF PROPERTY.

Where an engine resting on a brick foundation two feet higher than the floor level was held to be a trade fixture, and removable, as against the landlord, by the tenant's trustee in bankruptcy, the landlord was entitled to have the foundation removed and the floor made level, if she desired it, at the expense of the estate.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 63, 65; Dec. Dig. § 32.*]

3. BANKRUPTCY (§ 116*)—TITLE TO PROPERTY—PLENARY SUIT—WAIVER.

Where an issue was raised between a landlord and her tenant's trustee in bankruptcy as to the ownership of certain machinery placed on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rented property by the bankrupt, the landlord was entitled to waive her right to have such issue determined in a plenary suit, and did so by appearing without objection and submitting her right to the master and the court, and was estopped thereafter to claim that the bankruptcy court had no jurisdiction thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

In the matter of bankruptcy proceedings of the Howard Laundry Company. On appeal from an order of the District Court for the Southern District of New York, confirming the report of a special master holding that certain pieces of machinery used by the bankrupt in its business were trade fixtures, and belonged to the receiver in bankruptcy, and not to the landlord, this appeal is taken. Affirmed.

Kellogg & Rose, of New York City (Abram J. Rose, William K. Hartpence, and Asa B. Kellogg, all of New York City, of counsel), for appellant.

Kurzman & Frankenheimer, of New York City (John Frankenheimer and Abraham L. Gutman, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. At the time involved in this controversy, Henrietta M. Parker was the owner of the premises Nos. 1198-1200-1202-1204 Third avenue, New York City, which she leased to the bankrupt, Howard Laundry Company. The premises with the exception of the floors above the store floors of the premises Nos. 1202-1204 were used by the bankrupt as a steam laundry and were equipped with the machinery necessary to carry on such business. Dispute having arisen as to what part of the plant was personal property which passed to the trustee and what part was real property because permanently attached to the freehold, the court appointed a special master to view the premises, take proof and report to the court "with all possible dispatch."

The master reported that the boilers were permanently attached to the realty and could not be removed without permanent injury to the premises. He made a similar report regarding two cement bleach tanks. Regarding the engine in the cellar of No. 1200 Third avenue the master says:

"The engine rests upon a brick foundation built in the cellar, which brick foundation is approximately 2 feet higher than the level of the cellar floor, and is about 8 feet long and 3 feet wide, and upon which rests the engine, said engine being held in place by means of nuts and bolts affixed to the raised brick foundation. This brick foundation extends below the level of the cement floor of the cellar somewhat less than 2 feet. The engine is connected with the boiler by means of a steam pipe, which conveys the steam from the boiler to the engine, of a circumference of about 2½ to 3 inches. Connected with this engine is a system of pipes running throughout the building connected with the various laundry machines, these machines in turn being connected by means of the usual shafting with pulleys fastened upon hangers. In my opinion the engine can be readily detached from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

brick foundation and removed, and the brick foundation taken away and the floor restored to its original level, and I therefore report that this engine is not so annexed to the freehold that it cannot be removed without substantial injury to the premises."

As to the seven washing machines, the four extractors, the two water pumps, the exhaust fan and the soap tank, all in the cellar of No. 1200, the master reported that they could be removed without substantial damage to the freehold.

The master makes similar findings as to the pulleys, belting and shafting throughout the premises and as to all the machinery, means and appliances used in a steam laundry plant which can be removed without any substantial damage to the buildings. He finds, however, that the two bleach tanks above referred to were built where they now stand and cannot be removed without breaking the tanks or injuring the floor to which they are connected and reports that they cannot be removed without substantial damage to the freehold.

[1] In short, the master, recognizing that an extensive laundry plant containing a variety of valuable machines had been placed on the premises under a seven years' lease, made the criterion of ownership depend upon the question whether or not the various machines could be removed without substantial injury to the building. If the chattel could be so removed, he decided in favor of the tenant, if it could not be, he decided in favor of the landlord.

This ruling we believe to be in accordance with the rule laid down by this court and the courts of the state and is unaffected by the clause of the lease providing that all additions and improvements which may be made by either party to or upon said premises shall be the property of the landlord. This clause was simply declaratory of the law and gave the landlord no additional right to articles found to be trade fixtures. It was undoubtedly intended to cover permanent additions to the buildings and not personal property which for business purposes is temporarily and detachably fastened to the floor or ceiling of a building.

The presumption is that trade fixtures belong to the tenant and if it be the intention of the parties that they shall become the property of the landlord at the expiration of the lease, that purpose should be stated in language so clear and explicit that there can be no doubt as to its meaning. That intent cannot be deduced from broad and general language, which is usually found in the printed forms, regarding "improvements"; when this word is used without any language defining or extending its ordinary meaning, the courts with substantial uniformity have held that it relates to improvements to the realty and not to trade fixtures.

As was said by the court in *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 309, 38 Atl. 858, affirmed 57 N. J. Eq. 347, 45 Atl. 1090:

"The improvements, to be within the provisions, must, when made, savor of the realty. The association of the words in the clause of the covenant shows this to be the true meaning. It was 'alterations, repairs or improvements made upon the premises' which should be left. That is, if the premises should be altered, as by opening the wall and placing a window, the window should remain. If they should be repaired, as by hanging a new door in the place of a broken one, the new door should be left. I think the improvements must also have been improvements of the demised premises, so that the condition and value

of the premises as realty were improved, and that the word did not include articles which were in their nature chattels which had not been subjected by the parties to any action which converted them into realty. The covenant did not refer to improvements brought upon or placed in the demised premises. It was improvements made of the premises themselves which were agreed to be left."

The questions here debated have been so frequently passed upon by the courts that it is only necessary to refer to a few of the leading cases. *Wiggins Ferry Co. v. O. & M. Railway*, 142 U. S. 396, 415, 416, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93, affirmed 175 N. Y. 472, 67 N. E. 1080; In the Matter of New York, 192 N. Y. 295, 84 N. E. 1105, 18 L. R. A. (N. S.) 423, 127 Am. St. Rep. 903; *Montello Brick Co. v. Trexler*, 167 Fed. 482, 93 C. C. A. 118; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146. See, also, the decision of this court in *Bergh v. Herring-Hall Co.*, 136 Fed. 368, 69 C. C. A. 212, 70 L. R. A. 756.

The question upon which the legal status of each piece of machinery turned was one of fact. The master had unusual opportunity to reach a correct conclusion because he saw the plant and personally inspected the manner in which it was installed and examined witnesses on the premises. We see no reason to question the accuracy of his conclusions.

[2] We have some doubt as to the ruling of the master in the case of the engine, regarding which his finding is quoted in full. The engine rested upon a brick foundation 2 feet higher than the level floor. Equitably this foundation should be removed and the floor made level at the expense of the estate. But in the absence of proof as to the cost of removal and without knowing whether the landlord wishes it removed or will consent to its removal, it is difficult to say what, if any, relief should be given. The master who saw the situation would not have made the report as to this piece of machinery if its removal was to result in any serious damage to the premises. Should it appear that the receiver has removed the engine, leaving the foundation, and that the landlord desires the foundation removed or has herself removed it, we see no reason why the District Court may not make an order directing that the expense of removal together with any damage which may have been done the building by reason thereof, be paid out of the estate.

[3] The practice established in ordering a reference is so simple, direct and inexpensive that it should be encouraged where, as here, speedy settlement of the bankrupt's estate is of such controlling importance. Although the landlord probably had the right to insist that the title to the property should be determined in a plenary suit, she could waive that right and we think she did so when she appeared without objection and submitted her right to the master and the court. It is too late now that the court has found against her upon a part of her claim, to urge the objection of lack of power. Every fact bearing upon the controversy is now before the court. To dismiss the proceeding upon the ground that it should have been presented in different form would cause delay and expense with the result that the same questions upon the same proof would again be submitted for decision.

Indeed, we understood at the argument that both parties, being anxious that the controversy should be determined on its merits, consented to waive objections of a technical nature.

The order is affirmed.

KIRKPATRICK v. McBRIDE.

(Circuit Court of Appeals, Fourth Circuit. March 6, 1913.)

No. 1,106.

APPEAL AND ERROR (§ 1178*)—REVIEW—DISPOSITION OF CAUSE.

Where, in a suit between a tenant and a devisee of the landlord, the tenant relied on the effect of her sworn answer largely as testimony, both as to the existence of the lease and ownership of certain personal property claimed by her, while the devisee relied on the presumption arising from the large amounts paid by her ancestor for taxes, etc., and both parties in argument of an appeal expressed their ability to produce additional testimony which would substantiate their respective contentions, the court would modify the decree to the extent of opening the question of the ownership of the personal property and permitting each side to introduce additional testimony, subject to the condition that the answer of the tenant in the future consideration of the case should not be given any further force than if the bill had waived an answer under oath, and been so amended as to pray for an accounting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

On rehearing. Modified and remanded for further proceedings.

For former opinion, see 202 Fed. 144.

Before GOFF and PRITCHARD, Circuit Judges, and SMITH, District Judge.

PER CURIAM. An order for a rehearing of this cause was made at the last term, limited to the question of the ownership of the personal property involved in this controversy, and upon this order the cause has been reheard. The main question discussed at the first hearing was as to the error of the court below in its conclusions as to the lease claimed by the appellant; the appellant relying for her testimony, both as to the existence of the lease and the ownership of the personal property, mainly upon the effect of her sworn answer as testimony. The question of the ownership of the personal property does not seem to have been gone into on the argument with much detail as to specific articles. The one side relied upon the presumption arising from the large amounts paid by Mr. McBride, the payment of taxes, etc., and the appellant relied mainly on the effect claimed to be due to the statements in a sworn answer responsive to the bill, and the evidence in detail as to the ownership would seem in part subject to conflicting inferences. For these reasons, the court, upon the record as it now stands, finds it difficult to arrive at satisfactory conclusions, and, as both sides in argument express their ability to produce such additional testimony as will substantiate their respective contentions, the court conceives that it would be in the interest of justice to modify the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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cree below to the extent of reopening the question as to the ownership of the personal property, and of permitting each side to introduce such additional testimony as they may be advised, so that the court below may upon the testimony now in the cause, with such additional testimony as may be introduced make a final decree as to the ownership of the property. As this is done upon the application of appellant, the court conceives that it is only proper that it should be done on condition that certain questions heretofore made that affect a full and final adjudication on this question should be eliminated. The answer of the appellant should, in the future consideration of this cause, not be given any further force and effect than if in the bill of complaint an answer under oath had been waived, and the bill shall be deemed amended so as to pray and require an accounting from the appellant, Mrs. Kirkpatrick, for the sums of money that may be proven to have been paid to her by Lee McBride prior to his death.

It is therefore ordered that so much of the decree of the Circuit Court of the United States for the Northern District of West Virginia as decrees that the complainant, Harriet Elizabeth McBride, is the owner and entitled to the possession of the personal property, to wit, the furniture and furnishings in the hotel and cottages at Brookside, including the farming machinery, tools, wagons, horses, cattle, and other articles, is hereby modified, and set aside as to so much thereof as is claimed by the defendant, Emma Jane Kirkpatrick, in her answer to the bill of complaint herein, and the cause is remanded to the District Court for the Northern District of West Virginia for the purpose of allowing the respective parties, in such manner and at such times as that court may prescribe, to put in such additional competent testimony as they may be advised upon the question of the ownership of the personal property as claimed in the said answer, and that said District Court do thereupon, upon the testimony in this cause and such additional testimony as may be introduced, proceed to a final decree upon such question; but that in the determination of the same the answer of the defendant, Emma Jane Kirkpatrick, shall have only such force and effect as if an answer under oath had been waived in the bill, and the complainant shall have leave to prove any sums of money that were paid to the defendant by Lee McBride during his lifetime, and require of her an accounting therefor, and the decree below is modified accordingly.

Modified.

In re BRITANNIA MINING CO.

BUSCHMANN v. NICKKY.

(Circuit Court of Appeals, Seventh Circuit. March 11, 1913.)

No. 1,967.

1. JUDICIAL SALES (§ 9*)—PLACE—STATUTES—APPLICATION.

Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), requiring that judicial sales of land shall be made on the property or at the courthouse in the county where it lies, on not less than four weeks'

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

notice, applies not only to federal courts in existence when the act was passed, but to those subsequently created, unless something in the organic act exempts them, and governs as well any possible new forms of judicial sales under decrees, as foreclosure, execution, and partition sales then known.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 33; Dec. Dig. § 9.*]

2. BANKRUPTCY (§ 262*)—SALE OF ASSETS—EQUITY OF REDEMPTION—PLACE—STATUTES.

Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), requiring judicial sales of land to be made on the property or at the courthouse in the county where the land lies, on not less than four weeks' notice, was inapplicable to sales in bankruptcy; and hence a sale in Wisconsin of a bankrupt's equity of redemption in a mine in Montana without complying with such act was not void for that reason.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

Petition to Review and Revise an Order in Bankruptcy of the United States District Court for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

In the matter of bankruptcy proceedings of the Britannia Mining Company. Original petition to review and revise an order (197 Fed. 459) reversing a referee's order denying the petition of a creditor to set aside a sale of certain of the bankrupt's real estate in Montana subject to a mortgage. Reversed.

Louis A. Lecher, of Milwaukee, Wis., for petitioner.

Jackson B. Kemper, of Milwaukee, Wis., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Britannia Company, the bankrupt herein, had title to real estate, located in Montana, which, prior to adjudication of bankruptcy, had been sold on mortgage foreclosure to respondent Nickey. At a sale of the bankrupt's assets, conducted by the trustee in Milwaukee, Wis., petitioner Buschmann was the purchaser of the equity of redemption of the Montana real estate and received the trustee's deed therefor. Subsequently on motion of respondent Nickey the District Court annulled the deed and vacated the sale as being void for noncompliance with Act March 3, 1893, c. 225, 27 Stat. L. 751, 3 Fed. St. Ann. 54.

Said act is as follows:

"Section 1. That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the courthouse of the county, parish or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec. 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order, judgment or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1937 to date, & Rep'r Indexes

regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

Provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) and General Orders which refer to title and sales of real estate in bankruptcy are these:

"Sec. 70a. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * *

"(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

"Sec. 70b. All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

"Sec. 70c. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee."

"Sec. 58a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of * * *

"(4) all proposed sales of property."

"Sec. 47a. The trustees shall respectively * * *

"(2) collect and reduce to money the property of the estates for which they are trustees under the direction of the court," etc.

"Sec. 30a. All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

General Order 18 (89 Fed. viii, 32 C. C. A. xx). "1. All sales shall be by public auction unless otherwise ordered by the court.

"2. Upon application to the court and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

"3. Upon petition by the bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."

[1, 2] Undoubtedly the act of March 3, 1893, applies not only to federal courts then in existence, but also to those subsequently created, unless something in the organic act exempts them, and governs as well any possible new forms of judicial sales under decrees as foreclosure, execution, and partition sales then known. But, in our judgment, the act of 1893 has no application to trustees' sales of the assets of bank-

rupt estates for this prime reason: In a judicial sale under order or decree, the order or decree fixes the relative rights of the parties in the property according to the status or conduct or contract between them, and the sale itself is the thing that divests all the parties of their title and confers it upon another; while in a trustee's sale the sale itself is not the thing that divests the parties in interest of their title; there is no order or decree of the bankruptcy court that gives the creditors any adjudicated rights in specific property—the statute gives them the right to a distribution after the assets, not already in money, have been reduced to money; there is no order or decree that divests the bankrupt of his title—the only decree against him is the adjudication of bankruptcy, and after that he still has the legal title (in trust for the trustee thereafter to be elected); when the trustee is elected, *eo instanti* he is vested, not by virtue of any order or decree of court, but “by operation of law” (section 70a), with the title of the bankrupt as of the date of adjudication. In short, the statute operates as a self-executing conveyance from the bankrupt to the trustee. His quality of title is the same as if the statute, instead of operating directly, had required that the court should either cause the bankrupt to convey to the trustee or should appoint a commissioner to execute a conveyance in the bankrupt's name. So when the trustee, as grantor, conveys what he acquired as grantee, he is not making a sale within the purview of the act of March 3, 1893. If he needs to resort to the ancillary jurisdiction of bankruptcy courts in other districts, which jurisdiction, independently of the amendment in 1910 of section 2, subd. 20 (Act June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1492), was held to exist (*Babbit v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969), it is not for the purpose of becoming vested with title and the right and power to sell and convey, but only to aid him in acquiring or holding or delivering possession.

Other sections of the Bankruptcy Act and of the General Orders, hereinabove quoted, only restrict, in the interest of the beneficiaries of the trust, the manner in which the trustee shall exercise his otherwise unlimited power of disposition; and they confirm us in the conclusion we have derived from a consideration of the nature of the trustee's title, namely, that Congress in the Bankruptcy Act has provided a comprehensive and exclusive method of administering estates of bankrupts.

A like answer has been given by the United States District Courts of Maine and Massachusetts. *In re Edes* (D. C.) 135 Fed. 595; *In re National Mining Exploration Co.* (D. C.) 193 Fed. 232. And a contrary one by the Supreme Court of Kansas. *Robertson v. Howard*, 82 Kan. 588, 109 Pac. 696.

The order under review is hereby vacated and held for naught.

FORTNEY et al. v. CARTER et al.

(Circuit Court of Appeals, Fourth Circuit. March 8, 1913.)

No. 1,112.

1. STIPULATIONS (§ 14*)—EQUITY SUIT—TAKING TESTIMONY.

Where counsel agree to take testimony by consent, regardless of the equity rule as to time, the court will apply such agreement to all the testimony so taken.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14;* Depositions, Cent. Dig. § 6.]

2. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where holders of bonds of a corporation sued to restrain strikers from interfering with the operations of the corporation, on the ground that the strikers' acts were operating to decrease the security, the amount in controversy was the value of the bonds held by the complainants, which were being so jeopardized.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of Circuit Court as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis' Mercantile Co. v. Klepner, 100 C. C. A. 288.]

3. INJUNCTION (§ 114*)—RIGHT TO SUE—BONDHOLDERS—STRIKES.

Bondholders of a corporation, having an independent personal right to protect their interests in the security, were entitled to sue to restrain strikers from interfering with the operations of the corporation to the injury of the corporation's property mortgaged to secure the bonds, and it was therefore immaterial whether the corporation as such aided them in the prosecution of their suit or not.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

4. INJUNCTION (§ 101*)—STRIKES—MISCONDUCT OF STRIKERS.

Where striking employes of a coal company conspired to prevent the employment of miners by the company, to compel those at work to quit, and to prevent the operation of the mines, and for this purpose insulted the company's employes by opprobrious epithets, fired guns at them, threw stones at their houses, where their wives and children were living, sent threatening letters, and went masked at night, and threatened to kill, etc., and the peace officers of the town were either members of the strikers' organization or in full sympathy with them, the bondholders of the corporation were entitled to an injunction to restrain the continuance of such acts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

Restraining boycotts, strikes, and other combinations by employes interfering with commerce or business, see note to Shine v. Fox Bros. Mfg. Co., 86 C. C. A. 313.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Bill by Merville H. Carter and others against Osborne Fortney and others. From a decree perpetuating an injunction, defendants appeal. Affirmed on opinion of Dayton, District Judge, which was as follows:

In the first opinion filed by me in this cause, ruling upon the demurrer, I considered the questions of the bondholders' right, independent of the com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany, to ask for and secure an injunction, and held them to be entitled, and that neither the company nor the mortgage trustee were necessary parties. I adhere to these rulings for the reasons stated in that opinion. It seems clear to me that the verified copy of the mortgage, which I have permitted to be filed, clearly shows the existence of the mortgage lien, and that the allegations of the bill that the plaintiffs are holders of bonds of the value of \$24,000 under this mortgage is not denied in the answer in such way as to demand affirmative proof; that the value of these bonds, as shown by the evidence of Atkinson, was almost wholly dependent upon the ability of this coal company to operate its mine, whereby revenue could be derived with which to pay interest and principal of these bonds in accord with the provisions of the mortgage contract, and that the other source of revenue, that from the rent of mine houses, was small and immaterial.

[1] I do not think, under the manifest agreement of counsel, whereby the taking of the testimony in this cause was extended over a period far in excess of that fixed by the equity rules, that objection can be made that this deposition of Atkinson was taken too late. Fairness requires, where counsel so agree to take testimony by consent regardless of the equity rule as to time, that the court should apply such consent agreement as relating to all the testimony so taken.

[2] It would seem clear, therefore, that the technical amount in controversy here necessary to confer jurisdiction is the \$24,000 of value of these bonds held by plaintiffs, which is being jeopardized by the acts of defendants in preventing the coal company from meeting the payment of interest and principal in accord with the mortgage contract relating thereto. Taking up the several questions discussed in the able and exhaustive brief of counsel filed in support of the motion to dissolve this injunction, I think it is clear (a) that the value of the coal company's property does depend upon its substantially continuous and uninterrupted operation of its coal plant, so far as its ability to comply with its mortgage contract with plaintiffs and its other bondholders is concerned, and that this is shown by the undisputed testimony of Atkinson; (b) that the pleadings and proofs in the case are sufficient to show plaintiffs to be lien creditors of this company; (c) that such pleadings and proofs are ample to show that irreparable injury to plaintiffs was threatened by the acts imputed to defendants; (d) that such acts did prevent the coal company from operating its plant in the usual manner and injunction was necessary; (e) that such acts were sufficient to preclude the coal company from operating its coal plant at a profit; (f) that the pleadings and proofs do show that the acts alleged were committed by the defendants for the purpose of interfering with the operation of the company's mining plant; and (g) that such acts were unlawful, committed by a sufficient number to prove conspiracy, and give equity jurisdiction.

[3] Holding the law to be, as I have held in my former opinion, that these bond lien holders have an independent personal right to protect their interests in the premises, it becomes immaterial whether the company as such has aided them in the prosecution of this suit or not, and no question of collusion can arise. It is undisputed that they have instituted this suit to preserve such right. The bill has been filed on their behalf by an attorney practicing at this bar of the highest character and in the very best standing thereat, and there is absolutely no evidence of or ground for the charge "that the Merchants' Coal Company is using the names of the plaintiffs in said bill as a means of instituting this suit and obtaining said injunction in a federal court upon the alleged ground of diverse citizenship, when in truth and in fact the plaintiffs themselves did not seek to institute said suit and obtain said injunction" as set forth in the motion made of record to dissolve and dismiss. It would be clearly incumbent upon defendants alleging this to supply the evidence thereof.

[4] I have carefully read all of the more than 1,600 typewritten pages of evidence filed in this cause, and I find it overwhelmingly sustains the plaintiffs' contention that these defendants, with others, conspired to prevent the employment of miners by the coal company, to compel those at work to quit and to prevent the operation of the mines. To accomplish this they and their co-conspirators threatened, menaced, insulted, and intimidated the

company's employes; called them "scabs," "black legs," "black sheep," "yellow dogs," and other even viler and more opprobrious epithets; fired at them with guns; fired guns and threw stones into their houses where their wives and children were; exploded dynamite or other explosive on the porch of the assistant mine foreman's house; stoned and otherwise assaulted them; sent threatening letters, went masked at night, threatened to kill, and gathered at the trains to prevent men from going to work for the company; exposed banners, warning men not to come there for work, and paraded in large numbers the streets surrounding the company's property, yelling, hooting, and calling the men working for the company insulting names, and applying to them opprobrious epithets. The officers of the town were either members of their organization, or in full sympathy with them, so that in some cases men were not only assaulted, but, after being so, were arrested and fined by these officers. In short, this record discloses a state of affairs existing in this town by reason of the acts and conduct of these strikers and their sympathizers that was a disgrace to the town, county, and state. Their own testimony shows almost throughout that they had no true conception of their moral and legal obligations. Because they were not willing to work at the wages this company was willing to give, they turned themselves into a mob of idle and largely drunken lawbreakers, determined to prevent other and better men from working. They took this course under the guise of a local union of the United Mine Workers of America, but it is hardly conceivable that they did so with the sanction and approval of the national officers of that organization.

The motion to dissolve and dismiss will be overruled, and this injunction will be perpetuated, with costs.

See, also (C. C.) 170 Fed. 463; (C. C.) 172 Fed. 722.

Charles E. Hogg, of Morgantown, W. Va., for appellants.

P. J. Crogan, of Kingwood, W. Va., for appellees.

Before PRITCHARD, Circuit Judge, and BOYD and SMITH, District Judges.

PER CURIAM. We have carefully considered the questions involved in this appeal, and find ourselves forced to the conclusion that the assignments of error are without merit. The opinions filed by the learned trial judge properly applied the facts as found in the record to the law applicable thereto, and directed a decree with which we find no fault.

It follows that the decree complained of will be affirmed.

TELFORD et al. v. JENNING PRODUCING CO.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1913. Rehearing Denied March 11, 1913.)

No. 1,853.

MINES AND MINERALS (§ 57*)—OIL AND GAS LEASE—CONTRACT—BREACH.

Plaintiffs contracted with defendant company for consideration of \$75 per acre to obtain for it an oil and gas lease on certain described property, to be signed by the owners of the land, leasing to defendant the land for oil and gas, together with good and sufficient title. *Held*, that such provision did not require plaintiffs to convey to defendant an absolute estate in fee to all of the premises, defendant being only entitled to the oil and gas with proper servitudes on the remaining property to efficiently

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

permit extraction and removal, and hence it was no defense to defendant's liability for refusal to accept a lease that the owners of the land had previously conveyed the coal rights under 50 acres of the tract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 167; Dec. Dig. § 57.*]

In Error to the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by James D. Telford and another, doing business as Telford & Schwartz, against the Jennings Producing Company. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

Plaintiffs in error, hereinafter termed plaintiffs, procured a written option from one Lyford and wife for the purchase by plaintiffs from the defendant in error, hereinafter called defendant, of a tract of 162½ acres of land in Marion county, Ill., for the price of \$40 per acre. Shortly after the option was obtained, oil was discovered on neighboring land. Thereupon, and on July 24, 1909, plaintiffs and defendant entered into a written agreement, whereby plaintiffs agreed with defendant, for and in consideration of \$75 per acre for the oil and gas lease to said premises, to procure and deliver to defendant a lease in due form, signed by the owner of said land, leasing to defendant the said land for oil and gas, "together with good and sufficient title," etc., in consideration whereof defendant agreed to accept a lease containing the terms, conditions, and stipulations of a certain copy of the proposed lease attached to said agreement, and made a part thereof, and pay said sum of \$75 per acre for said land on delivery of said lease.

The lease provided that plaintiffs, in consideration of \$1 in hand paid and of the covenants and agreements made by defendant in said lease granted, demised, leased, and let to defendant, "for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, constructing tanks, buildings," and other necessary structures, the said tract of 162½ acres. The lease was to remain in force 10 years, and as long thereafter as oil or gas was produced therefrom by defendant. In consideration of plaintiffs' said covenants, defendant agreed to complete a well on said premises within four months, and to perform certain other covenants not here in question.

An abstract of title was produced to defendant's counsel, from which it appeared that the coal rights lying under 50 acres of the 162½-acre tract had been deeded away. When advised of this by his attorney, as he was, defendant's agent said defendant was not leasing for coal, but for oil, and did not care a snap of his finger about the sale of the underlying coal. After this the contract above recited was prepared and signed. Thereupon plaintiffs took steps to exercise their option, and procure a deed from the Lyfords. The latter resisted, so that the summer of 1909 was spent in negotiations. These proving unavailing, plaintiffs instituted specific performance proceedings. In the meantime defendant's representative Shannon was urging a speedy procurement of the deed, as defendant was anxious to begin drilling. At length the Lyfords offered to convey for an advance of \$30 per acre over the contract or option price. Shannon was advised of this, and asked if he would conclude the deal and pay the \$75 per acre, if the suit were settled and the lands conveyed within 10 days, to which he replied that he would, and that he would have the money to pay for the lease as soon as plaintiffs could get the deed from the Lyfords. Acting upon this, plaintiffs compromised the suit, and received the title on paying the additional \$30 per acre, or a total of \$70 per acre to the Lyfords, subject to the rights of the owner of the coal under said 50 acres. In conformity with their said contract, the plaintiffs thereupon executed and tendered to defendant said lease. It appears that after said land had been conveyed to plaintiffs, and a few days before the tender of the lease, defendant's well on neighboring land was completed and failed to produce any oil, indicating that there was no oil or gas in that vicinity. When the lease was tendered, defendant refused to accept the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same, giving as his reason the fact that the coal rights under 50 acres thereof had been sold, and that plaintiffs had therefore not complied with the contract on their part, and claiming, also, that neither the defendant nor his agent, Shannon, had had any knowledge of the sale of said coal rights. Plaintiffs thereupon began a suit in assumpsit in the circuit court of Marion county, Ill., against defendant for damages growing out of breach of said contract, which suit was duly removed to the Circuit Court of the United States for the Eastern District of Illinois, and came to trial at the May term, 1911, upon defendant's plea of nonassumpsit. On the hearing the court held that plaintiffs had failed to furnish a good and sufficient title, and, on defendant's motion, took the case from the jury and directed a verdict for the defendant, which was duly excepted to. Thereupon plaintiffs moved for a new trial, which was denied. They then sued out this writ of error. Forty errors are assigned, most of which go to the rejection of evidence. The others, and as we regard it, the essential assignments, are contained in assignments 19 to 36, which go to the action of the court in excluding the evidence and taking the case from the jury, and directing them to find the issues for the defendant. These objections are duly preserved in the record.

Edward C. Kramer, Rudolph J. Kramer, and Bruce A. Campbell, all of East St. Louis, Ill., and L. M. Kagy, of Salem, Ill., for plaintiffs in error.

Charles P. Wise, David E. Keefe, and William E. Wheeler, all of East St. Louis, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The language of the contract is:

"That said party of the first part [plaintiffs] for and in consideration of seventy-five dollars (\$75.00) per acre for the oil and gas lease to the property hereinafter described, agrees to and with the Jennings Producing Company, party of the second part, to procure and deliver to the Jennings Producing Company, party of the second part, a lease in due form signed by the owners of said land, leasing to said party of the second part the said land for oil and gas, together with good and sufficient title,"

—to, to wit, said 162½ acres. Did this language require plaintiffs to convey to defendant an absolute estate in fee to all of said premises? The language clearly discloses that defendant was to take no estate in said tract except in the gas and oil and their appurtenances, which included such other estate as was reasonably necessary in securing to him the enjoyment of his gas and oil estate therein. He acquired no interest in the coal whatever. As was said in the concurring opinion of Justices Williams, Green, and McCullum, in *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 293, 25 Atl. 600, 18 L. R. A. 702, 34 Am. St. Rep. 645:

"One who buys a single stratum is bound to know where it is and how it is situated with reference to the strata above and below it, and he must be conclusively presumed to have taken title subject to the servitudes imposed by nature upon it as the necessary consequence of its position among the rocks that underlie the surface. * * * We do not hesitate to enforce the servitude for support whether subjacent or adjacent, or to regulate the extent and manner in which it shall be rendered and enjoyed. With equal propriety and with equal ease, we may enforce the servitude for access and regulate the extent and manner in which it shall be rendered and enjoyed."

Earlier in the concurring opinion, it is said:

"I concur in the decision made in this case and in the opinion which so ably vindicates it, but I would go further—I would lay down the broad proposition that the several layers or strata composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitude, and, as these are imposed by the laws of nature and are indispensable to the preservation and enjoyment of the several layers or strata to and from which they are due, the court should recognize and enforce them."

Defendant purchased only two of the several strata which the fee embraced. Can it be claimed that he secured any interest in the remaining strata, except those of support, means of access, and removal of the gas and oil? As was said in the majority opinion of the court in the case last cited:

"While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business as well as legal standpoint. The grantee of the coal owns the coal, but nothing else save the right of access to it and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This is sometimes limited in point of time; in others, it is without limit. In either event, it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed, the estate ends for the plain reason that the subject of it has been carried away. The space of it reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. * * * The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times."

Applying the foregoing statement of the law to the present case, we are of the opinion that the covenant for a good and sufficient title conveys all gas and oil rights in said premises together with all rights necessary in securing to defendant the enjoyment of his said estate, such as the right of access, the right to install the necessary plants for producing and removing the oil and gas and each of them; that such rights are subject to the natural servitudes which secure to the owners of the other strata such as surface clay and coal and any other substance located between the center of the earth within the boundary lines of said tract projected to the zenith. This doctrine is approved in *Thornton on Oil and Gas*, p. 367, and in *Rend v. Venture Oil Co.* (C. C.) 48 Fed. 248.

Defendant was in no sense prejudiced by the sale of the coal. His insistence to the contrary under the facts of this case was factitious, sired by an afterthought. The case should have been submitted to the jury, and the ruling of the district judge in that respect was error.

The judgment of the district court is therefore reversed, with directions to grant a new trial.

J. H. SULLIVAN CO. v. WINGERATH.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 115.

1. CONTRACTS (§ 284*)—CONSTRUCTION—SATISFACTION OF ARCHITECTS.

Where a contract for the construction of certain curbing and granolithic work provided that it should be performed to the satisfaction of specified architects, and that final payment should be made when the work should be approved by them, and on completion the architects examined the work and decided that it was not satisfactory, their decision was conclusive on the parties, in the absence of fraud or mistake so gross as to necessarily imply bad faith.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1317, 1326-1338, 1340-1346, 1350, 1351; Dec. Dig. § 284.*]

2. TRIAL (§ 243*)—CONTRADICTORY INSTRUCTIONS.

Where certain contract work was to be performed to the satisfaction of specified architects, and, they having refused to approve the work on completion, the court charged that their decision was conclusive, unless based on fraud or mistake so gross as to necessarily imply bad faith, further instructions, leaving the question to the jury as one of substantial performance, and charging that it was for them to determine whether the work as done measured up to what the architects should reasonably have required, and if the jury thought that defendant had fairly performed his contract he was entitled to a verdict, were contradictory and erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*]

In Error to the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Action by the J. H. Sullivan Company against Charles Wingerath. Judgment for defendant on a counterclaim, and plaintiff brings error. Reversed.

The following statement contains the facts particularly relevant to the questions of law considered in the opinion:

The plaintiff—a general contractor—had a contract with the owner of a church in Far Rockaway, Long Island, to make improvements upon the premises including the construction of concrete or granolithic sidewalks and curbs. The contract provided that no payment should be made to the contractor by the owner without the approval of the landscape architects and contained different provisions stating that the work should be done in a manner satisfactory to such architects. The plaintiff having taken the general contract from the owners made a subcontract with the defendant for the granolithic work. This contract provided that the work should be performed "to the satisfaction of the architects, Messrs. Olmsted Brothers," and that final payment should be made when the work should be approved by them. The defendant did the work under the subcontract but it was not satisfactory to the architects who rejected it and compelled the plaintiff to renew and replace it. The plaintiff brought this action to recover the expense it was put to over and above the contract price with the defendant, and the defendant by his counterclaim demanded the unpaid balance of the contract price.

Upon the trial the court, in the first part of its charge, told the jury that it was for them to say from the testimony whether the curb as constructed "did measure up to what Mr. Olmsted should have reasonably required under those specifications." Subsequently, the court charged in the language of the plaintiff's request as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Under this contract the decision of the architects as to whether the work was satisfactorily performed is conclusive, unless the jury find that the decision of the architects was based upon fraud or a mistake so gross as to necessarily imply bad faith on the part of the architects. If, after the completion of the work by the defendant, the architects examined it and decided that it was not satisfactorily performed, this decision of the architects is not subject to review by the court or by the jury, unless their decision was based upon fraud or upon a mistake so gross as to necessarily imply bad faith."

The jury retired after the charge but later came in for further instructions and the court charged in part as follows:

* * * * *

"It really turns on the architects' decision, whether that was justified or not."

* * * * *

"Fifth Juror: I would like to know if we are indorsing Mr. Wingerath's contract if we bring in a verdict for Mr. Wingerath?"

"The Court: You would be indorsing the performance of his contract, or the way in which the contract was performed."

"Fifth Juror: Whether it was right, whether it was done properly, or whether it was not?"

"The court: As far as I understand the word 'indorse' you would be finding that Mr. Wingerath had either performed the contract, or that any failure to perform was such that it should not be fairly made a basis of rejection by the architect."

"Fifth Juror: That is, whether he did it right, or whether it was done inferiorly?"

"The Court: Yes."

The jury brought in a verdict for the defendant upon his counterclaim, and to review the judgment entered upon such verdict the plaintiff has brought this writ of error.

Julien T. Davies and Herbert Barry, both of New York City, for plaintiff in error.

S. H. Voris, of Jamaica, N. Y., for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The trial court, in charging in accordance with the request of the plaintiff, correctly stated the law. The case was not one in which the necessity for, or finality of, an architect's certificate was involved. It was simply a case in which the parties had agreed that the work should be done "to the satisfaction of the architects." But in such a case the agreement as made must be lived up to. The question is not whether the work ought to be satisfactory but whether it is satisfactory. When parties agree that the question of the performance of a contract shall be left to the determination of a third person, his decision is final in the absence of mistake, fraud or arbitrary action amounting to legal fraud. To say in such a case that the question is one of substantial performance is to make a new contract for the parties and to substitute the judgment of the jury for that of the person they have agreed upon.

[2] The difficulty in this case is that although one part of the charge correctly stated the law, other parts in effect left the question to the jury as one of substantial performance. Thus in the first place they were specifically instructed that it was for them to determine whether the work as done measured up to what the architects should reasonably

have required, and we are unable to construe the last words of the court otherwise than as saying in substance that if the jury thought that the defendant had "fairly" performed his contract, they were justified in giving him a verdict. Portions of the charge upon the subject were clearly erroneous and we are not convinced that the correct portion cured the error.

As the judgment must be reversed on account of this prejudicial error and as the other questions raised upon the assignments of error may not arise upon the new trial, we think it unnecessary to consider them.

The judgment of the District Court is reversed.

KANSAS CITY SOUTHERN RY. CO. v. ROGERS et al. †

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,846.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RAILROADS—ERECTION OF POLES—NEGLIGENCE—QUESTION FOR JURY.

In an action against a railroad company for injuries to a sectionman by a fall of a telegraph pole he was assisting to erect, evidence held to require submission to the jury of the question whether defendant exercised ordinary care in furnishing and use of appliances for the erection of the pole, and also in the use of an iron rod or bar, instead of a flat board or bar, to hold the end of the pole in place as it was being lowered into the hole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ACT IN EXTREMIS.

Where plaintiff, a railroad sectionman, was injured by the sudden fall of a telegraph pole, which he was assisting to erect, he was not guilty of contributory negligence as a matter of law because he did not run in the right direction to escape injury when he discovered that the pole was about to fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

3. EVIDENCE (§ 538*)—EXPERTS —MATERIALITY OF TESTIMONY.

Where, in an action for injuries to a servant by the fall of a telegraph pole, which he was assisting to erect, he claimed that defendant was negligent in failing to provide proper appliances for the work, an expert, who had had 13 years' experience in the work of constructing telegraph and telephone lines, was properly permitted to testify concerning the usual and proper method of erecting poles of that character, and as to the appliances that were required therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2348; Dec. Dig. § 538.*]

4. DAMAGES (§ 216*)—MENTAL AND PHYSICAL SUFFERING—INSTRUCTIONS.

An instruction, in an action for injuries, that if the jury found for plaintiff they might consider his pain and suffering, both mental and physical, "caused by the injury," if any were proved, and probable future suffering as a result of the injury, if it appeared from the evidence that future suffering would probably result from such injury, was not objec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 26, 1913.

tionable, as authorizing the jury to award damages for mental suffering disconnected from the physical injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

In Error to the District Court of the United States for the Western District of Arkansas; F. A. Youmans, Judge.

Action by Frank Rogers against the Kansas City Southern Railway Company and another. Judgment for plaintiff, and defendant Railroad Company brings error. Affirmed.

J. B. McDonough, of Ft. Smith, Ark. (S. W. Moore and J. G. Schaich, both of Kansas City, Mo., on the brief), for plaintiff in error.

J. D. Head, of Texarkana, Ark., for defendant in error.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff; such being their titles in the trial of the case in the court below. Plaintiff brought this action to recover for injuries sustained by him while in the employ of the defendant as a section hand. The defendant having made a change in the location of its line, it became necessary to erect two telegraph or telephone poles on the sides of the new line. The work of erecting the poles was in charge of two linemen, who were brothers, named Moore. They had authority to call upon the section foreman for the assistance of his men in erecting the poles. They called upon the section foreman, and he directed plaintiff, with several of his fellow workmen, to assist in the erecting of a pole of chestnut wood weighing, according to the evidence, approximately 1,250 pounds. Plaintiff, in his petition, charged negligence on the part of the defendant as follows:

"That said defendants then and there negligently and carelessly failed to furnish a reasonably sufficient force of men to handle the heavy pole then sought to be erected; said defendants were further negligent and careless in failing to furnish sufficient and proper instruments or pike poles with which to reasonably and safely carry on the erection of said poles; and said defendants then and there negligently and carelessly furnished pike poles the points of which were torn and old and unsuitable for the purpose for which they were being used; further, that the defendants negligently and carelessly failed and neglected to use a sufficient guide board, and then and there negligently and carelessly failed to use a board of sufficient width to guide the said pole into the hole while it was being erected by the plaintiff and the other servants working with him, and then and there negligently and carelessly failed to provide reasonably safe means of any kind or character, both for the erection of said pole and for the guiding of same into the hole in which it was to be set."

[1] The evidence shows that, in erecting the pole, they had two pike poles, which were used by the Moores. The plaintiff and one of his companions were directed to lift on the pole, each with a shovel, which they inserted in season cracks in the pole. Two others of the sectionmen assisted with their shoulders near the base of the pole. A crossbar was used under the pole to hold it when it became

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

necessary to change the position of the pike poles and shovels. An iron bar or rod was used at the butt of the pole to guide it into the hole. According to the testimony, the pole at the base was approximately 14 inches in diameter, and the hole in which it was to be inserted was some 18 inches in diameter. When the pole was partly raised, it in some manner turned, fell, and hit the plaintiff, causing the injuries which he complained of.

As to whether a trench had been dug, leading into the hole in which the pole was to be erected, in which trench the lower end of the pole would rest, the testimony was in conflict. Plaintiff called as a witness one Burton, who testified that he had been some 13 years in the work of constructing telegraph and telephone lines. He qualified to testify as an expert as to the usual and proper method employed in erecting a pole of the character in question. From his testimony, a trench should be dug into the hole $2\frac{1}{2}$ or 3 feet back from the hole, so that the butt of the pole would go into proper position in the hole; that a jenny, or raising crotch, should be used in place of a crossbar, and pike poles should be used in place of shovels. It appears from the testimony that, while the crossbar would hold the pole up the same as a jenny or crotch, yet it would not assist in preventing the pole from turning to the extent that would be done by a jenny; that the trench would tend to prevent the pole from oscillating. We think the evidence sufficient to submit to the jury the question as to whether the defendant exercised ordinary care in the use of the appliances above stated, as well also in the use of an iron rod or bar, instead of a flat board or bar, to hold the end of the pole in place.

[2] The claimed negligence on the part of plaintiff consisted in the fact that, after he discovered the pole was going to fall, he did not run in the right direction to escape injury. The entire transaction happened in just a few moments, and it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence because, in the confusion at the time, he did not run in the direction in which it appeared subsequently that, had he run, he would have been safe.

Complaint is made to several sentences in the instructions given by the court. Considered as a whole, we think the instructions faultless; that they presented the issues and the law applicable thereto fully and fairly to the jury.

[3] The expert testimony given by the witness Burton was clearly admissible, under the authority of *U. S. Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159, and *Barrett v. Telephone & Telegraph Co.*, 201 Mass. 117, 87 N. E. 565.

[4] The court, in its instructions to the jury, stated that, if they found for the plaintiff, in assessing his damages they might take into consideration his pain and suffering, both mental and physical, caused by the injury, if any were proved, and probable future suffering as a result of the injury, if it appeared from the evidence that future suffering would probably result from the injury. That portion of the instructions is complained of, for the reason that it permitted the jury to award damages for mental as well as physical suffering. While it is true that, in personal injury cases, mental suffering alone,

disconnected from physical injury, is not an element of recoverable damages, the exception to the instruction in this case is unavailing, for the reasons stated in 166 Fed. 415, 92 C. C. A. 167, in the opinion in the case of *United States Smelting Co. v. Parry*, supra.

From a full reading and consideration of the evidence and the briefs of counsel, we fail to find any prejudicial error, and the judgment is affirmed.

AMERICAN MFG. CO. v. MASLANKA.

Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 175.

1. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—DUTY TO WARN.

Where defendant operated a dangerous machine in its factory, used to tear old bagging and rope into shreds, and plaintiff, an inexperienced employé, was ordered to take the material from the machine with his hands, without warning or instructions as to the danger involved, and was injured by having his hand drawn into the machine, defendant was negligent in failing to warn.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

In Error to the Circuit Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Action by Joseph Maslanka against the American Manufacturing Company to recover for personal injuries sustained by plaintiff while employed in defendant's factory. From a judgment for plaintiff, defendant brings error. Affirmed.

T. F. Wagner, of Brooklyn, N. Y., for plaintiff in error.

A. J. Ernest, of New York City, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The machine at which plaintiff was working was known as a picker. It was used to tear old bagging and rope into shreds. At one end of it was a movable apron, made of pieces of wood, on which the material to be operated on was fed forward to a set of fluted rollers. These seized the material and passed it inside of the machine, presenting it to a spiked cylinder. The spikes on this cylinder tore off the stuff presented by the rollers, shredding it to a proper size. This spiked cylinder made 450 revolutions a minute, and pitched the material torn off against a brick wall to the rear of the machine about 8 feet away. The space between the cylinder and the wall was inclosed in a box; the back and top being wood, and one side being the brick wall, against which the material was thrown. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—30

side of this box towards the workroom was open, except that it was covered with an apron of burlap fastened on the top and both sides, but split in the middle for the purpose of permitting the worker to take the shredded material out of the box. All of the spiked cylinder, except about 18 inches towards the rear, where the shredded material was thrown back into the large box, was covered by an iron plate. While the plaintiff was engaged in removing material from this box, his left hand came so near to the revolving cylinder that it was caught on the spikes, or encountered some reverse draught which drew it towards the spikes, or was caught in some bit of shredded stuff which had failed to dislodge itself from the spikes and was thus carried upward beyond the point of discharge. The left hand was cut off.

There was some testimony as to the box being overloaded with material, and as to the effect of such overloading; also as to removal of the material with a pitchfork instead of the hand. In the view we take of the case, it seems unnecessary to refer to any other charges of negligence than the one hereinafter discussed. There was abundant evidence to show that this machine, with its spiked cylinder revolving at a very high rate of speed, and approachable despite its iron protecting plate, from the side where workmen removed the material, was of such a character that a person of reasonable prudence would not have set an ignorant man to work at it, without explaining its structure and mode of operation, and giving some warning as to the risk involved in getting too close to it. The complaint alleged that defendant failed to give plaintiff any instructions as to the proper methods of doing the work, and failed to instruct him as to the dangers to be encountered in the removal of the material.

[1] The court left it to the jury to say whether defendant did all that it should have done in making the man understand what the danger was, and that, if plaintiff satisfied them that defendant did not do that, then he could recover unless he were himself negligent. Indeed, although the court referred to some of the other propositions which had been discussed, the only charge of negligence which he sent to them to pass upon was whether defendant set a green hand to work at a dangerous machine, without giving him such information and instructions as a reasonably prudent man would have given under the circumstances. Plaintiff testified that all his prior work had been with a truck on the dock; that this was the first time he was ever put to work at a picker, and that he had worked at it only 15 minutes when the accident happened; that he was not instructed about the machine, or warned of any danger, and that the only instruction he got was to "go there and take the stuff out with your hands." His knowledge of our language was so imperfect that he had to be examined through an interpreter.

[2] It is true that his cross-examination disclosed a familiarity with the machine and its operation which could not possibly have been acquired by such an ignorant man in 15 minutes; but he may have learned about the machine afterwards. It is also true that several witnesses, some of them fixing dates by workmen's time cards and similar documents, testified that plaintiff had worked at a duplicate

of this machine in an adjoining room almost daily for six months before the accident. But if the jury believed the plaintiff and disbelieved the others, as their verdict shows they did, we cannot reverse their finding. There was a sharp conflict of evidence on the precise point, and they are the triers of the fact. If the plaintiff's story were true, he was certainly entitled to a verdict.

In some instances the cross-examination of defendant's witnesses was carried too far, and parts of the charge are open to criticism; but we do not go into these details, because we are not satisfied that there is reversible error shown.

The judgment is affirmed.

ROYCE v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 112.

1. APPEAL AND ERROR (§ 268*)—REVIEW—WEIGHT OF EVIDENCE—EXCEPTION.

Where, in an action for injuries to a railroad brakeman, plaintiff took no exception to an instruction submitting the case to the jury on the question of the train dispatcher's negligence, and did not request any further instruction or charge that there was no conflict of testimony on that branch of the case, or that the negligence had been proven as a matter of law, there was no exception on which plaintiff was entitled to have reviewed on writ of error a contention that the verdict in favor of defendant was against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1596-1608; Dec. Dig. § 268.*]

2. COURTS (§ 356*)—FEDERAL COURTS—REVIEW—DENIAL OF NEW TRIAL—EXCEPTION.

An exception to the denial of a motion for new trial or to set aside a verdict presents nothing for review by a federal court of appeal on a writ of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

In Error to the District Court of the United States for the Southern District of New York; James L. Martin, Judge.

Action by Joseph M. Royce against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 110 C. C. A. 125, 188 Fed. 55.

This cause comes here upon appeal from a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was defendant below. It has been twice before in this court on writs of error to review prior judgments, and our opinions (176 Fed. 331, 99 C. C. A. 256; 180 Fed. 879) may be consulted for a detailed statement of the facts. Briefly summarized, they are as follows: Plaintiff the front brakeman on a freight train, while sitting in the cab of the engine, was scalded by steam escaping from the boiler. This was caused by the driving rod on the left side, which flew up, striking the bottom of the cab, jamming the doors and windows, and breaking a stud from the boiler. This accident occurred near the entrance to the Port Morris yard, and was itself induced by a prior accident, which occurred about two hours before on a siding at Waterloo Station. The top guide on the left side had been lost in some way, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had carried away with it a part of the steel block or yoke which held the guide. The loss of the top guide thus left no support, except the lower guide, to the crosshead to which the driving rod and piston rod on that side were attached. It would have been an easy matter, with the ordinary kit of tools carried on the engine, to disconnect the driving rod on that side, thus putting it out of commission. This would not have interfered with the operation of the driving mechanism on the right side. The train remained an hour and a half at Waterloo Station after the loss of the guide was discovered. The conductor telephoned to the train dispatcher at Hoboken, and told him they had lost the top guide and that they wanted a pusher sent to Waterloo Station. To this there came a reply, stating merely that a pusher engine would be sent. The pusher arrived in due course, and after it was attached they proceeded towards Port Morris, using the train engine, without disconnecting the left driving rod.

Hatch & Clute, of New York City (E. S. Hatch, of New York City, E. M. Gregory, of Newark, N. J., and V. P. Donihee, of New York City, of counsel), for plaintiff in error.

F. W. Thomson, of New York City, for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The question of negligence on the part of defendant was submitted to the jury. The charge was clear, careful, and accurate. It called attention to the circumstance that the master had been informed of the accident to the engine, just what it was—that the top guide was lost—and that whether or not the defendant was negligent depended upon the question whether a person of reasonable prudence would have done more than the master did, viz., inform the conductor that they would send the pusher, which was in fact sent. The court told the jury that the question was: Did the train dispatcher, who for the purpose of the case was the superintendent, perform his full duty in merely sending the pusher? that it was for them to say whether he should have done something more. He further told them that, if the superintendent or dispatcher turned the matter over to the conductor to do as he thought best, he delegated his own authority on the matter to the conductor, and if the latter did not exercise due care the plaintiff could recover.

[1, 2] There was no exception to this charge by the plaintiff; indeed, it is difficult to see how there could be. It charged the law of the case correctly and favorably for him. There was no request for any further instruction, no request for a charge that there was no conflict of testimony on this branch of the case, or that negligence had been proved as a matter of law. There was no objection made to sending the cause to the jury on the question whether or not the defendant exercised due care. The contention now made really is that the verdict was against the weight of evidence; but there is no exception which brings any such question here. Plaintiff moved to set aside the verdict and for a new trial and took an exception to the denial of that motion, but no such exception comes to a federal court of appeal on a writ of error.

There are exceptions to admission or exclusion of testimony—all bearing on the question whether under the rules of the road plaintiff, at the time he was injured, should have been in the engine cab, or on

top of the cars. These need not be considered, because the court, by the charge, eliminated all question as to whether plaintiff was or was not where he ought to have been. He charged that, even though plaintiff was not at his place of duty, nevertheless, if he had done nothing that contributed to the happening of the accident, he would be entitled to recover. And he charged, further, that his presence in the cab did not contribute at all to the happening of the accident to the engine, which caused his injuries.

The judgment is affirmed.

AMERICAN CAR & FOUNDRY CO. v. DIETZ.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,833.

MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DEFECTIVE MACHINE.

Plaintiff was thrown from the top of a car and injured by an electric shock received from an electric emery wheel that he was using. He had used the machine for some time before, and on the afternoon before the injury, ascertaining that the hood was loose, took the machine to defendant's repair man for inspection and repair. After it was repaired, plaintiff started to use it on the succeeding day, and received the shock. There was no evidence as to the particular defect in the machine that permitted the escape of the electricity: but it appeared that it might have been caused by the wearing off of the insulation on the conductor cord, or by the detachment of the fine wires therein. *Held*, that such facts were insufficient to show defendant's negligence, under the rule that a master, having adopted the customary and approved methods or tests for the discovery of defects in its appliances, discharges its duty to its employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Henry Dietz against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

William R. Gentry, of St. Louis, Mo. (Edwin W. Lee, M. F. Watts, and G. A. Orth, all of St. Louis, Mo., on the brief), for plaintiff in error.

B. R. Brewer and Charles W. Casey, both of St. Louis, Mo., for defendant in error.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. Henry Dietz brought this action against the American Car & Foundry Company to recover for an injury sustained by him while in the employ of said Company. In his petition he alleged that:

"On or about the 3d day of October, 1911, in said city of St. Charles, on top of one of the cars then being built, and whilst using a machine that had been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

furnished to him with which to grind off the rough edges of irons which were being used in constructing said cars of defendant, and whilst operating said machine, which was run and operated by electricity and electrical appliances, and whilst in the exercise of reasonable care for his own safety, the machine by some means unknown to plaintiff became unmanageable and through some defect in the wire, which was then heavily and dangerously charged with electricity and connected with said machine, that by reason of some defect not known to the plaintiff, but known to defendant, or which defect by the exercise of reasonable care could and should have been known to defendant, the machine, which plaintiff was using, became charged with electricity, and when he took hold of it, to move it from one place to another to do the work assigned him, both of his hands were caught and held fast to the handles of the machine, and by reason of the force of the electricity and its dangerous character plaintiff was whirled about the top of the car on which he was working, and thrown violently to the cement floor beneath, a distance of some 12 or 15 feet, and as the direct result of said shock and fall the plaintiff received the following injuries, to wit. * * *

From the evidence it appears that the machine in question was a small electrical driving machine, which drove an emery wheel used to grind down the rough ends that were welded on joints. The machine had a small, flexible cord, by which it could be attached to sockets in different parts of the building near where it was to be used. This cord, to give it flexibility, was composed of a number of small insulated wires. There was a small hood over the emery wheel to prevent the little particles of iron from flying in the face of the workmen. Plaintiff had been working in the shops of the defendant for about 16 years, and had used one of these electrical machines off and on during 4 weeks preceding his injury. The afternoon before the injury, the hood over the emery wheel being a little loose, and the machine needing, as he thought, oiling, the plaintiff took the machine to the repair rooms, and told the repair man to oil the machine, to fix the wheel protector, look it over, and see that it was in good order. This the repair man did, handed it back to the plaintiff, who took it back to his work, and used it that afternoon from an hour and a half to an hour and three-quarters, until the close of his day's work, when he returned it to the usual place. The next morning, returning to his work, he took the same machine, went onto the car, and, after fastening the cord to an electric socket, turned on the electricity, and, as he pressed a button or lever on the machine, to start the emery wheel in motion, he received an electric shock, which threw him from the car to the floor below, causing him the injuries complained of.

What the defect was in the machine, which caused it to give him such electric shock, is not disclosed by the evidence. There was testimony to the effect that, if the insulation upon the small cord spoken of became worn off, so that two of the wires could come together, it would produce such a shock, or, if one of the wires in the machine should become detached, it probably would produce such a shock. There was evidence to the effect that the insulation would be worn off from the cord by the workmen dragging it over the rough places on the car, instead of lifting the cord up when they moved about the car from place to place. There was evidence, also, tending to show that some of the little wires in the machine frequently became detached by employes lifting and carrying the machine by the cord,

instead of taking hold of the machine itself. It appears from plaintiff's evidence that at about 4 o'clock in the afternoon of the day before he took the machine to the repair shop to be oiled, have the hood or protector tightened up, and the machine generally looked after to see that it was all right, which the repairer did. As before said, it does not appear what the defect was in the machine in question which caused the shock to the plaintiff.

At the close of all of the evidence, defendant asked the court to instruct a verdict in its favor, which was overruled, and defendant has brought the case here on error.

The pleadings and evidence bring this case directly within the rule announced in *Ill. Cent. R. Co. v. Coughlin*, 132 Fed. 801, 65 C. C. A. 101, *Midland Valley R. R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151, *Patton v. Texas & Pac. R. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564, and it was error to refuse the requested instruction.

The judgment is therefore reversed, with directions to grant a new trial.

IN RE HOUSE OF FASHION.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 128.

BANKRUPTCY (§ 340*)—CLAIMS—EVIDENCE.

Evidence *held* to require a finding that the bankrupt, on taking over the assets and business of another concern, assumed and agreed to pay the debt of that concern to claimant.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 527; Dec. Dig. § 340.*]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of *House of Fashion*, bankrupt. From an order denying a petition of *Bernard J. Ludwig*, reducing his claim from \$6,100 to \$2,400, and expunging and rejecting the claim except to that amount, an appeal is taken. Reversed.

Olcott, Gruber, Bonyng & McManus, of New York City (D. W. Kahn and I. L. Ernst, both of New York City, of counsel), for appellant.

McLaughlin, Russell, Coe & Sprague, of New York City (F. C. McLaughlin, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The facts are somewhat involved, and it will not be necessary to recite them at length. The real controversy in the case is whether or not the bankrupt assumed the indebtedness of another corporation.

Prior to the organization of the *House of Fashion* and for some

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time thereafter there was in existence a concern known as Blumenkrohn Company; both concerns were engaged in the same line of business. Siegfried Blumenkrohn was president of the House of Fashion, apparently the owner of a majority of its stock, and the person in charge of its business and affairs. He was also president and in sole control of the Blumenkrohn Company. The latter company proving unsuccessful, Blumenkrohn decided to turn over all its assets to the House of Fashion, which had a better location, and which he thought might have better success. There were creditors of the Blumenkrohn Company, among them Ludwig for the claim under discussion. Ludwig was applied to by Blumenkrohn to give his consent to the transfer of the assets, a transfer which, as the District Judge says, would deprive him of any lien on the assets of his original obligor. He consented to the transfer of part of them on June 1, and of the residue on August 1, 1911, and he contends that he gave this consent upon the assurance of Blumenkrohn, the sole representative of the House of Fashion, that it would assume and pay the debts of the Blumenkrohn Company. Both men testified. We think both witnesses were entirely honest, although their testimony is a little vague, as might be expected from laymen without any appreciation of legal questions. From this testimony Judge Hand reached the conclusion that Blumenkrohn made no promise on behalf of the House of Fashion, and that, as he says, "neither man seems to have so understood the transaction."

Upon the same testimony a majority of this court have reached the opposite conclusion. We understand Blumenkrohn to state expressly that he did tell Ludwig that the House of Fashion intended to assume the indebtedness; the context shows that his answers to the questions mean just that. The witness sometimes says "I," and sometimes "we," but it seems clear to us that in so doing he did not intend to indicate any legal distinction. Thus, in answer to the question whether he didn't tell Ludwig that the House of Fashion would assume "all of the Blumenkrohn indebtedness to him" (which evidently means the Blumenkrohn Company indebtedness), he replied, "I did intend to do so, but we really did not." The rest of the testimony shows that the phrase "we really did not" means only that the House of Fashion did not actually give Ludwig notes for all the indebtedness of the other company. The answer to the next question shows that he did at that time tell Ludwig of his intention.

Ludwig's testimony seems to us equally clear that it was the House of Fashion which took over the assets, which promised by Blumenkrohn, the person in sole control of it, to pay the debt.

The order is reversed.

CHARLES A. COWEN & CO. v. PRICE.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 118.

MUNICIPAL CORPORATIONS (§ 809*)—STRUCTURES IN STREET—LIABILITY OF CONTRACTOR.

A general contractor, who has occasion to build a temporary bridge over an excavation in a crowded thoroughfare for use by the public, may build it himself, or he may employ some one else to build it, but in either case he is responsible for the manner in which the work is done; nor does his duty end when a suitable and safe structure has been furnished, but he must see that it remains so, and is liable if he fails to discover and remedy an obvious defect, and injury results therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

In Error to the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Action at law by Mary C. Price against Charles A. Cowen & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Amos H. Stephens, of New York City (E. Clyde Sherwood, of New York City, and William B. Davis, of counsel), for plaintiff in error.

Franz Neilson, of New York City (Wilbur F. Earp, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This action is to recover damages for injuries received by Mary C. Price, caused by a defect in a temporary bridge, which was built over an excavation on Sixth avenue, New York, with steps leading up to and down from the bridge. The plaintiff had crossed the bridge and was going down the steps at the north end when a part of the second step gave way under her weight—she weighed 215 pounds—causing her to fall. From this fall she received injuries for which the jury gave her a verdict of \$2,000 against the general contractor, Cowen & Co., and released the subcontractor, Miller, Daybill & Co. This finding exonerates the subcontractor from the charge of negligence. If, however, the finding had been otherwise, it would not operate to discharge the general contractor who had charge of the work. The general contractor might delegate a part of the work, but that fact does not relieve him from liability if the bridge were improperly constructed or negligently maintained. The public had a right to use the bridge and to rely upon its being in a safe condition.

The duty of the subcontractor ended when a safe and properly constructed bridge was completed. Thereafter the general contractor undertook the duty of its inspection and maintenance. After the bridge was accepted by the general contractor, that corporation assumed the responsibility of keeping it in repair and was responsible for its condition. If it permitted the structure to get into a dangerous condition so that it became a menace to pedestrians passing along one of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

principal streets of the city, the contractor was guilty of negligence. The question whether the defendant was in fault was one of fact and the jury, if they believed the plaintiff and her witnesses, was fully justified in finding a verdict in her favor. The testimony for the plaintiff was to the effect that a part of the step which caused the fall became detached and caught the plaintiff's foot as she descended the steps. Either this piece was insecurely nailed to the tread or it broke off from the plank. In either event, the steps were not in a proper condition for the use of the crowds which are constantly passing up and down Sixth avenue. This testimony was contradicted by the defendant's witnesses but the jury evidently believed the plaintiff's version of the accident and their conclusion on the facts should not be disturbed by an appellate court. If the condition of the step was such that an ordinary pedestrian stepping upon it would cause it to give way, it was the duty of the jury to say whether such condition could have been discovered by a reasonably careful inspection on the part of the defendant. All of these questions of fact were fairly submitted to the jury.

The defendant contends that the general contractor had discharged his full duty when he employed a competent subcontractor to construct the bridge, and if a safe bridge were thus built, the duty of the general contractor was done. This contention in effect releases both contractors from liability. The subcontractor, because he has done the work which he was employed to do, his work has been accepted and paid for and he has been discharged. The general contractor, because when he accepted the bridge, it was properly built and in a safe condition. We think such a rule leaves out of sight the obligation which a general contractor owes to the public. For the time being he is in entire charge of the premises and the work thereon and it is his duty to see not only that the sidewalk is in a safe condition when completed, but also, by careful inspection and constant diligence, he should see that it is kept in such condition. Otherwise the public, who have a right to assume that the city streets may be safely traversed, will be left without redress if they are injured. A contractor who has occasion to construct a bridge in a crowded thoroughfare may build it himself or he may employ some one else to build it. His duty does not, however, end when a suitable and safe structure has been furnished, he must see that it remains so, and is liable if he fails to discover and remedy an obvious defect, and injury results therefrom.

Some of the authorities cited by the defendant seem to indicate a different doctrine, but when examined in the light of the circumstances of each case we think they are not in conflict with the rule as above stated.

The judgment is affirmed with costs.

In re SCHWAB-KEPNER CO.

GREEY v. DOCKENDORFF.

(Circuit Court of Appeals, Third Circuit. March 17, 1913.)

No. 1,692.

APPEAL AND ERROR (§ 1022*)—REVIEW—EVIDENCE—FINDINGS OF MASTER.

Findings of a master, sustained by the trial judge, will not be set aside on appeal, unless a preponderance of the testimony shows that they involve reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

In the matter of the Schwab-Kepner Company, bankrupt. Petition by J. E. Dockendorff for the delivery to him of the proceeds of certain assigned accounts collected by the trustee. From an order allowing the petition, Arthur Greey, as trustee in bankruptcy, appeals. Affirmed.

Hays, Hershfield & Wolf, of New York City (Ralph Wolf, of New York City, John G. Johnson, of Philadelphia, Pa., and James N. Rosenberg and Garrard Glenn, both of New York City, of counsel), for appellant.

Einstein, Townsend & Guiterman, of New York City (Gerard B. Townsend and Julius Henry Cohen, both of New York City, of counsel, and J. de R. Storey, of New York City, on the brief), for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. This case involves the findings of a special master, to whom a reference was made of a dispute between one Dockendorff and the trustee in bankruptcy of the Schwab-Kepner Company as to the ownership of the proceeds of certain accounts of the bankrupt company, which had been assigned to Dockendorff, but collected by the trustee. On the part of Dockendorff it was alleged the assignments were valid; on the part of the receivers, who filed the answer, that they were preferential, invalid, and with the intent on the part of Dockendorff and the company to hinder, delay, and defraud creditors. In pursuance of his appointment, the special master, who was also an experienced referee, took and reported testimony and exhibits aggregating over 2,000 pages. In a report which evidences his patience, thoroughness, and ability, the special master reported in favor of Dockendorff and against the receivers' contention. The matter was again considered and examined by a judge of the District Court, whose careful and exhaustive consideration of such matters is well known to this court. In an opinion confirming the special master's report, that judge, after again examining the testimony, says:

"I am satisfied with the master's findings of fact, and his conclusions of law thereon, to which statement, by way of enlargement, it may be added

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that there is no sufficient or satisfactory evidence to show that the transfers in question were made with an intent to hinder, delay, or defraud the bankrupt's creditors, while as to the question of the insolvency of the Schwab-Kepner Company, at the times when the accounts were severally assigned to the petitioner, it must be said, after a careful reading of the testimony, that the proofs fail to establish it. At the most, they go no farther than to create a doubt or engender a suspicion of that fact. There is certainly a lack of evidence to warrant me in overruling the master's findings upon that point."

In this court we have had the benefit of the fullest and ablest discussion of the testimony, and the case has been again reconsidered. Substantially the questions involved are ones of fact, and without entering upon a discussion of the proofs, and of what has been so fully covered by the report of the master and the opinion of the experienced judge below, we limit ourselves to saying that no such preponderance of testimony is disclosed by the proofs as would warrant this court in holding the findings and conclusions of the master and the court below involved reversible error, and we may add the briefness of this opinion and its nonreference to details will not be taken as indicating that this court has overlooked any point or question raised in the arguments or briefs.

The decree of the court below is affirmed.

SMITH v. FARBENFABRIKEN OF ELBERFELD CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,320.

1. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—JURISDICTION.

If the trial court decided and the assignments of error raise an independent question of general law, as well as one of jurisdiction, the Circuit Court of Appeals has jurisdiction to determine both questions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1103; Dec. Dig. § 405.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

2. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent has been sustained in a number of contested cases, its validity should be assumed by another court for the purposes of a motion for a preliminary injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

3. PATENTS (§ 288*)—SUIT FOR INFRINGEMENT—JURISDICTION—"REGULAR AND ESTABLISHED PLACE OF BUSINESS"—"AGENT ENGAGED IN CONDUCTING SUCH BUSINESS."

Defendant conducted a mail order drug business. He resided in Windsor, Canada, from which place he solicited orders in the United States, and he there received orders and remittances in payment therefor, but all of his goods were kept in a warehouse in Detroit, Michigan, to which place he imported goods in bond and there paid the duties. Such warehouse was in charge of an employé who received and stored and cared for all goods, and on instructions from defendant filled all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

orders and made all shipments. *Held*, that defendant had "a regular and established place of business" in Detroit, and that his employé there in charge was his "agent engaged in conducting such business" within the meaning of Judicial Code Act March 3, 1911, c. 231, § 48, 36 Stat. 1100 (U. S. Comp. St. Supp. 1911, p. 149); that, where he sold and had shipped from his warehouse articles alleged to infringe a patent, he was subject to suit for infringement in that district under said section by service on such agent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. § 288.*]

4. PATENTS (§ 288*)—SUIT FOR INFRINGEMENT—JURISDICTION—SUIT AGAINST NONRESIDENT ALIEN.

Since Judicial Code (Act March 3, 1911, c. 231) § 48, 36 Stat. 1100 (U. S. Comp. St. Supp. 1911, p. 149), vests jurisdiction of patent infringement suits in the District Court in any district wherein a defendant shall have committed such acts of infringement and have a regular and established place of business, and also, where defendant is not an inhabitant of the district, authorizes service on his agent engaged in conducting such business, the court has jurisdiction of such a suit, although the defendant is a nonresident alien.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. § 288.*]

Jurisdiction of federal courts in suits relating to patents, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Suit in equity by the Farbenfabriken of Elberfeld Company against Albert C. Smith. From an order granting a preliminary injunction, defendant appeals. Affirmed.

See, also, 197 Fed. 894.

H. C. Walters and A. P. Hicks, both of Detroit, Mich., for appellant.

Anthony Gref and Livingston Gifford, both of New York City, for appellee.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from an order of the District Court temporarily enjoining appellant (defendant below) from infringing United States letters patent No. 644,077. The patent was granted February 27, 1900, to appellee (complainant below) as assignee of Felix Hoffman, for an improvement made by him in acetyl salicylic acid, known in pharmacy as "aspirin." The bill is in ordinary form, except that it contains averments that in a suit in equity for infringement of such letters patent, brought by the present appellee against Edward A. Kuehnstedt in the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois, and heard finally on testimony taken by both parties and arguments of their respective counsel, a decree was entered sustaining the patent and ordering an injunction and an accounting (171 Fed. 887); that this decree was affirmed and rehearing denied (179 Fed. 701, 103 C. C. A. 243, C. C. A. 7th Cir.); and that a petition for a writ of certiorari was

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

thereafter denied by the Supreme Court (*Kuehmstedt, Petitioner, v. Farbenfabriken of Elberfeld Co.*, 220 U. S. 622, 31 Sup. Ct. 724, 55 L. Ed. 613). It is further averred in the bill that decrees had been entered in certain of the Circuit Courts of the United States enjoining defendants in various suits (23 in number) brought by the present appellee to restrain infringing such letters patent, and that preliminary injunctions restraining similar infringements had been granted in five other suits of appellee against defendants named.

Appellant appeared specially in this case, moved to quash the service of the subpoena, and filed two affidavits in support of the motion and in opposition to the granting of the temporary injunction. It is stated in this motion that the service of the subpoena is defective, and the return of the marshal is untrue, because (a) the person named in the return of service was not, at the date of service, and never had been, "an agent of the defendant"; (b) such person "was not, and never had been, engaged in conducting the business of the defendant"; (c) defendant (appellant) did not then have "and never has had a regular and established place of business within the Eastern District of Michigan"; (d) defendant (appellant) was not then "and never has been, a resident or an inhabitant of the Eastern District of Michigan, and it does not appear from the service of said subpoena that there was personal service upon him", stating, further, that the motion was "based upon the files, record, and proceedings had in the above-entitled cause, and upon the affidavits of Charles Henri (alleged agent upon whom service was made) and Albert C. Smith (defendant), filed herewith." It is admitted by the affidavit of Henri that on February 9, 1912, the date of the marshal's service, there was handed to Henri "a copy of the subpoena, of the bill of complaint, of the order to show cause why an injunction should not issue, and of the notice of motion for a preliminary injunction, all in the said cause."

[1] No motion or other effort has been made in this court to dismiss the present appeal. While the motion to quash might seem to have presented below only a question of jurisdiction of the trial court, and so to have suggested the taking of a proceeding directly to the Supreme Court instead of this court, yet the lower court did in fact decide an independent question of general law as also the question of jurisdiction. The assignments of error are addressed to both questions; as to the former, challenging the validity of the order granting a preliminary injunction "upon the showing made in the bill of complaint and affidavits made in support thereof." It is settled that in such a case this court has power to hear and decide all the questions. *Olds v. Herman H. Hettler Lumber Co.*, 195 Fed. 9, 11, 115 C. C. A. 91 (C. C. A. 6th Cir.); *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 195 Fed. 12, 15, 115 C. C. A. 94 (C. C. A. 6th Cir.).

[2] The matter of general law so decided involved the validity of the patent, and the question whether or not it had been infringed by appellant. In view of the undenied averments of the bill, before pointed out, to the effect that the patent in suit had been adjudged valid upon final hearing, and that repeated orders of injunction had been made upon the faith of such adjudication, the law is too well established to justify discussion of the merits of the order allowing the preliminary

injunction. For the purposes of this appeal we hold that the patent is valid, and that appellant infringed. *Acme Acetylene A. Co. v. Commercial Acetylene Co.*, 192 Fed. 321, 323, 325, 112 C. C. A. 573 (C. C. A. 6th Cir.), and decisions there cited.

[3] It is contended that the court's jurisdiction is dependent upon section 48 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [U. S. Comp. St. Supp. 1911, p. 149]), which is set out in the margin;¹ and that appellant has no "regular and established place of business" in the Eastern District of Michigan, and no agent conducting such business as appellant has within the meaning of section 48. The important facts bearing upon the motion to quash may be summarized thus: As many as 12 years prior to the commencement of this suit the appellant moved from Cleveland, Ohio, to Windsor, Canada, and since then has been engaged in a mail order drug business. He solicits orders from his residence in Windsor, and receives them with remittances at the same place. His customers seem to be in the United States. He imports his goods in bond by way of eastern ports of the United States directly to Detroit, where the duties are paid. He maintains a warehouse on Woodward avenue in the city of Detroit, where his goods are stored, but does not himself visit Detroit. The warehouse and the goods stored there are in the immediate charge of Henri, upon whom the service of process in this suit was made. The appellant notifies his customers:

"All orders filled promptly and completely from my Detroit warehouse, duty paid."

Henri receives shipping instructions, and also tags and labels, from appellant at Windsor, but just what instructions are given and how communicated do not appear. Henri is the only representative of appellant, and the Detroit warehouse is the only warehouse or place for storage and handling of appellant's goods, in the state of Michigan. Upon receiving instructions from appellant, Henri fills the orders of customers by "putting up, wrapping and attending to the shipping of packages," by attaching "shipping tags and labels," and by delivering the packages "at the post office, the express office, or to the express drivers, or at a freight depot." It is manifest that Henri must also receive the goods when they reach Detroit in bond, and then place them in the warehouse preparatory to breaking, assorting and storing them for the purpose of conveniently filling and executing sales orders. He does not receive orders directly from customers or enter into contracts with them, or receive any money in payment of bills;

¹ "Sec. 48. In suits brought for the infringement of letters patent, the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

and both Henri and appellant in terms state in their affidavits that Henri has no authority so to do.

Thus negotiations and acts leading up to, though not completing, the purchases and sales of appellant's goods, are conducted and performed by appellant; but plainly there are a number of other steps to be taken in order to consummate the transactions so begun by appellant individually. Whether goods received in bond are in kind, quality, or condition according to the terms of purchase must, by reason of appellant's failure to enter Detroit, be ascertained and tested by Henri. Kindred facts must also be determined by Henri as respects sales to customers. The performance of such duties as these necessarily involves an important part of appellant's business. Appellant's individual acts do not embrace delivery of the goods (*Norfolk & West. Ry. Co. v. Sims*, 191 U. S. 447, 24 Sup. Ct. 151, 48 L. Ed. 254; *Wheelhouse v. Parr*, 141 Mass. 595, 6 N. E. 787; *Sarbecker v. State*, 65 Wis. 174, 26 N. W. 541, 56 Am. Rep. 624); nor does it affirmatively appear that he selects the carrier where there are two or more reaching any given destination, or fixes the cost of carriage in any case; and, in the absence of such showing, Henri is obviously clothed with implied authority to select the carrier in the one instance, and stipulate for the terms of transportation in the other (*Nelson v. H. R. R. Co.*, 48 N. Y. 504; *The St. Hubert* [D. C.] 102 Fed. 364; *Armstrong v. Chicago, M. & St. P. Ry. Co.*, 53 Minn. 189, 190, 54 N. W. 1059; 1 Hutch. Car. [3d Ed.] § 108; 1 Clark & Skyles on Agency, § 286); nor does it appear that appellant has anything to do with the manner of storing, or the method and safety of packing, nor that he limits or regulates the control and management exercised at the warehouse or with respect to the goods while stored there. These features are all committed to Henri, and they necessarily invest him with some degree of authority and discretion as an agent, and not merely as a servant. Indeed, Henri's duties and work cover the entire portion of appellant's business that is carried on in the Eastern federal district of Michigan; and since they comprise the last essential acts of performance of appellant's contracts, they operate to fix the place of performance at Detroit. *Johnson v. Chas. D. Norton Co.*, 159 Fed. 363, 86 C. C. A. 361 (C. C. A. 6th Cir.); *Bond v. John V. Farwell Co.*, 172 Fed. 64, 96 C. C. A. 546 (C. C. A. 6th Cir.); *Shaw v. Goebel Brewing Co.*, 202 Fed. 408, decided by this court January 7, 1913.

It results that sales of the infringing goods are consummated either in Detroit or through the mail or other carriers there which reach the points of destination. The law applicable to such sales would ordinarily be that of Michigan (see decisions last cited), except, of course, in cases like this where the federal enactments apply. If what is done at the warehouse at Detroit, and in that city, looking to the delivery of the goods, were subtracted from what is done in Windsor, appellant could not conduct his present business at all. We need not repeat that he has no other warehouse, no other representative, and no stock of goods through which to conduct business, except only at the Woodward avenue warehouse in Detroit. Now, despite the fact that the preliminary steps are taken at Windsor, it is plain enough that the final and essential acts of infringement in issue are committed by Henri

at the warehouse in Detroit, and through his dealings with the carriers at the warehouse and elsewhere within that city. Henri thus does something with respect to the business upon which the suit is founded. Henri is there in the right of appellant, and Henri's acts are appellant's acts; and to say that appellant has "no regular and established place of business" there is to ignore the use that has been made for years of the Woodward avenue warehouse. This we think presents a situation similar to one recently described in *St. Louis Southwestern Ry. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. —, decided by the Supreme Court February 3, 1913. The object of that suit was to recover damages for loss sustained by Alexander through alleged negligence of the railway company for failing properly to ice and to re-ice certain poultry shipped from Waco, Tex., to New York City. Suit was brought in the Southern District of New York. No part of the railroad was within that state; and the presence of the company through an agency maintained there or business done there was not relatively, we think, as material as was the presence of appellant through Henri and the business done by him in Detroit. Mr. Justice Day, in summing up, said:

"In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the district of New York, in which it was sued and to make it subject to service of process there."

See, also, *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 611, 19 Sup. Ct. 308, 43 L. Ed. 569; *Lumbermen's Ins. Co. v. Meyer*, 197 U. S. 407, 415, 25 Sup. Ct. 483, 49 L. Ed. 810; *Houston v. Filer & Stowell Co.* (C. C.) 85 Fed. 757, 758; *American Steel & Wire Co. v. Speed*, 110 Tenn. 524, 539, 75 S. W. 1037, 100 Am. St. Rep. 814; *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658, 659; *Premo Specialty Co. v. Jersey-Creme Co.*, 200 Fed. 352 (C. C. A. 9th Cir.). It is true that these decisions all relate to corporations and their representatives; and it is urged that substituted service like that authorized here cannot be made upon an agent of an absent or nonresident natural person. This contention is not tenable. *Andonique v. Carmen*, 151 Ky. 249, 151 S. W. 921; *Rauber v. Whitney*, 125 Ind. 216, 219, 25 N. E. 186. Indeed, section 48 of the Judicial Code expressly authorizes substituted service upon an agent engaged in conducting his principal's business in the district in which suit is brought, whether such principal be "a person, partnership or corporation." This case is not like that of *Pennoyer v. Neff*, 95 U. S. 714, at page 735 (24 L. Ed. 565), where a personal judgment was held to be without validity, which had been rendered by a state court in an action upon a money demand against a nonresident of the state, who was served only by publication of summons, no personal service of process being made, and the defendant not appearing. In that case, however, Justice Field expressly recognized the right of a state to "require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent to receive service of process." There can be no difference in principle between that mode of securing service and the one prescribed by section 48.

[4] It is in substance urged that aliens are not within the purview of section 48. This action was commenced February 9, 1912; and the Judicial Code was approved March 3, 1911, and became effective January 1, 1912. It is therefore not necessary to trace the history of the earlier pertinent acts of Congress. See *Bowers v. Atlantic G. & P. Co.* (C. C.) 104 Fed. 887, and *Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co.* (C. C.) 116 Fed. 641, as to origin and consequent purpose of section 48. It is enough to state that by the first paragraph of section 24 the District Courts are given jurisdiction of suits of a civil nature, at common law or in equity, between citizens of a state and citizens or subjects of a foreign state; and by the seventh paragraph of all suits at law or in equity arising under "the patent, the copyright and the trade-mark laws." If we assume, although it is not shown, that appellant is an alien, it is difficult to see why section 48, before quoted, should not be considered as applicable to an alien. Chapters 2, 3, and 4 of the Code treat of parties and subjects-matter within the jurisdiction of the District Courts, and also of the places where suits shall be instituted. Obviously the scope and intent of these chapters, their comprehensive character, must be ascertained by considering them as an entirety. When the legislative purpose is so considered, its scope manifestly embraces an alien, as well as a citizen—who maintains through his own agency a regular and established place of business within our territorial limits—quite as certainly as if it were in express terms so stated in every section, including section 48. Paragraph 1 of section 24, c. 2, treats of parties, while paragraph 7 of the same section treats of causes arising under Acts of Congress, like the patent act; and section 48, c. 4, was designed to fix the districts in which suits for infringement of letters patent should be brought. Judge Coxe said, and rightly we think, of Act 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 589), now section 48, that "patent suits can be brought only in the district of which the defendant is an inhabitant, or in the district where he infringes and has a regular and established place of business" (*Bowers v. Atlantic G. & P. Co.*, supra [C. C.] 104 Fed., at page 892); and, where these conditions are brought about by a nonresident alien, we are disposed to hold that he should be regarded as having intended to subject the consequences of such acts as are committed in the prosecution of such business, through such agency, to the law of the place where the business is carried on, and so is chargeable with having consented to answer to process there served upon his agent (*Feyerick and Others v. Hubbard*, 71 L. J. [1902] 509, 511; *Bank of Australasia v. Harding*, 9 C. B. 662, 686. See, also, *Copin v. Adamson*, 9 Exch. 345, 349; *Bank of Australasia v. Nias*, 16 A. & E. 717, 733; *Shaw v. Goebel Brewing Co.*, supra); for otherwise a nonresident, absent alien could with immunity from suit maintain such a place of business with such an agency in any federal district of this country for the very purpose of infringing patents, and at the same time secure all additional advantage that is accorded to resident citizens, in short, such alien infringers would enjoy greater privileges and protection than are claimed in respect of resident citizens of any of the states of this country. Such a construction as this will

never be given to the patent laws of the United States, unless plain and express words are found in them to indicate that such was the intent of Congress; and such an intent is not predicable of the language found in the jurisdictional chapters before referred to. *Brown v. Duchesne*, 60 U. S. (19 How.) 194, 195, 15 L. Ed. 595. See, also, *In re Hohorst*, Petitioner, 150 U. S. 653, 662, 14 Sup. Ct. 221, 37 L. Ed. 1211, in connection with *In re Keasbey & Mattison Co.*, Petitioners, 160 U. S. 221, 229, 16 Sup. Ct. 273, 40 L. Ed. 402.

Furthermore, since the jurisdiction of the District Courts in patent infringement cases is founded upon an act of Congress, the important token of such jurisdiction is not, in any respect, the character of the parties, but it is the nature of the case, and it ought to follow that, if the conditions existing in any federal district warrant the exercise of jurisdiction by reason of the nature of the case, the fact that an absent alien had created such conditions is of no more significance than if a nonresident native had created them; in short, the status of the parties is simply incidental, and in no wise controlling. As Chief Justice Marshall said nearly a century ago in *Cohens v. Virginia*, 19 U. S. (6 Wheat.) star pages 390 to 394 (5 L. Ed. 257), when speaking of the nature of causes and the character of parties involved in suits calling respectively for the exercise of original or of appellate jurisdiction:

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the Constitution—the character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these, the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction in cases where a state shall be a party to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class, those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the Constitution or a law."

We conclude that the motion to quash was rightly denied, and that the decree below must be affirmed, with costs.

IMPERIAL BRASS MFG. CO. v. NELSON.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,936.

PATENTS (§ 328*)—ANTICIPATION—COMPRESSION PIPE COUPLING.

The Burgess patent, No. 906,099, for a compression pipe coupling, *held* void for anticipation by a device in all practical respects the same, known and in public use prior to the application of the patentee.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the Imperial Brass Manufacturing Company against Alexander Nelson, doing business under the name of A. Nelson Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 194 Fed. 165.

George E. Waldo, of Chicago, Ill., for appellant.

Arthur F. Durand, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellant, herein termed complainant, filed its bill to enjoin infringement of claims 3 and 4 of patent No. 906,099, granted to W. S. Burgess on December 8, 1908, for a compression coupling, of which patent complainant was, by due assignment, the owner. The invention covers a union or coupling for firmly connecting the ends of pipes or rods to each other, or to any desired structure, without solder or brazing. The claims sued on read as follows, viz.:

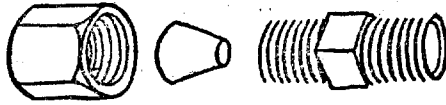
"3. In combination, a pair of tubular coupling-members threaded one into the other, the inner end of the inner coupling-member being annularly recessed and shouldered to receive the end of the member to be coupled, and a hard-metal sleeve inclosed within the coupling-members and tapered longitudinally to a bendable annular edge, the larger end of this sleeve abutting against the outer coupling-member and the thin tapered edge entering the recessed entrance end of the other member and having contact only with the inner annular corner thereof, for the purpose set forth.

"4. In combination, a pair of tubular couplings and means for adjustably connecting them, one of the couplings being provided with an internal shoulder against which the coupled member abuts and with a flaring entrance end, and a hard-metal sleeve tapered forwardly to a thin bendable edge, the larger end of this sleeve having abutment against one of the coupling-members and its tapered end extending into the flared mouth of the other member and having an annular contact near its tapered end with the flared entrance end aforesaid, whereby, when the coupling-members are drawn hard together, the said thin bendable edge of the sleeve will be swaged inwardly to form an inwardly extending annular bead and a similarly shaped groove in the coupled member."

On the hearing, the court found for the defendant, and dismissed the bill for want of equity. From the claims, specification, and drawings, it will be seen that the component parts of the device of the pat-

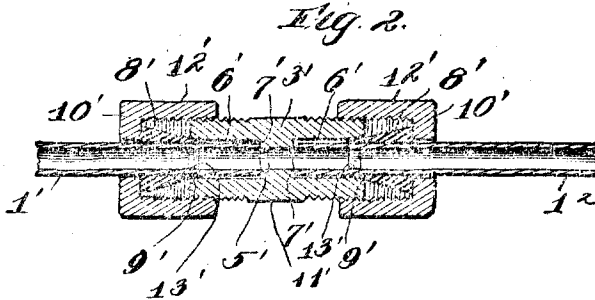
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ent in suit are a male and female coupling member and a tapered sleeve or ring as follows, viz.:



These may be termed, respectively, a nut "A," a cone "B" and a nipple "C."

Drawing 2 of the patent is as follows, viz.:



At line 96, col. 2, p. 1, of the specification, it is said:

"In connecting the union, the nut 10 and sleeve or ring 8 are first placed over the end of the pipe or tube 1. The end of said pipe is then inserted into the open end of the bushing 3 until the end thereof abuts against the shoulder 7 at the end of the recess 6 therein. The thread of the nut 10 is then engaged with the thread on the bushing 3, and said nut is screwed up until the small end of the sleeve or ring 8 is forced into strong engagement with the rounded edge 9 at the outer end of the recess 6 in said bushing 3; said nut 10 being preferably turned or set up until the pressure on said tapered sleeve or ring 8 is sufficient to cause the rounded edge 9 of the bushing 3 to swage an interior bead on said sleeve or ring 8, which will in turn swage a corresponding groove in the external surface of the pipe or tube 1, as shown at 13. Said bead, being interlocked with said groove, will operate in an obvious manner to prevent the pipe or tube 1 from being withdrawn from the bushing 3."

It is evident that the device of the claims in suit does not include the pipes or rods to be coupled, since it is for a means of effecting the coupling, and not for a coupled set of pipes or rods, so that the groove in the pipe is no part of the patent. Complainant's expert was asked on cross-examination (X. Q. 80):

"And does that coupling structure include the indented pipe?"

His answer was:

"I do not so understand, but merely that it is a coupling to be applied to a pipe in the manner described, and so as to indent it, if desired."

Manifestly, therefore, Fig. 2 above shows an application of the patent to the parts to be coupled.

Appellee (termed defendant herein) interposes the defenses of want of validity and of infringement. The answer sets up a great many prior patents, of which we need consider only the following, viz.: Pat-

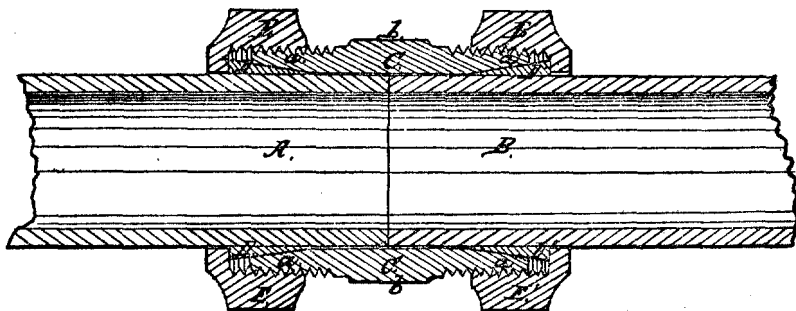
ent No. 91,319, granted to J. J. Fifield on June 15, 1869, for a pipe coupling. In this device, the nut "D," the tapering ring-wedge or cone "B," and the nipple "C" are shown. The specification at line 13, col. 1, p. 1, reads:

"In carrying out my invention, I employ a short tube, or auxiliary pipe, to receive the ends of the two pipes to be coupled; they being inserted into such tube from its opposite extremities. On and around the coupling tube I cut a male screw, extending from each end of the tube toward its middle and to a prismatic flange, circumscribing the coupling tube. The bore of the coupling-tube I construct bell-mouthed, or tapering near each end of it; such being to receive a ring-wedge, to encompass the pipe to be connected to the coupling-tube."

Commencing at line 1, col. 2, p. 1, it is said:

"The nuts, when so screwed against the wedge-rings, operate to crowd the said rings into the conical mouths of the tube C, and consequently force them to contract such rings, so as to cause them to embrace and fit closely to the pipes A B, and make therewith and with red lead, putty, or other suitable joint-tightening material or compound previously inserted in the said mouths, tight joints between the pipe and the coupling-tube. The taper of each of the ring-wedges, or wedge-rings, both inside and outside, should be such as to enable the putty to flow between the opposite surfaces of the coupling-pipe and the pipe surrounded by the wedge-ring."

Figure 2 of the drawings is as follows:



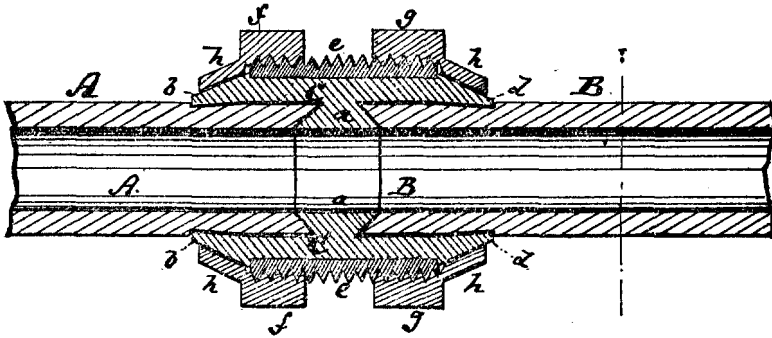
Patent No. 181,714, granted to H. Pennie, August 29, 1876, for pipe and hose coupling. "This invention," says the inventor at line 11, col. 1, p. 1—

"relates to a new mechanism for firmly connecting two pieces of lead pipe, rubber hose, or other soft tubing; and consists, principally, in effecting the desired result by means of an outer soft-metal shell or sleeve, which is pressed into the soft pipe or tube; also, in the arrangement of mechanism for pressing the ends of said shell or sleeve into or against the pieces of pipe to be joined, all as hereinafter more fully described."

This device has the sleeve or cone with soft tapered and reduced ends and hard middle portion. It also has coupling nuts with conical extensions differing in angle from that of the tapering ends of the cone or sleeve, whereby, when the nut is advanced upon the sleeve or cone, the reduced or tapered ends of the latter are compressed and sunk into the pipes to be coupled with such force as to insure their permanent connection with the sleeve or cone, and produce a tight joint. This patent also calls for the process.

"3. The process, herein described, of joining two ends of pipe *A B* by inserting them within a cylindrical continuous sleeve, and thereupon crowding the ends of said sleeve closely against the pipes, substantially as specified."

Fig. 2 of the patent is as follows:



Patent No. 275,193, granted to L. Grannan, April 3, 1883, for packing for valve-stems. The patentee provides for the coupling nut, the pipes to be connected, an inclosed annular recess formed around the valve-stem, into which he inserts a soft metal ring shaped like two hollow cones with joined bases, making a double cone which slips over the valve stem.

"By thus tapering the outside of the ring *F* from the center to each end of the same, a comparatively thin edge *b* is made thereon at such end that will fit around the valve-stem."

At line 62, col. 2, p. 1, (Record, p. 471) it is said:

"To apply my improved packing-ring to the valve, it is placed over the stem, the cap *E* and hand-wheel *G* being understood as removed until the lower tapering side of the ring rests upon the blunt edge made by the conical recessing of the upwardly-extending portion *B*, when the lower thin edge *b* of the ring will project into the space between the valve-stem *C* and the upright portion *B*. The cap *E* is then placed over the stem *C*, and screwed upon the upright portion *B* until the blunt edge within the cap *E*, made by the conical recessing of the same, rests upon the upper tapering side of the ring *F*. The upper thin edge *b* of the ring will project into the space between the valve-stem *C* and the cap *E*. If the cap *E* be still further screwed down upon the upright portion *B*, the blunt edges of both the cap and upright portion will force or swage the upper and lower thin edges, *b*, of the ring tightly in around the stem *C* (see Fig. 3), and prevent any leakage from the valve around the stem, which operation I find is not necessary as often with my improved packing as is the case where the usual gum or cotton packing is used."

The patent also covers the use of a single cone or ring, as in the patent in suit. The one claim reads as follows:

"The combination, with the valve-stem *C*, upright portion *B*, and cap *E*, of the soft-metal packing-ring *F*, reduced to a thin edge, *b*, adapted to project into the space between the valve-stem *C* and upright portion *B*, or into the space between the valve-stem *C* and cap *E*, or both, for the purpose specified."

Patent No. 546,906, granted to M. Sexton on September 24, 1895, for a pipe-joint.

"The invention consists principally of a sleeve, exteriorly-threaded collars screwing in the ends of the sleeve and formed at their inner ends with bevels,

and wedge-shaped rings adapted to be engaged by the bevels of the said collars and be pressed upon the pipe periphery at or near the pipe ends."

Claim 2 reads as follows:

"2. A pipe-joint, comprising a sleeve formed with an integral interior annular projection against which the ends of the pipe sections abut, packing-rings seated on the said internal projection and surrounding the said pipes, wedge-shaped rings made in detached segments or sections fitted on the pipes within the said sleeve, and collars screwing in the threaded ends of the said sleeve and formed at their inner ends with bevels adapted to engage the said wedge-shaped rings, to press the latter upon the said packing-rings and to fasten the rings on the said pipes, substantially as shown and described."

The coupling-nut, flexible tapering sleeve or gasket, the flaring receiving end of the nipple, are shown also in Cornelius application, No. 494, filed October 11, 1901; also, in substance, in patent No. 782,552, granted to J. H. Glauber on February 14, 1905, for a coupling pipe. Of the French patent, No. 340,937, complainant's expert says:

"This patent shows a pipe-coupling employing an ordinary squeeze packing, and the only way in which it differs in its showing from the patents employing packings of this character which I have already discussed is that it assumes the compression of the plastic packing-ring to have been carried so far, by the screwing up of the nut, as to crimp the pipe. The plastic material simply yields in all directions under the pressure until it completely fills the cavity of the nut beyond the end of the nipple, and, having no further channel of escape, is squeezed against the pipe itself with so much pressure as to bend it.

"As a matter of fact, this is just what must always happen with a squeeze packing, if the screwing up of the nut is carried far enough and the engaging members of the coupling are strong enough to withstand the strain. Whether the packing material is of soft metal, such as lead, or of rubber, fiber, or other elastic and compressible material, it may be ultimately molded by the pressure so as to completely fill the cavity within the nut, and then, if the screwing up of the nut continues, the action is practically that of a hydraulic press, and the pressure of the entire ring of material inwardly against the wall of the pipe will serve to bend in the latter, if, as above suggested, the coupling members are strong enough to stand the strain.

"Obviously, however, the construction and mode of operation in any such squeeze packing are not those which characterize the Burgess patent in suit, in which, as has been repeatedly pointed out, there is no deformation of the hard metal cone, except at its thin edge, and in which, consequently, the cone never takes the shape of the cavity of the nut, or varies from its original shape, except at its thin edge.

"The practical difference between the squeeze packing and the Burgess coupling is marked, particularly when it comes to uncoupling the pipes and reconnecting them, which operation, in a squeeze packing, ordinarily requires, or at least is very likely to require, the replacing of the packing material, in order to insure the tightness of the joint when the pipes are coupled a second time, whereas in the Burgess coupling the pipes may be uncoupled and recoupled repeatedly and for an indefinite number of times, without any renewals and without the least tendency to produce a leaky joint, and whereas the effect of the first setting up of the coupling nut, in the case of the Burgess coupling, is to mechanically seal the cone to the pipe around the thin edge of the cone, where it is crimped into the pipe, and in the squeeze packing, the packing material becomes united, in so far as it does so at all, to the nut rather than to the pipe, by being forced into the threads of the nut, from which it must frequently be dug out in order to be replaced, when the nut is loosened.

"Every such squeeze packing—the one illustrated in this French patent, No. 340,937, for example—is therefore distinctly different in theory and mode of operation from the coupling of the Burgess patent in suit, and fails to re-

spond in spirit or in terms to the claims of the Burgess patent, and particularly to its claims 3 and 4, inquired of."

From a perusal of the foregoing, it will be apparent that whatever invention, if any, there be in complainant's patent, must reside in very narrow bounds. It seems to be practically admitted by complainant that it resides in the angle of the taper of the cone or sleeve with relation to that of the flared mouth of the bushing or nipple, and, apparently, to some extent, in the material used in making the cone or sleeve.

In the Pennie patent, each of the coupling nuts of the double coupling parts has a conical extension which differs in angle from the taper of the leaden or other soft metal sleeve cone, the purpose of which is identical with that of the beveled mouth of the nipple in its action upon the reduced or thin end of cone of the patent in suit. In the one case, the compression of the end of the cone is effected by the beveled extension on the coupling nut, and the other, by the beveled opening at the mouth of the nipple. In each case, the thin or reduced ends are swaged and driven into the pipes or other articles to be coupled, so as to form a bead and groove connection, and consequently a tight joint.

The Grannan patent discloses a device almost identical with that of the patent in suit. While it is a packing for valve stems, it belongs to an art analogous to that of the Burgess patent. It is manifestly capable of use in pipe and rod coupling without changing its form or function. The parts are so adjusted as to force the tapered or thinned ends of the packing or double cone in a swaging manner against the valve stem. The patent does not call for the bead and groove, though it is evident it would be present, as the same conditions as to pressure prevail as in Burgess' device.

Grannan prefers to make his cones of brass. The specification calls attention to the fact that the ends of the packing or cone may be increasingly compressed. This could not fail to result in a bead and groove connection.

In the French patent, above set out, the bead and groove connection brought about by the compression of the cone or sleeve is clearly shown. It is not, however, a sinking of the end of the cone into the pipe, but one corresponding to the distorted body of the cone after compression. In view of the prior art, as above set out, it hardly seems possible that there can be anything of novelty in the invention claimed to be covered by the patent.

The trial judge, in dismissing the bill for want of equity on the ground of lack of patentable novelty, rested his decree upon the fact that the device of the patent was, for all the purposes of that hearing, substantially identical with, and anticipated by, that previously known to defendant and the McCanna Manufacturing Company.

From the evidence it appears that some time during the spring and summer of the year 1907 the McCanna Manufacturing Company caused to be made certain blue prints of the several parts of a compression coupling joint, substantially in appearance identical with those of the patent in suit. These original drawings are produced as exhibits in

the case, Nos. 2, 7, 9, and 10. On June 20, 1907, said company quoted prices to the A. Nelson Manufacturing Company on various of the coupling parts, as shown by correspondence in evidence and orally, among which were included 10,000 of the brass compression cones, in all essential respects similar to those here in suit. Receipts for payments for the parts are also shown in the record. An examination of the blue prints shows that the angle of the cone is somewhat sharper than that of the mouth of the nipple. Certain other physical exhibits, viz., spark plugs, Exhibits Nos. 48 and 50, cone, Exhibit No. 8, nipple, Exhibit No. 11, and other exhibits, Nos. 44 and 49, all made by the Nelson Company prior to date of patent, are produced. These disclose the fact that the cone will not fit into the flare of the nipple, but first strikes the same on or near its (the cone's) small end, so that, when the nut is screwed up, the thin end of the cone is forced or swaged above the pipe as in the patent in suit. So far as the evidence goes, there was no substantial difference between the McCanna-Nelson compression device and that of Burgess. The former clearly was made public in 1907, in a form adapted to practical use, and the trial court found that it was in public use, though for a period less than two years anterior to the filing of the Burgess application. The facts of the case plainly distinguish it from *Mueller Mfg. Co. v. Glauber*, 184 Fed. 609, 106 C. C. A. 613. Under the doctrine of *Stitt v. Eastern Ry. Co.* (C. C.) 22 Fed. 649, *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821, *Buser v. Novelty Co.*, 151 Fed. 478, 81 C. C. A. 16, *Brush v. Condit*, 132 U. S. 48, 10 Sup. Ct. 1, 33 L. Ed. 251, *Mast, Foos & Co. v. Stover*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, *Wilson v. Townley*, 125 Fed. 491, 60 C. C. A. 327, *Bates v. Coe*, 98 U. S. 46, 25 L. Ed. 68, *Eastman v. Mayor*, 134 Fed. 844, 69 C. C. A. 628, *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, 24 L. Ed. 68, *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755, and *Dalby v. Lynes* (C. C.) 64 Fed. 376, the trial judge was right in holding that the patent in suit was anticipated by the McCanna device.

The foregoing disposes of the errors assigned. The decree of the District Court is affirmed.

MORGAN GARDNER ELECTRIC CO. v. BUETTNER & SHELBURNE
MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,793.

1. PATENTS (§ 328*)—INFRINGEMENT—COAL-MINING MACHINE.

The Rauscher patent, No. 574,822, for a coal-mining machine, covers a combination in one structure of two devices of the prior art, and is not infringed by one who made and sold one of such devices, unless it was sold with the intention that it should be used as a part of the patented combination.

2. PATENTS (§§ 255, 259*)—INFRINGEMENT—FURNISHING REPAIRS FOR PATENTED MACHINE.

The manufacturer of a patented coal-mining machine, parts of which were subject to frequent breakage, who sold the same without restric-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions, has no monopoly of the right to furnish repairs, or to replace such parts when broken; and another, who makes and furnishes the same on orders from the owner of the machine, is not chargeable with either direct or contributory infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 397, 399, 400–402; Dec. Dig. §§ 255, 259.*]

Appeal from the Circuit Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Morgan Gardner Electric Company against the Buettner & Shelburne Machine Company. Decree for defendant, and complainant appeals. Affirmed.

One Edward P. Rauscher made application to the Patent Office for a patent for improvements in coal-mining machines, which application was filed April 23, 1896, and numbered 588,747. Of the six claims asked for, all were rejected by the examiner. Applicant thereupon amended his application, by canceling the six claims and substituting two new claims. Of these claims, one was allowed, being the claim in suit, and claim 2 rejected. The patent in suit was granted January 5, 1897, and numbered 574,822. Its one claim reads as follows, viz.: "In a device of the class described, the combination with a driven shaft *d'*, and worm *d*⁴, longitudinally movable thereon, of the hollow washer *E*, resting upon said worm and having a conical hole in its upper end, and a collar *E'*, having a corresponding conical end resting in the conical hole in the washer, whereby the collar *E'* will split the washer *E*, before sufficient strain is put upon the other portions of the machine to injure the same, substantially as described."

Original claims 1 and 2 in terms covered the protection device alone. Claims 3, 4, 5, and 6 covered the same in combination with the so-called channeling machine described in the specifications, which is, in substance, the device of patent No. 550,283, granted to E. C. Morgan, on November 26, 1895. These were all rejected by the examiner, upon references to prior patents. It cannot be claimed that either of the two devices of the combination, viz., the channeling machine or the protective device, is new. The former is substantially the channeling machine of E. C. Morgan, No. 550,283, aforesaid, and the latter is found, in substance, in patent No. 158,800, granted January 19, 1875. The claim is for a combination of the two in one structure.

The channeling machine of the chain machine order is, in practice, so applied to coal mining as to cut a narrow channel or kerf under the wall of coal presented by the walls of the room or chamber in which it is used. The frame carrying the cutter is moved close to the foot of the wall to be undercut. The cutter is advanced into the wall by means of a motor or other driving device. As it is fed into the bed of coal, it often encounters very hard substances, such as rock or sulphur balls, or is wedged by the falling of the coal above it, and subjected to unusual strain, whereby it becomes broken or damaged. The patent in suit seeks to provide a means to protect the machinery from breaking under this unusual strain, and for automatically reversing the feed when at its thrust limit, and for automatically stopping the feed at the end of the return movement.

The defendant is charged with direct and contributory infringement. The charge of direct infringement is based by complainant upon the filing by defendant of one dummy order to the Hart Williams Coal Company of the complete protective device, inspired by complainant. The charge of contributory infringement rests upon the manufacture by defendant of several of the parts or elements of the protective device, and the alleged miscellaneous sale thereof by defendant to any person desiring them. Other evidence is set out in the opinion. The bill asks for a permanent injunction to restrain infringement, and for other relief. In its amended answer, defendant sets up the invalidity of the patent, and denies infringement.

The District Court, on hearing, dismissed the bill for want of equity. For error, the failure of the court to decree validity and infringement is assigned.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Glenn S. Noble, of Chicago, Ill., for appellant.

John T. & Will H. Hays, of Sullivan, Ind. (Arthur M. Hood, of Indianapolis, Ind., of counsel), for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). [1] So far as the record shows, appellee never manufactured a complete mining machine of any kind, nor had it ever manufactured or sold a complete protective device, with the exception of one sale, and that sale was procured by complainant. It nowhere in the record appears that the device so sold was intended for use in connection with an infringing machine. On the contrary, it appears that defendant never sold the sleeve or collar, except in the one instance when complainant caused it to be ordered through said Hart Williams Coal Company, and then the same were ordered as parts for "Morgan Gardner Standard D chain mining machines." Of the elements of the protective device furnished on that occasion, it appears from the record that defendant did not have on hand the worm, but had to purchase it elsewhere, and that, when furnished, it did not fit the shaft. From defendant's catalogue it is shown that it advertised:

"List and prices of parts we have for the Morgan & Gardner Type Chain Coal-Mining Machines, November, 1908."

Thus it is clear that defendant held itself out as being ready to furnish certain parts of complainant's patent, and the question of law presented is: Did such action on defendant's part constitute direct or contributory infringement of the patent in suit? If we have correctly stated the scope of the patent, as we think we have, then defendant has not directly infringed the same, since it has never manufactured or sold any channeling mining machines, and, therefore, has not infringed the combination. Whether or not it has been guilty of contributory infringement depends upon a construction of that term. Contributory infringement is intentional aid or co-operation in transactions which collectively constitute complete infringement. Walker on Patents (4th Ed.) § 407 and authorities cited; Robinson on Patents, § 905, and authorities cited.

Where a person manufactures or sells a device particularly adapted to be used in performing a patented process, and such is his intention, he is liable for any infringement which thereafter occurs in accordance with his intention. Walker on Patents (4th Ed.) § 407. Where, however, the thing furnished is adapted to use for other purposes than to be a part of a patented article, and the person furnishing the same does not know that it is to be thus used, he is not an infringer. Walker on Patents (4th Ed.) § 407.

As above stated, the record fails to show any evidence of intent on the part of appellee to furnish parts for any infringing machine, and it must be assumed for the purposes of this suit that it did not.

[2] Appellant contends that the supplying of the different elements of the protective device, by one or other than itself, when once broken in the operation of its mining machines, constituted infringement. It

will be borne in mind that the machines were sold without restriction of any kind; that the sleeve or collar was not supplied in any instance, excepting in the case of the protective device furnished to the Hart Williams Company on appellant's connivance; that, so far as appears from the record, that sale was for use in appellant's machine. It is evident that the protective device was of a perishable character. Its destruction, or that of some of its parts, was contemplated by the appellant, as well as by those to whom the latter sold its mining machines, yet no attempt was made to limit the purchaser in respect to the source from which it should procure the repair parts.

"The mere fact that the patentee is able and willing to replace the injured parts, and make the repairs, is not alone sufficient to vest in him a monopoly of this work. If the purchaser sees fit to make necessary repairs himself, or employs others for that purpose, he has a right to do so." *Wagner Typewriting Co. v. Webster* (C. C.) 144 Fed. 405.

In a number of cases cited to section 302a, Walker on Patents (which reads in part: "A purchaser may repair a patented machine which he has purchased, by replacing broken or worn-out unpatented parts, so long as the identity of the machine is not destroyed"), the rule adhered to in *Wagner Typewriting Co. Case*, is followed. See, also, 30 Cyc. 985. In the present case, the appellee had the right to make repairs. It did nothing more. To replace the hollow washer and other separate parts of the protective device did not destroy the identity of the patented device. It was clearly a repair contemplated by the appellant when it sold the mining machine. To hold otherwise, in the absence of some restricting license or other limitation, would result in the extension of appellant's monopoly beyond the terms of the government's grant. We are therefore of the opinion that no infringement has been shown.

In view of the foregoing, it becomes unnecessary to pass upon the other questions presented.

Affirmed.

WINCHESTER REPEATING ARMS CO. v. OLMSTED.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,920.

1. PATENTS (§ 294*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—DISCRETION.

While the granting or refusal of a preliminary injunction in a patent suit is within the sound discretion of the trial court, such discretion does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. § 294.*]

Grounds for denial of preliminary injunction in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 257*)—INFRINGEMENT—VIOLATION OF PRICE RESTRICTIONS.

Where the manufacturer of a shotgun, several parts of which were covered by patents, sold the same under contracts imposing price restrictions on their resale, and both the validity of the patents and such restrictions had been acquiesced in by dealers and the public for several years, a dealer who, with knowledge of such facts, sells such guns at less than the price fixed by the maker, is chargeable with infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 398; Dec. Dig. § 257.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Winchester Repeating Arms Company against Leon A. Olmsted. From order denying preliminary injunction, complainant appeals. Reversed.

Frank F. Reed and Edward S. Rogers, both of Chicago, Ill. (George D. Seymour, of counsel), for appellant.

Fred Gerlach, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. [1] Appellant seeks the reversal of a decree denying a preliminary injunction in a suit for infringement of patents. As a rule, the grant or refusal of a preliminary injunction is a matter within the sound discretion of the trial court; and where the preliminary record discloses that the validity of the patents was in doubt, that the fact of infringement was uncertain, and that, in view of such doubts and uncertainties, an injustice might be inflicted upon the defendant greater than any benefit that might accrue to complainant from the preliminary decree, the reviewing tribunal will not weigh the conflicting showings with respect to the facts of validity, infringement, or comparative equities, but will let the case go to final hearing undisturbed, because abuse of discretion is not made affirmatively to appear. Such is the doctrine of the cases cited by appellee.¹ But discretion (which must be legal discretion, not merely the individual view or will of the particular chancellor) does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts.² If this is not so, Congress did a vain thing in providing at all for appeals from preliminary injunctive decrees.

¹ Gillette Safety Razor Co. v. Durham Duplex Razor Co. (D. C.) 197 Fed. 575; Lovell-McConnell Mfg. Co. v. Automobile S. Mfg. Co. (C. C.) 193 Fed. 658, 662; Whippany Mfg. Co. v. United Indurated Fibre Co., 87 Fed. 215, 30 C. C. A. 615; Standard Elevator Co. v. Crane Elevator Co., 56 Fed. 718, 6 C. C. A. 100; George Ertel Co. v. Stahl, 65 Fed. 519, 13 C. C. A. 31; Brush Electric Co. v. Electric Storage Battery Co. (C. C.) 64 Fed. 775; Brookfield et al. v. Elmer Glassworks (C. C.) 132 Fed. 312; Blakey v. National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27.

² Charles E. Hires Co. v. Consumers' Co., 100 Fed. 809, 41 C. C. A. 71; Standard Elevator Co. v. Crane Elevator Co., 56 Fed. 718, 6 C. C. A. 100; American Cereal Co. v. Eli Petrijohn Cereal Co., 76 Fed. 372, 22 C. C. A. 236.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] From the record herein it appears that the following facts are either conceded or established beyond controversy: Appellant, manufacturer of firearms, is owner of patents 564,421, 599,587, 605,734, 659,928, and 839,390, for repeating, take-down, magazine, ejector, and cartridge-stop features of breech-loading shotguns; that the improvements are substantial and valuable, are susceptible of conjoint use, and are so used in making the modern Winchester repeating shotgun; that appellant has never licensed any one to manufacture its patented guns, but has itself made and marketed them to the extent of half a million in the last 15 years; that appellant has sought to control, not only the manufacture, but also the terms of sale, of its patented guns—that is, has put price restrictions upon dealers into whose hands it sent its guns; that upon each gun sent out were placed notices of the patents and of the price restrictions; that the public and makers and dealers have acquiesced in the asserted validity of the patents (going back to 1896) and have respected appellant's rights as claimed both under the patents and the price restrictions; and that appellee, a retail dealer in firearms, with complete knowledge of each of the foregoing facts, somehow obtained a supply of appellant's patented guns, and was advertising and selling them at cut prices.

On these facts the law is that appellee by his acts was committing and threatening to continue willful trespasses upon a part of the territory within the patent monopoly that the owner had reserved. *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, *Victor Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58, and numerous cases collated by appellant,³ with none to the contrary cited by appellee or found by us.

The decree is reversed, with the direction to grant the preliminary injunction as prayed.

³ *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645; *Victor Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Edison v. Smith Mercantile Co.* (C. C.) 188 Fed. 925; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117, 92 C. C. A. 43; *N. J. Patents Co. v. Schaeffer* (C. C.) 159 Fed. 181; *Id.*, 178 Fed. 276, 101 C. C. A. 540; *Commercial Acetylene Co. v. Autolux Co.* (C. C.) 181 Fed. 387; *Dick v. Milwaukee Off. Specialty Co.* (C. C.) 168 Fed. 930; *A. B. Dick Co. v. Henry* (C. C.) 149 Fed. 424; *Automatic Pencil Sharpener Co. v. Goldsmith Bros.* (C. C.) 190 Fed. 205; *Waltham Watch Co. v. Keene* (C. C.) 191 Fed. 855; *Crown Cork & Seal Co. v. Standard Brewery Co.* (C. C.) 174 Fed. 252; *Heaton P. B. F. Co. v. Eureka Spec. Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Cortelyou v. Lowe*, 111 Fed. 1005, 49 C. C. A. 671; *Cortelyou v. Johnson*, 145 Fed. 933, 76 C. C. A. 455; *Rupp & W. Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544; *Tubular Rivet Co. v. O'Brien* (C. C.) 93 Fed. 200; *Æolian Co. v. Juelg Co.*, 155 Fed. 119, 86 C. C. A. 205; *Victor, etc., Co. v. Leeds & Catlin Co.* (C. C.) 150 Fed. 147; *Leeds & Catlin Co. v. Victor, etc., Co.*, 154 Fed. 58, 83 C. C. A. 170, 23 L. R. A. (N. S.) 1027; *Rubber Tire Co. v. Milwaukee Co.*, 154 Fed. 358, 83 C. C. A. 336; *Indiana Co. v. Case Co.*, 154 Fed. 365, 83 C. C. A. 343; *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594; *Crown Cork Co. v. Brooklyn Bottle Stopper Co.* (C. C.) 172 Fed. 225; *Edison Co. v. Pike* (C. C.) 116 Fed. 863; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mitchell v. Hawley*, 16 Wall. 544, 21 L. Ed. 322; *Paper Bag Case*, 210 U. S. 405, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766; *Board of Trade v. Christie Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Straus v.*

MORGAN CONST. CO. et al. v. PORTER-MILLER ENGINEERING CO.
et al.

(District Court, W. D. Pennsylvania. February 24, 1913.)

No. 104.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FURNACE FOR HEATING INGOTS.

The Morgan patent, No. 632,020, for a furnace for heating ingots or billets, covers a combination of elements, all of which were concededly old in the art; but the dominant feature of the combination, which consists in so arranging the fuel and air ports as to fix a zone of maximum heat at a certain point in the furnace and the construction of an inclined track with its apex in such predetermined zone, so as to quickly and automatically remove the billet therefrom for delivery at the mill with a minimum exposure to the air, was new, and, as so limited, the patent was not anticipated and is valid. It is not infringed, however, by a furnace which is so constructed that the zone of maximum heat cannot be predetermined, but is subject to variation.

2. PATENTS (§ 328*)—INVENTION—FURNACE FOR HEATING INGOTS.

The Laughlin & Reuleaux reissue patent, No. 11,666 (original No. 582,476), for an improvement in a continuous heating furnace for heating billets or ingots, is void for lack of invention in view of the prior art.

In Equity. Suit by the Morgan Construction Company and Alexander Laughlin against the Porter-Miller Engineering Company, Dilworth, Porter & Co., Limited, and Lawrence Dilworth, Chairman. On final hearing. Decree for defendants.

Christy & Christy, of Pittsburgh, Pa. (J. Nota McGill, of Washington, D. C., of counsel), for complainants.

Charles M. Clarke, of Pittsburgh, Pa., for defendants.

YOUNG, District Judge. The complainants filed their bill of complaint, charging the defendants with having infringed certain letters patent owned by the complainants. It appears from the bill of complaint that letters patent of the United States, No. 632,020, were granted to the Morgan Construction Company, as assignee of C. H. Morgan, for an improvement in furnaces for heating ingots or billets, and that letters patent of the United States, No. 582,476, were granted to Alexander Laughlin, as the assignee of Alexander Laughlin and Joseph Reuleaux, and that subsequently the last letters patent were

American Publishers' Ass'n, 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819; Authors' & Newspapers' Ass'n v. O'Gorman Co. (C. C.) 147 Fed. 616; Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Betts v. Willmott, 25 L. T. R. (N. S.) 188, L. R. 6 Ch. 239; Société Anonyme v. Tilghman's Patent, etc., Co., 49 L. T. R. (N. S.) 451, L. R. 25 Ch. D. 1; British Mutoscope, etc., Co. v. Homer, 84 L. R. (N. S.) 26, L. R. 1 Ch. 671; Incandescent Gas Light Co. v. Cantelo, 12 Rep. Pat. Cas. 262; Incandescent Gas Light Co. v. Brogden, 16 Rep. Pat. Cas. 183; Badische Anilin und Soda Fabrik v. Isler, [1906] 1 Ch. Div. 611; 23 Rep. Pat. Cas. 173; McGruther v. Pitcher, [1904] 2 Ch. Div. 306, 91 L. T. R. 678; National Phonograph Co. v. Menck, 27 L. T. R. 239, 104 L. T. 5 (Feb. 3, 1911); U. S. v. Winslow (D. C.) 195 Fed. 578; Winchester Repeating Arms Co. v. Evans (not for publication).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

reissued to Alexander Laughlin; the reissue number being 11,666. It also appears by the bill of complaint that, under the letters patent No. 632,020, Alexander Laughlin, one of the complainants, obtained the exclusive right, except as to the Morgan Construction Company, to manufacture and use the said invention, and that the said Morgan Construction Company, under the said letters patent No. 11,666, obtained the exclusive license, except as to Alexander Laughlin, to manufacture and use the invention described in that patent. The complainants in their bill of complaint limit the infringement of the Morgan patent, No. 632,020, to the third, fourth, fifth, sixth, and seventh claims thereof, and also limit the infringement of letters patent No. 11,666 to the tenth claim thereof.

The defendants in their answer set up as a defense that they have not infringed the complainants' patents; and, further, that the said Charles H. Morgan, the complainants' assignor of patent No. 632,020, was not the original inventor of the alleged inventions and improvements described in said letters patent, but that the inventions and improvements described in said letters patent were prior to the alleged inventions of Morgan fully described in certain letters patent issued in the United States and in certain British and German patents; and also that the inventions and improvements claimed in said letters patent had theretofore been used at the Cambria Iron Works in the city of Johnstown, Pa., in the year 1886. As to patent No. 11,666, the defendants set up the defense that the said Alexander Laughlin and Joseph Reuleaux were not the original inventors of the alleged inventions and improvements described in those letters patent, but that the inventions and improvements described in those letters patent were prior to the alleged inventions of Laughlin and Reuleaux fully described in certain letters patent issued in the United States.

We shall consider this case in the following order: First. Were the letters patent granted to Charles H. Morgan under the number 632,020 anticipated by other patents or prior use? Second. If said letters patent were not anticipated, what is the scope of the invention made by Charles H. Morgan? And, third. Have defendants infringed those letters patent as construed and limited by the court? It will also become necessary to consider, first, whether or not the letters patent, No. 11,666, granted to Laughlin and Reuleaux, were anticipated by other patents; and, second, whether the defendants have infringed those letters patent.

[1] An examination of the letters patent cited as in anticipation of the letters patent involved in this case, viz., Allen's United States patent, No. 234,162, Daniel's United States patent, No. 385,247, and Daelen's German patent, No. 74,484, together with the file wrapper and contents of Morgan's application in the Patent Office, and together with the expert witnesses on both sides of the case, clearly shows that all of the elements claimed in Morgan's patent had been theretofore invented and used. This is clearly seen, if we first set down before us the claims of the Morgan patent:

"1. The combination, in a furnace for heating ingots or billets, of a heating-chamber, conduits for gaseous fuel opening into said heating-chamber and at opposite sides thereof, whereby two opposing currents of gaseous fuel are

directed transversely into said heating-chamber, and means for imparting a downward direction to each of said currents as it approaches the center of the heating-chamber, substantially as described.

"2. The combination, in a furnace for heating ingots or billets, of a heating-chamber, conduits for gaseous fuel opening into said heating-chamber at one end and at opposite sides thereof, whereby two opposing currents of gaseous fuel are directed transversely into said heating-chamber, means for imparting a downward direction to said currents as they approach the center of the heating-chamber, and an escape flue at the opposite end of the heating-chamber, whereby said transverse currents are diverted into a longitudinal current, substantially as described.

"3. In a furnace for heating ingots or billets, the combination with a heating-chamber having openings at opposite ends for the admission and delivery of heated ingots or billets and an opening for the admission of gaseous fuel to said chamber, between its ends, whereby a zone of maximum heat is maintained, of an inclined track extending from said delivery opening to a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel opening, by which a heated ingot or billet is moved by gravity from the zone of maximum heat through said delivery opening, substantially as described.

"4. In a furnace for heating ingots or billets, the combination with a heating-chamber having openings at opposite ends for the admission and delivery of heated ingots or billets, and an opening for the admission of gaseous fuel to said chamber, between its ends, of an inclined track extending from said delivery opening to a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel opening, and a pushing mechanism by which the ingots or billets are pushed upon said inclined track, substantially as described.

"5. In a furnace for heating ingots or billets, the combination with a heating-chamber having an opening at one end for the admission of ingots or billets, an opening for the delivery of heated ingots or billets, and an opening for the admission of gaseous fuel to said chamber between the charging end of the furnace and said delivery opening, of an inclined track extending from said delivery opening to a vertical plane passing transversely through said chamber and through said fuel opening, whereby the ingots or billets as they become heated, are carried by gravity through said delivery opening, substantially as described.

"6. In a furnace for heating ingots or billets, the combination with a heating-chamber provided with an opening at one end for the admission of ingots, an opening at its opposite end for the delivery of heated ingots and an opening near the delivery end of the chamber for the delivery of gaseous fuel, of a track extending longitudinally through said chamber, and having an inclined section inclosed within said chamber and extending from said delivery opening to a vertical plane passing transversely through said chamber and said fuel opening, whereby an ingot in passing over said track is acted upon by gravity at a point opposite said fuel opening, and moved out of the heating-chamber, substantially as described.

"7. In a furnace for heating ingots or billets, the combination with a heating-chamber having an opening at one end for the admission of ingots, an opening at its opposite end for the delivery of heated ingots, and an opening near the delivery end of the chamber for the admission of gaseous fuel, of a track extending longitudinally through said chamber, said track having an inclined section on which the ingots are moved by gravity, extending from said delivery opening to a vertical plane passing transversely through said chamber and said fuel opening, thereby bringing the inner end of said inclined section opposite the fuel opening, and a pushing mechanism by which the ingots are pushed along the track and upon said inclined section, substantially as described."

These claims have been carefully analyzed by Prof. Wadsworth, called by defendants as an expert (Defendant's Record, 186), and we adopt that analysis for the purpose of this case:

Claim 3. "In a furnace for heating ingots or billets, the combination with (1) a heating-chamber having (a) openings at opposite ends for the admission and delivery of heated ingots or billets, and (b) an opening for the admission of gaseous fuel to said chamber, between its ends, whereby a zone of maximum heat is maintained, of (2) an inclined track extending from said delivery opening to a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel opening, by which a heated ingot or billet is moved by gravity from the zone of maximum heat through said delivery opening."

Claim 4. "In a furnace for heating ingots or billets, the combination with (1) a heating-chamber having (a) openings at opposite ends for the admission and delivery of heated ingots or billets, and (b) an opening for the admission of gaseous fuel to said chamber, between its ends, of (2) an inclined track extending from said delivery opening to a point between the charging end of the furnace and a vertical plane passing transversely through said chamber and said fuel opening, and (3) a pushing mechanism by which the ingots or billets are pushed upon said inclined track."

Claim 5. "In a furnace for heating ingots or billets, the combination with (1) a heating-chamber having (a) an opening at one end for the admission of ingots or billets, (a') an opening for the delivery of heated ingots or billets, and (b) an opening for the admission of gaseous fuel to said chamber between the charging end of the furnace and said delivery opening, of (2) an inclined track extending from said delivery opening to a vertical plane, passing transversely through said chamber and through said fuel opening, whereby the ingots or billets, as they become heated, are carried by gravity through said delivery opening."

Claim 6. "In a furnace for heating ingots or billets, the combination with (1) a heating-chamber provided with (a) an opening at one end for the admission of ingots, (a') an opening at its opposite end for the delivery of heated ingots, and (b) an opening near the delivery end of the chamber for the delivery of gaseous fuel, of (2) a track (c) extending longitudinally through said chamber, and having (d) an inclined section (d') inclosed within said chamber, and (d'') extending from said delivery opening to a vertical plane passing transversely through said chamber and said fuel opening, whereby an ingot in passing over said track is acted upon by gravity at a point opposite said fuel opening, and moved out of the heating-chamber."

Claim 7. "In a furnace for heating ingots or billets, the combination with (1) a heating-chamber having (a) an opening at one end for the admission of ingots, (a') an opening at its opposite end for the delivery of heated ingots, and (b) an opening near the delivery end of the chamber for the admission of gaseous fuel, of (2) a track (c) extending longitudinally through said chamber, said track having (d) an inclined section on which the ingots are moved by gravity, (d'') extending from said delivery opening to a vertical plane passing transversely through said chamber and said fuel opening, thereby bringing the inner end of said inclined section opposite the fuel opening, and (3) a pushing mechanism by which the ingots are pushed along the track upon said inclined section."

The elements, we thus see, are the oblong furnace, the water-cooled pipes making a track for the support of the billets, an inclined track at the delivery end, means for introducing fuel and air into the furnace, and a pushing device to cause the billets to move forward. An inspection of the prior patents, especially the Allen, Daniel, and Daelen patents, as well as the prior state of the art, as shown by the Cambria furnace in use in 1886, conclusively shows that each of these elements or instrumentalities was old. Not one of them but exists in some form or was included in some claim of some one of the patents referred to or in the Cambria furnace. The patentee recognized this, and on page 3 of his specification, at line 115, he says:

"I am aware that the individual instrumentalities embodied in my improved furnace have been used before my invention, and I do not claim such broadly; but such use was in combinations substantially different from those devised by me.

"I have described what I consider the most desirable means for maintaining a zone of maximum heat contiguous to the wall of the furnace at the delivery end of the heating-chamber, comprising opposite side openings for transverse currents of gaseous fuel and inclined roof-surfaces; but I do not wish to confine myself to the specific means described, as the same may be modified and still come within the scope of my claims.

"I am aware that it is not new to construct a furnace with openings at the opposite ends of the heating-chamber for the admission and delivery of ingots or billets, and with an inclined track leading from the delivery opening of the heating-chamber to a conveyer and inclosed within a separate chamber from the heating-chamber."

This was but the summing up of what appears over and over again in the contents of the file wrapper of this patent. It appears, then, that the patentee took these instrumentalities, every one of them conceded to be old, and formed the combination set out in his claim.

It must be apparent, from a consideration of the specification and claims of this patent in the light of the former patents and of the limitations fixed by the applicant as required by the Patent Office, and as shown in the file wrapper and contents and the evidence now before us, that the main purpose of the Morgan patent was to fix a zone of maximum heat in the furnace and to bring to or within that zone an inclined track, so that, immediately upon the ingot or billet reaching the point of maximum heat, it might be taken quickly and automatically from that zone to a conveyer, so as to be removed to the reducing mill. The patentee could not determine the apex of this inclined track, unless he could have a well-defined and fixed zone of maximum heat. This appears throughout the history of the case while in the Patent Office, it appears in the specifications, it appears in the claims, and it appears in the evidence of the witnesses interrogated as to the patent.

On page 33 of complainants' record, Mr. Julian Kennedy, a witness for complainant, and one of the highest authority, testified:

"The essence of the invention of Morgan is clearly and plainly in arranging a gravity or automatic device for quickly taking the billet from the zone of highest heat in the furnace to the outside of the furnace without allowing it to linger at the end wall, where it would be chilled and possibly oxidized by air accidentally coming in through the crevices around the door left for allowing the bloom to pass out."

And again, on page 34, after testifying as to claim 3, he says:

"The vital feature of this claim is the inclined track extending into the zone of maximum heat. In the specification the inventor specifically does not limit himself to any particular location of this zone; but he does run this inclined track into this zone of maximum heat, wherever it may be."

Again, on the same page, he says:

"The vital point of claim 3 is also the vital point in claims 4, 5, 6 and 7. These vary in detail and call attention to other features of the furnace; but in each of them the central idea and the dominant feature is the inclined track running into the zone of highest temperature, thus allowing the billet to be quickly abstracted from this zone of highest temperature and gotten out to the mill with a minimum exposure to the air and to oxidizing gases."

Prof. Wadsworth, a witness for defendants, after discussing the arrangement of the fuel ports and high-arched furnace roof (pages 169 and 170), says, on page 178:

"Every feature of the design and arrangement of parts—side wall, fuel ports, high crown, and transversely arched and inclined furnace roof—at the front or fuel end of the Morgan continuous furnace bears evidence of a particular aim or purpose on the part of the patentee. The purpose, as set forth over and over again in the specifications, is to maintain 'a zone of maximum heat * * * at the delivery end of the heating-chamber and continues to the end wall of the chamber.' (See lines 12 to 15, page 2, of the specification.) 'A zone of maximum heat, which is either within or approximate to the plane of the fuel opening, depending upon the strength and direction of the current of incoming fuel, and also upon the strength of the longitudinal current induced by the escape flue at the opposite or charging end of the furnace.' (See lines 40 to 46, page 2, of the specification.) 'A zone of maximum heat contiguous to the delivery end of the furnace. (See lines 112, 113, page 2, of the specifications.) 'A zone of maximum heat contiguous to the vertical end walls of the heating-chamber, with a gradually increasing temperature towards the entrance end of the chamber.' (See lines 26 to 30, page 3, of the specifications; also lines 122, 125, same page.)"

The apex of the inclined track must be determined by the zone of maximum heat. The zone of maximum heat was not to be determined by the apex of the inclined track. The pushing device, the arrangement of the billets crosswise, upon longitudinal tracks, the discharge of the billets, either through the sides of the furnace or at the end of the furnace, the introduction of fuel and air into the furnace, so as to gradually heat the billets from the charging end to the delivery end, were all old, and not only old as separate elements, but old in combination, as in the Cambria furnace and in the Allen patents, British and American. All, then, that the patentee added to the combination was the fixing of a zone of maximum heat and the projecting into that zone of an inclined track, the one terminus of which should be its apex within the zone and the other terminus the delivery opening. The introduction of the fuel and air near the delivery end was old, as in the Daelen patent; the inclined track was old, as in the Daelen patent; but the quick passage of the heated billets from the zone of maximum heat was new, and the means of effecting this, viz., the projection of the inclined track into a zone of maximum heat, that zone being predetermined by the adjustment of the fuel and air openings, so as to produce the maximum heat at a certain point in the furnace, was new; and for this he was entitled to a patent. His claims must therefore be limited and interpreted as meaning only, in a furnace for heating ingots or billets, the admission into said furnace of gaseous fuel in such manner that a predetermined zone of maximum heat is maintained within certain limits in the heating-chamber thereof, and adjacent to the delivery end of the furnace, in combination with an inclined track, extending from the delivery opening of the furnace to or within the zone of maximum heat.

Let us now inquire whether or not defendants have infringed the Morgan patent as thus limited. Albert K. McMillen, a witness for complainants, who had seen the defendants' furnace in operation, produced a drawing of it marked "Complainants' Exhibit No. 1, Drawing Defendants' Furnace" (Complainants' Record, 19), a copy of the same

being attached to the Complainants' Record at page 245, and during his examination marked numbers on it showing the different parts, and which are explained by the witness, beginning at page 15 of Complainants' Record. This drawing is conceded to be a fair general representation of defendants' furnace. It is described by Mr. Julian Kennedy, on page 35 of Complainants' Record, and the succeeding pages, as follows:

"Q. 6. Have you read the deposition of Mr. A. K. McMillen, a witness in behalf of the complainants in this cause, and have you examined and do you understand the 'Complainants' Exhibit No. 1, Drawing of Defendants' Furnace,' referred to by Mr. McMillen? A. I have, and I do. Q. 7. Now, will you please state to the court your understanding of the construction and operation of the furnace shown by 'Complainants' Exhibit No. 1, Drawing of Defendants' Furnace,' and in doing so please point out such resemblances, if any, as you may find between the furnace shown by such exhibit and the furnace shown and described by letters patent to Morgan, No. 632,020, and particularly as defined by claims 3, 4, 5, 6, and 7 thereof? A. The furnace shown on the drawing mentioned, Complainants' Exhibit No. 1, as will be evident to any one looking at it, is very similar to the one shown in the patent to Morgan."

It is also described by Prof. Wadsworth (Defendants' Record, 249) as follows:

"The air for the combustion of the fuel is introduced through a transverse passageway 10, running across the furnace above the fuel inlet opening, and provided with a series of vertical ports 11 and horizontal ports 12; the former discharging a portion of the air in downward direct currents, which meet and commingle with the entering gas streams in the spaces above the inclined gravity discharge track 16, while the latter discharge the remainder of the air supply in horizontal, longitudinal entering currents, that meet and commingle with the lower gas and air currents in the space back of the beginning of the gravity incline discharge. Combustion will begin at a point a little back of the first set of air ports 11; but it cannot, of course, be completed until the ignited and burning mixture of gas and air has been supplied with the additional air which enters through the air ports 12. As the currents of gaseous fuel and currents of air, passing through the ports 12, both enter the heating-chamber in longitudinally directed streams at a considerable velocity, the point of complete combustion—or substantially complete combustion—will, in defendants' furnace, be carried well back into the heating-chamber proper, and the zone of maximum heat and maximum temperature will in consequence of this be located at a considerable distance from the delivery end wall of said chamber."

It may be assumed, then, that the furnaces bear a strong resemblance to each other. But the vital question is: Have defendants infringed the Morgan patent as construed hereinbefore? And this turns about the inquiry as to the manner of obtaining a zone of maximum heat. In the Morgan furnace, we have seen that the gaseous fuel and air are brought in through openings in the opposite side walls, so that these commingling currents of gas and air are introduced transversely to the heating-chamber and are given a downward direction by the arched roof, so that there is produced a predetermined zone of maximum heat within the furnace and adjacent to the delivery end thereof.

Referring to the drawing (page 245 of Complainants' Record) and to McMillen's testimony (page 23), in the defendants' furnace the gas and air are brought horizontally into the furnace through the openings 9 and 11 in the delivery end wall, so that they commingle below

11, where combustion commences; complete combustion being obtained just inside the arch 21, and the zone of maximum heat extending a width of three or four feet from 21 to 22. Kennedy was asked (Complainants' Record, 46):

"XQ. 32. Do you agree with the witness McMillen in locating the point or zone of maximum heat at all the points indicated by the numeral 22 on the exhibit drawing? (Complainants' counsel objects to the statement of the question as inaccurate, and refers to XQ.'s 93-95 of McMillen's testimony.) A. The point of maximum heat in a furnace probably changes from time to time according to the speed with which the material to be heated is passed through it and possible variations in the fuel supply. I should judge, however, that the point of maximum heat might be within a very short distance either way of the points marked 22, or it might under certain conditions be moved over toward the points marked 20. Anywhere between these points, however, I should judge would be in a zone of heat which would be amply great for imparting the proper temperature to a billet, whereas close to the end of the chamber there would be a zone which would not be nearly so hot, and in which combustion would be incomplete, and where, also, there would be more or less free oxygen in the gaseous currents."

It is unnecessary to refer to the other evidence in the case upon this point, because an examination of it, as well as of the evidence above referred to, results in the conclusion that in defendants' furnace the gas and air are brought through the end wall and longitudinally of the furnace, so that a zone of maximum heat is found between the points 21 and 22. This is just where the defendants' construction departs from the Morgan patent. In the Morgan patent, as we have said, the zone of maximum heat is predetermined by bringing the fuel and air into the furnace from opposite sides and near the top of the furnace, so that the commingling currents will pass transversely into the furnace and have a downward or vertical direction, thus fixing at a certain point in the furnace a zone of maximum heat, and thereby fixing the point of the apex of the inclined track. The patentee of the Morgan patent was limited to the introduction of the air and gas through side openings, so that the current would be transverse of the heating chamber; and he was also limited to a manner of introduction so that those currents would pass down vertically, and not horizontally, for that was the only way to predetermine a zone of maximum heat and determine where the apex of the inclined track should be. The zone was not to be left to change or chance—that change or chance which might occur from the increased or lessened pressure of air or gas, as described by Prof. Wadsworth and Mr. Kennedy, or from the lowering of the temperature of the furnace by the forcing of the furnace by the too rapid introduction of cold billets, or by the pulling of the currents of air and gas by increased draft through the stack and away from the apex of the inclined track—but the certainty of a fixed zone was secured by the vertical transverse introduction of the gas and air just in the manner described. This fixing of the zone was also necessary, so that the billet might be removed from the zone of greatest heat, the very essence of the Morgan invention, and not pass through a cooler zone, which would occur, if the zone by change or chance was moved towards the charging end of the furnace.

The defendants' construction, as we have seen, is defined, and it is readily seen that the zone of greatest heat in it might vary greatly.

(Wadsworth, Defendants' Record, 249; Kennedy, Complainants' Record, 46.) It is apparent, by the introduction of the air and gas through the end wall horizontally, as in defendants' furnace, it would be impossible to determine the exact zone of highest temperature, and to so regulate the furnace that the zone would be constant and always at practically the same place. Mr. Wellman, an expert for defendants, says (page 118, Defendants' Record):

"The exact point of highest temperature would be very hard to determine, depending altogether on the manipulation of the gas and air and chimney damper, by the heater in attendance. If he thoroughly understood his business, this point could be varied within quite a high range. The hottest point in my judgment, in the regular working of the furnace, would be at a point between the point of entrance of the gas and the outlet of the same, probably at a point about 25 per cent. of that distance."

In a furnace 40 feet in length the zone of greatest heat would be 10 feet from the delivery end wall. Unless this zone could be determined, therefore, and practically always kept at the same place in the furnace, the position of an inclined track could not be constructed so as to have its apex at or within this zone. The construction of the inclined track would necessarily be without regard to the zone of highest heat, and in the operation of the furnace would leave a cooler zone between the apex and the zone of highest temperature. The evidence shows that this cooler zone does exist in defendants' furnace. Prof. Wadsworth (page 250, Defendants' Record) says:

"The temperature measurements made by Mr. Knote show that this zone of maximum temperature in defendants' furnace is, in fact, located nearly five feet back or away from the end wall containing the fuel entry ports 9, and fully three feet away from the point of beginning of the gravity discharge incline or slope 16. Mr. Knote's measurements show that the temperature in the furnace chamber at a point very close to the head or beginning of the inclined slope 16 is about 1190 degrees Centigrade, whereas the maximum temperature measured at a point some three feet or more away from this was 1380 degrees Centigrade. There would, therefore, be a difference in temperature of 190 degrees Centigrade—342 degrees Fahrenheit—between this zone of highest temperature in the furnace chamber and the point where the bars are discharged by gravity down the incline 16. As I have already pointed out, there is an interval of about three feet between the zone or plane of highest temperature and the beginning of the gravity discharge track, and this three-foot interval would contain 24 $1\frac{1}{2}$ "x $1\frac{1}{2}$ " bars. According to Mr. Devlin's testimony (see answers to Q. 5 and XQ's 64 and 65, of first deposition; Defendants' Record, pages 48, 55, and 56), the bars are delivered from defendants' furnace at an average of about one in every 18 seconds. The bars would, therefore, on the average, lie on the horizontal portion of the skid tracks and furnace hearth for over seven minutes (24x18 secs.) after passing through the zone of maximum heat, before they were pushed over the head of the gravity incline and discharged through the delivery door. In the normal operation of defendants' furnace, it certainly cannot be said that the bars or heated articles are 'moved by gravity through the intervening space between the zone of maximum heat and the opening' in the delivery end wall, as described by Morgan, in lines 47 to 49, page 3, of the specification, or that they are 'moved by gravity from the zone of maximum heat, through said delivery opening,' as set forth in claim 3 of the patent in suit."

It is very apparent, therefore, that defendants by their construction do not accomplish that which is the essence of the Morgan patent, to wit, the immediate passage of billets from the zone of maximum heat.

Under all the evidence in this case, considered in the light of the Morgan patent, as construed, we are of the opinion that the defendants by their construction have not infringed the Morgan patent, No. 632,020.

[2] Let us now consider the Laughlin reissue patent, No. 11,666, which is claimed in the bill of complaint to have been infringed by defendants. First, was the Laughlin patent anticipated by other patents or prior use? And this inquiry is confined to the tenth claim thereof, which reads as follows:

"A continuous heating furnace having receiving and discharge openings at or near the ends of the furnace, and pipes or supports for the billets extending from the receiving or charging opening toward the discharge opening, and provided with one or more cinder pockets arranged adjacent to and below the rear ends of the pipes or billet supports and extending below the latter, and openings through the side walls of the furnace into said pockets, thereby permitting of the removal of the cinder during the operation of the furnace, substantially as set forth."

The element of this claim which we are to consider is:

"Provided with one or more cinder pockets arranged adjacent to and below the rear ends of the pipes or billet supports and extending below the latter, and openings through the side walls of the furnace into said pockets, thereby permitting of the removal of the cinder during the operation of the furnace."

The patents offered in evidence by the defendants are (Defendants' Record, 165): The Conklin patent, No. 132,139; the Eynon patent, No. 151,581; the Buck patent, No. 503,926; the Standish patent, No. 502,593; and the Bagley & Roberts patent, No. 550,774. So that we may determine whether or not these patents have anticipated the Laughlin patent, let us determine, by an inspection of the drawings and specifications, exactly what the Laughlin patent covers. We are aided in this by the testimony of Prof. Wadsworth, who, on page 199 of Defendants' Record, says, in describing this patent:

"The 'cinder pockets' referred to as the third element of claim 10 are, according to my understanding, the openings below 'the pipes or billet supports 11 just back of the transverse bridge wall 10, these openings extending transversely across the floor or hearth of the furnace, and being bounded in part by portions of the longitudinally extending piers 9, and in part by portions of the transverse piers 26, when the latter are used. The 'openings through the side walls of the furnace into said pockets,' which are specified as the fourth element of the claim under consideration, are openings corresponding to those marked 24, 24, 24, in both Figs. 2 and 14 of the Laughlin & Reuleaux patent drawings; these openings being provided, as already explained, for the removal of the cinder or scale that may accumulate in said pockets."

Also on page 227 of Defendants' Record:

"Claim 10 of the Laughlin reissue patent in suit sets forth a combination of four parts or characteristics of furnace construction, comprising, generally stated, two opposite end openings to the heating chamber, pipe or billet supports, extending from the charging opening toward the discharge opening, cinder pockets arranged adjacent to and below the pipes or billet supports near what I have termed the front end—but what the Laughlin patent in suit refers to as the rear end—and openings through the side wall of the furnace into these cinder pockets. The drawings of the Laughlin & Reuleaux patent show only constructions in which the parts, which are referred to in this claim as 'cinder pockets,' are on the same level as the main bed or hearth

of the furnace chamber. These pockets are 'below' the billet supports only because said supports are raised on piers above the furnace bed. The side door openings 24, which communicate with these so-called 'cinder pockets,' are likewise entirely above the level of the main bed or hearth of the Laughlin & Reuleaux furnace construction."

This seems to be an accurate description of the patent in question.

We also have the benefit of Prof. Wadsworth's expert opinion as to the Conklin, Eynon, Buck, Standish, and Bagley & Roberts patents. On page 227 of Defendants' Record, he thus describes the Conklin patent:

"In the early Conklin patent of 1872 (No. 132,139) there is illustrated and described a furnace construction, which is not of the continuous heating type, but which has receiving and discharge openings at the stack flue end of the furnace chamber, and which has a depression at the opposite end of the furnace chamber, which constitutes, in effect, a cinder or slag pocket that is below the rear ends of the material charged into the heating chamber. This Conklin furnace also has openings—marked *G*—through the side walls of the furnace into the depressed cinder or slag pocket, and these openings permit of the removal of such slag or cinder during the operation of the furnace. It may be further noted that in the regular operation of this Conklin furnace, any scale or semisolid cinder which would not run down to the depression at the end of the furnace would be pushed down by the introduction of the bars or 'piles' of plates to be heated."

He thus describes the Eynon patent, No. 151,581, on page 139 of Defendants' Record:

"A further object or result of this construction, which is not specifically mentioned in the Eynon patent, is that the depressions in the floor of the furnace, in which the boxes of pipes *N* and *P* are located, would form cinder or scale pockets extending transversely across the floor of the heating-chamber, which would collect the scale that might be formed on the surfaces of the material being heated, and which would be scraped off or jarred off these surfaces, as the bars passed over the supporting pipes. The cinder or scale which would thus be collected in the depressions containing the boxes *N* and *P*—or, more properly speaking, in the pockets formed between the back surfaces of these boxes and the hearth of the furnace—could be readily removed through enlargements of the openings in the side walls of the furnace that receive the ends of said boxes. Although no enlargements of these openings are specifically shown in the drawings of the Eynon patent, it would be a matter easily within the skill of a furnace builder to provide them, and I think they would be provided as a matter of course, if it was found that any considerable amount of scale or cinder piled up back of the boxes *N* and *P* in the operation of the furnace. The box *Q* would also act to scrape and jar off any scale which formed on surfaces of the bars as they pass through the furnace, and such scale would drop down into the fireplace *D*, and be removed with the cinder and ashes from the pit below the fire grate."

On page 157 of Defendants' Record he thus describes the Standish and Buck patents:

"In patents Nos. 502,593, to Standish, and 503,926, to Buck, dated respectively August 1 and August 22, 1893, there are illustrated and described two furnaces, to which I call attention only for the purpose of showing that it was common and ordinary practice to provide openings or pockets in the hearth or floor of heating furnaces of all kinds and descriptions for the reception and collection of cinder and slag. In the Standish furnace, the articles to be heated are moved longitudinally through the furnace, by means of an endless conveyer chain, carrying rods or holders *H H*, which are mounted transversely on the chain and have one end bent down to form hooks *h h*, on which the blanks or articles are suspended, so as to travel along through a slot in the roof of the furnace and become gradually heated to the tem-

perature desired. The scale which forms on the heated surfaces is jarred off as the blanks move along, drops down on the floor of the heating-chamber, and by union with the silicious material of that floor forms cinder or slag, which is raked out or flows out through a tap hole *T* (see best Figs. 3 and 5), formed in one of the side walls. The furnace shown in the Buck patent is not a continuous heating furnace at all, but is a furnace similar in its construction and mode of operation to the furnace of the early Conklin patent of 1872. Like the Conklin furnace, the Buck furnace is provided at one end with an outlet *U* for the removal of cinders or slag from the lowest portion of the furnace hearth. In the Conklin furnace, the outlets are in the side walls of the furnace, while in the Buck furnace (see best Fig. 1), the outlet is in the end wall, and leads into a depression or pocket *B* extending transversely across the heating chamber *A*."

On page 230 of Defendants' Record he thus describes the Bagley & Roberts patent, No. 550,774:

"In this connection, I might also call attention to the construction of the furnace illustrated and described in the Bagley & Roberts patent, No. 550,774, of December 5, 1895, which I inadvertently overlooked in my previous general discussion of the prior art. This patent shows a furnace for heating slabs, the general construction of which is well illustrated in the sectional views of Figs. 2 and 3. It is not a continuous furnace, and does not have, therefore, receiving and discharge openings at or near its ends, as called for in claim 10. It has, however, supports for the slabs or billets to be heated, which extend longitudinally of the heating chamber throughout its length, these supports being indicated in the drawings by the reference letters *H H'*. It has also a cinder pocket arranged below the slab or billet supports, and has, further, openings through the side walls of the furnace into these pockets, 'thereby permitting the removal of the cinder (or slag) during the operation of the furnace.' This last feature of construction is best shown in Fig. 3 of the Bagley & Roberts patent drawings. The only difference, therefore, between the structure described in the tenth claim of the Laughlin & Reuleaux re-issue patent is that the first structure is not 'a continuous heating furnace,' and for this reason does not have openings 'at or near the ends of the furnace' in the end or side furnace walls, but has instead openings near the ends of the furnace in the roof or crown of the heating chamber. It would, however, in my opinion, only involve engineering skill to provide the continuous heating furnaces of the earlier Allen and Daelen patents with the cinder pocket construction of the Bagley & Roberts furnace, and the Allen and Daelen furnaces, when so equipped, would present structures corresponding in all respects to the one generally described by the language of the claim under consideration."

It must be very apparent, therefore, from a comparison of these patents with the tenth claim of the Laughlin patent, that the providing of pockets with outlets for the collection and removal of cinder and slag in heating furnaces was well known in the art. It does not appear, in the evidence or in the argument of counsel on either side, how there could be invention in placing the cinder pockets at the discharging end of the furnace, as shown in Fig. 6 of the drawings, at the places marked 23, or in providing doors 24 for the removal thereof. In our opinion, the providing of pockets in such furnaces for cinder and slag and of openings either for the removal thereof or the outflow of the same in a melted condition was well known in the art, and Laughlin & Reuleaux were not entitled to a patent for the same. We therefore decide that the tenth claim of the Laughlin & Reuleaux re-issue patent, No. 11,666, is invalid.

This makes it unnecessary to consider the question of infringement. Let a decree be drawn in accordance with this opinion.

STANDARD ASPHALT & RUBBER CO. v. AMERICAN ASPHALTUM
& RUBBER CO. et al.

(District Court, N. D. Illinois. February 24, 1913.)

No. 29,015.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ASPHALTIC FLUXES.

The Culmer & Culmer patents, No. 635,429, for a process of making asphaltic fluxes by dehydrating petroleum residuum and simultaneously passing an air blast through the charge, and No. 635,430, for the product of such process, were not anticipated by the Byerley patent, No. 524,130, and must be conceded patentable novelty and invention, in view of the presumption arising from the grant, the large use of the product in pavement construction, and the difference between the two products, especially when considered in connection with the paving art; also *held* infringed.

2. PATENTS (§ 250*) — ANTICIPATION — CHEMICAL PROCESSES — IDENTITY OF PRODUCTS.

In comparing chemical processes, the lack of identity in the products is evidence of lack of identity in the processes.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 390, 392, 393; Dec. Dig. § 250.*]

In Equity. Suit by the Standard Asphalt & Rubber Company against the American Asphaltum & Rubber Company, James F. Hill, and Henry Rawstron. On final hearing. Decree for complainant.

Offield, Towle, Graves & Offield and Frank L. Belknap, all of Chicago, Ill. (Charles K. Offield and Albert H. Graves, both of Chicago, Ill., of counsel), for complainant.

Edward Rector and Charles C. Bulkley, both of Chicago, Ill., for defendants.

KOHLSAAT, Circuit Judge. [1] Complainant files its two bills to restrain infringement of process patent No. 635,429 and product patent No. 635,430, both granted October 24, 1899, to George F. and George C. K. Culmer, being, respectively, for the process of making, and product, of asphaltic fluxes. The claims read as follows:

"The method of preparing asphaltic fluxes which consists in dehydrating petroleum residuum, holding the mass in heated state sufficient to drive off water, but below the pitch-forming temperature—e. g., below 550° Fahrenheit—and simultaneously blasting the charge with air so as to profoundly modify the characteristics thereof, thus markedly lessening the petroleum content and markedly increasing the asphaltene content, without material loss through destructive distillation, while the volume and specific gravity of the finished batch remain essentially the same as in the dehydrated residuum, substantially as described."

"A black semi-solid asphaltic flux devoid of pitch, the same consisting of dehydrated and oxidized petroleum residuum, nearly alike in volume and specific gravity with the original residuum, but markedly higher in its content of asphaltene and lower in its petroleum than the residuum from which it was derived, and possessing the characteristics of a product obtained by prolonged exposure of petroleum residuum to a heat below pitch-forming temperature—e. g., below 550° Fahrenheit—under copious injection of air to transform the mass without material distillation, substantially as described."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The main value of the product obtained consists in providing a flux to be used in connection with Gilsonite, a mineral asphalt, in the construction of asphalt pavements. Prior to the alleged discovery of the flux in question, it is claimed that such fluxing was so imperfectly accomplished as to be impractical in the pavement art. Residuums of petroleum oil were used, but resulted in a roadbed that would soften and expand with hot weather and crack with cold. Complainant asserts that its product fluxes with asphalt, including Gilsonite, in such a manner as to make a roadway which practically overcomes this difficulty.

The process, briefly stated, consists in treating a given body of petroleum residuum, which has resulted, after the elimination of various light oils, under applications of heat ranging up to 650° or 700°, to heat approximating 380° in temperature, and at the same time permeating and agitating the mass by the violent injection of air. The body to be treated is first heated for a period of about 8 hours, until it is practically dehydrated. The air is then forced in from underneath the mass. The temperature is maintained at practically 380°, and the air applied for approximately 32 hours, when the amount of air may be reduced for a further period of 8 hours. During the 32-hour period, the mass thickens. The heat may be decreased, either by the reduction of air applied or by checking the fire. Previous to the introduction of the air, the batch is reduced in weight, approximately, 5 per cent.—not from any chemical action, but from dehydration. At the close of the 40-hour period, the loss does not exceed from 3 to 4 per cent. This the patentee accounts for by claiming the fixation of oxygen derived from the air blast, while petroleum residuum will not distill at a temperature less than that under which it was produced. The patentee claims that a marked change occurs in the mass under the air blast treatment. This is shown in the increase in the percentage of asphaltene therein after the 40-hour treatment with air. The real chemical and other effects of such processes are not definitely known, so that much is left to speculation. The time required may be varied with the character of the treatment, viz.:

"Holding the temperature beyond 380° Fahrenheit a harder flux will be produced, and below such temperature a softer. Hence, at the higher range, the air blast need be used for less time to afford a standard yield. At the lower range the blast must persist longer, or again at the lower range, for example, by increasing the volume of air supply, the period of treatment is lessened. Doubling the blast may nearly halve the time."

The character of the residuums treated is also a factor. By using the product of the patents in suit, it is claimed that the question of a successful pavement is solved.

Complainant claims to have built up a trade of 3,000,000 pounds per annum, so that the question presented is a very serious one. The cost of asphalt considerably exceeds that of the flux here involved. Prior to the present invention, it is claimed, the flux used could not exceed 25 per cent. of the pavement body. Under the instant process, it may be used up to 75 per cent. or 80 per cent. thereof.

Defendant sets up, by way of defense, several matters, of which it is only deemed necessary to consider two: First, patent No. 524,130,

for manufacture of asphalt and other products from petroleum, granted to F. V. Byerley, August 7, 1895, by way of showing invalidity of the two patents in suit; second, prior use and prior publication by the Byerleys.

The patent to Byerley declares:

"This invention related more particularly to the manufacture of solid bodies from petroleum, but each of the improvements constituting the same is included for all the uses to which it may be adapted."

This patentee calls attention to the methods of treatment of petroleum residuum, whereby he says the residuum has been reduced to coke or coke containing pitch. He distills the residuum to a solid body by a prolonged exposure to "a pitch-forming, non-coking temperature, about 600° F., with agitation and exposure to air or gas, which product is soluble in benzine 62° Baume. These bodies he calls new. He says:

"They vary, according to the extent to which the process is pushed, in hardness at atmospheric temperatures (say at 60° F.) from a rubberlike consistency to a mass of hardness and conchoidal fracture like the natural asphaltum."

The mass freed from oil, he says, is adapted to making varnish, and may be used in paving and roofing. He states that, in mixing for pavement purposes, the product should be used with oil. He claims that, while oils taken from different localities differ in specific gravity, his process can be used on residuums from any or all of them. He sets out the advantages of the application of air at atmospheric pressure to the residuum, and says:

"The distillation and formation of the asphalt may thus take place at a lower temperature, which favors the desired changes in the tar."

He recommends the application of the air blast or admixture in distilling other coal oil substances.

"So far as I am aware," he says, "it is new generally to subject a natural or artificial tar or pitch-forming oil to a pitch-forming, non-coking, or indeed to a pitch-forming temperature, whether accompanied by more or less coking or not, with agitation and exposure to air," etc. "Distillation of the flux," he continues, "should be carried on under a temperature of 600° F., and with some oils it may be produced at even 700° F., though the lower temperature is preferred in the use of Lima tar. Coking," he asserts, "must be avoided. If Lima tar of a heavier gravity is to be treated, the distillation commences at a higher temperature, and the entire operation is ended sooner."

The claims cover the process of making asphaltic products by prolonged exposure of petroleum tar to pitch-forming, non-coking temperature in a still, with agitation and exposure to air; also the—

"new asphaltic petroleum products soluble in benzine, varying in hardness at atmospheric temperatures from a rubberlike consistency to a mass of a hardness and conchoidal fracture like the natural asphaltums, the less hard having also a conchoidal fracture at lower temperatures, melting at from about 200° Fahrenheit to about 400° Fahrenheit, according to hardness," etc.

It will be seen that Byerley used a practically closed still in his process. It is complainant's contention that in practice Byerley's mass suffered a substantial decrease in weight, due to distillation, while Culmers' loss was very slight. On this point the evidence is very con-

tradiictory. The experiments conducted at Whiting, Grand Crossing, Ill., and at Independence, Iowa, are not satisfactory. They were ex parte and irreconcilable, and cannot be held to settle the question. The same may be said of the expert testimony. There is much learned discussion bearing upon the character of the changes, if any, which take place during the application of heat and air to petroleum residuum.

Complainant contends that through use of the still consequent distillation takes place in Byerley's process, whereby hydrogen is split off from the mass, which combines with the oxygen of the air to form water and further distillation, while in some occult manner the oxygen supplied by the Culmer process, being applied by force and not by suction, as in Byerley's, becomes fixed in the mass in such a manner as to offset in weight the loss sustained by dehydration in the first stages of the process. It is conceded that, by the application of heat at about 380° F. the so-called petroleum of the mass gives way to a considerable degree to the so-called asphaltene, and the liquid residuum thickens up, so that the melting point is advanced, whereby it may be used in paving in connection with Gilsonite or national asphaltum, without fear of its becoming too soft under heat or too hard and liable to crack in cold weather. This unsusceptibility to climatic changes is one of the chief results, and is claimed by both patentees.

Byerley, in his circular of 1895, in evidence as "Exhibit Byerley Circular," lays great stress upon the indestructibility of his product. The issues are befogged somewhat by the indiscriminate use of the terms distillation, coke, and pitch; the two patentees seemingly having somewhat different ideas in mind in the use of the terms. It has been the purpose of the court to make reasonable allowance for these discrepancies. It is defendants' contention that the splitting off of hydrogen from the hydrocarbons of the residuum effects the change from petroleum to asphaltene, that this occurs at and above a temperature of 550° F., and that the difference between its four exhibits and the product of the patent is simply one of degree. Defendant further contends that Byerley's product dissolves in carbon bisulphide, except as to a portion less than 2 per cent. thereof, and the product must have been effected at a temperature which Byerley calls "a pitch-forming, but non-coking, temperature, and which Culmer describes as below a pitch-forming temperature. Culmers place their temperature at about 380° F., deeming that the point at which they may be safe from the formation of what they call "pitch," but which Byerley calls "coke." The test of the desired product, defendant insists, is that it shall dissolve in carbon bisulphide.

It appears from the evidence that the Culmers were quite familiar with the Byerley patent process and product when they filed their application for the patent in suit, and, so far as the record shows, were thereby advised of the desirability of a process involving the combined action of heat and an air blast upon the petroleum residuum. With this information at hand, they set out to devise a flux for refined Trinidad and other materials suitable for paving purposes. In doing this, they sought for a flux which should be immune to climatic changes, and one which would, while acting as a flux to asphaltum, be itself in considerable degree a substitute for natural asphaltum and

Gilsonite. Byerley, while not in terms claiming a hardened flux or a substitute for asphaltum, seems to have so claimed in effect. His specimen No. 1 was the result of from 500° to 600° F. heat and applied air; No. 2 was the product of air and from 400° to 450° F. heat. Both Nos. 1 and 2 received an air blast covering four days, and may be used in making varnish and pavement, the patent says. No. 3 was treated about the same as No. 2, and was intended for paving and varnish. No. 4 was subjected to air and heat at about 300° F., and was intended as a flux for other asphalts. It thus appears that Byerley's process covered a range of temperature, including 380°, together with a natural air pressure application. It is true the process took approximately 4 days, whereas Culmers' took about 40 hours. But it seems to be conceded that Culmers' increased application of air would have the effect of reducing the duration of the process.

Complainant accounts in part for what it insists is the difference between Culmer and Byerley by reference to the employment of its open kettle as against Byerley's closed still, whereby the mass is freed from the condensed distillation which would attend the use of a still. It is not clear that such is the case, though it would appear that in the case of the use of a closed kettle the mass would be more exposed to the cracking off of hydrogen and hydrocarbon, and consequent increase of moisture through union with the oxygen of the applied air. However, the evidence as to the process leaves the court in doubt as to whether the increased oxygen of Culmer over Byerley, if any, results in considerable part from this cause. Byerley did not elaborate his process for a pavement flux, as Culmer did. He was absorbed in his new idea, so far as the record shows, of the results to be obtained from blowing the petroleum residuum into a substance which should, while losing none of its fluxing properties, be of such a consistency that it could be used in connection with asphaltic and other substances in forming solid bodies which would be unresponsive to climatic changes. This is clearly set out in his circular above referred to. The only substantial evidence offered in support of the claim that he succeeded in his quest as to a pavement material is found in the statement of several witnesses to the effect that 40,000 yards of pavement prepared in accordance with the suggestion of the Byerley patent were laid in Cleveland and Marion, Ohio, in 1894 and 1895, which were still in good condition at the time the evidence was taken. Strange to say, Culmer furnished the stone for the laying of this pavement. No specimen of the pavement is shown, and to that extent the evidence is weakened. It does not appear that Byerley ever made any considerable application of his process to the paving trade. It has now become public, and defendant claims to be operating under it.

When the Culmers received their patent, Byerley's patent was 5 years old. It does not, however, appear from this record that defendant has manufactured any considerable amount of the product in suit, while complainant is manufacturing more than 5,000,000 pounds a year. Byerley failed during the life of his patent, and for 12 years after the Culmers took out their patent, to institute any proceedings to hold the Culmers for infringement. The evidence of infringement by

defendant of Culmers' patent is covered by stipulation, which reads as follows, viz.:

"It is admitted by the defendant corporation, American Asphaltum & Rubber Company, that prior to the commencement of this suit and in the Northern district of Illinois it has treated the residuum oil of petroleum by subjecting the oil to a constantly maintained temperature of between 300 and 500 degrees; that temperature varying within this range, depending upon the particular character of such oil treated, and blowing the oil with air for a period of from 30 to 45 hours. And the defendant agrees to produce a specimen of the product from such treatment."

While there is confusion as to the fact of the identity of the Culmers' process with that of Byerley, the evidence seems to be clear as to the lack of identity between the product of the process patent in suit and that of Byerley.

The exhibits introduced by defendant are hard and friable in the harder varieties, and break with what the experts call conchoidal fracture. The softer specimens are cheesy, and all of them are wanting in the cementitious and rubbery character of Culmers' product. They are described as rotten and crumbling by complainant's expert. This is the result, the expert says, of high temperature or overheated material. He further says it was impossible to effect a perfectly homogeneous admixture without increase of temperature, while Culmers' blown residuum would flux Gilsonite without application of heat, by manual manipulation. Byerley's product seemed porous, while Culmers' resembled an amber-colored jelly under the microscope. Complainant's expert witness was able manually to incorporate Gilsonite powder into an equal weight of Culmers' product without heat, whereas this could not be done with Byerley's product, even with application of 212° F.

Culmers' product is a homogeneous mass. This cannot be said of the Byerley samples in evidence—especially as to the softer specimens. Whatever they may have been when first introduced (as to which the evidence is not satisfactory), they are at the present time inferior for paving purposes to those of the Culmers.

[2] Under the evidence, it is not shown that these differences are traceable to the difference in quality and specific gravity of the oil residuum treated. Added to these is the presumption arising from the grant of the patent. The foregoing are deemed sufficient to show that the two products are different, and, when considered in connection with the paving art, radically different. In *Pickhardt v. Packard* (7 C. C.) 22 Fed. 530, Judge Wallace held that the identity of a process might be inferred from chemical identity. Now, there is no doubt as to what Culmers' process was, nor of the resultant product. In chemical processes, the converse of the *Pickhardt* Case would seem necessarily to be true; i. e., that a lack of identity between the two products argues a lack of identity in the processes.

In view of the great extent to which the Culmer products have been used in pavement construction, the obstacles overcome in securing a suitable ingredient for pavement construction, and the presumption arising, as above stated, from the grant of the patents in suit, they are held to be valid and infringed.

FOWLER & WOLFE MFG. CO. v. NATIONAL RADIATOR CO.

(Circuit Court, W. D. Pennsylvania. January 10, 1905.)

No. 25.

PATENTS (§ 328*)—INFRINGEMENT—RADIATOR.

The Fowler patent, No. 609,800, for a radiator, *held* not infringed by a licensee, on the ground that the alleged infringing device, while within the patent, also came within the purview of the license.

In Equity. Suit by the Fowler & Wolfe Manufacturing Company against the National Radiator Company. Decree for defendant.

See, also, 203 Fed. 514.

Ernest Howard Hunter, of Philadelphia, Pa., for complainant.
Harding & Harding, of Philadelphia, Pa., for defendant.

BUFFINGTON, District Judge. By a decree in the former suit between these parties the validity of the patents here involved was established. As between them they are not here open to question. The respondent then took a license under them. By that license the respondent, *inter alia*, was empowered to continue the manufacture of the radiator it had theretofore been making, and stipulated to pay a license fee therefor. The respondent has begun the manufacture of a type of radiator which it claims is not covered by said license, does not infringe the patent, and is not of the particular form which by the exception in the license it was restricted from manufacturing.

After due consideration, we have reached the conclusion that the radiator here complained of is in substance and effect the one which formed the subject-matter of the original suit, and that its differences from that type are simply those of detail and form. In substance the two are the same, and in our judgment both alike come within the purview of the license agreement. Such being the case, it follows the charge of infringement cannot be sustained, by reason of the fact that the respondent is protected by its license right to manufacture the radiator complained of.

FOWLER & WOLFE MFG. CO. v. NATIONAL RADIATOR CO.

(Circuit Court, W. D. Pennsylvania. October 3, 1905.)

No. 25.

PATENTS (§ 328*)—INFRINGEMENT—RADIATOR.

The Fowler patent, No. 609,800, for a radiator, construed, and *held* not infringed, in a suit against a licensee, in which the validity of the patent was not involved.

In Equity. Suit by the Fowler & Wolfe Manufacturing Company against the National Radiator Company. On final hearing. Decree for defendant.

See, also, 203 Fed. 514.

Ernest Howard Hunter, of Philadelphia, Pa., for complainant.
Harding & Harding, of Philadelphia, Pa., for defendant.

BUFFINGTON, District Judge. This bill charges infringement of claims 1 and 2 of patent No. 609,800, for a radiator, issued August 30, 1898, to Arthur H. Fowler, assignor to complainant. In a prior suit between the same parties, the validity of the patent was established as between them. Thereupon respondent took a license, covering certain structures under the patent and excepting others. The complainant, alleging the respondent's particular make of radiator here in question was covered by the patent, but not included in the license, filed this bill, charging infringement. On application for preliminary injunction, we refused to grant it, holding respondent's form was covered by the license. The case now comes on for final hearing.

In the light of fuller proofs, we have now reached the opinion that, while we rightly refused the preliminary injunction, we were mistaken in the ground we took for so doing, and that the refusal should have been based on the fact that respondent's radiator does not infringe. While, as between these parties, the validity of the patent must be assumed, yet it is evident its scope is exceedingly narrow. In his specification, Fowler sets forth, as his substantial advance in the art, the fact that the cross-tubes of his radiator are of larger size than the connecting tubes, which run at right angles. It is evident that these relative sizes are not mere preferential or illustrative constructions, but that they are the particular features which characterize the invention, and are embodied in the claims in controversy. A study of the specification shows that, unless based on this difference, the patent has nothing to support it. Thus the patentee says:

"The sections are preferably rectangular in shape and composed of two longitudinal top and bottom tubes *B B'*, united by two end tubes *C C'*, which are connected by a series of *smaller* longitudinal tubes *D*. I prefer to employ intermediate cross-tubes *E*, connecting the tubes *B B'* and having the longitudinal tubes *D* connecting with them. In the construction shown there are two of these *large* intermediate cross-tubes *E*, located between the end tubes *C C'*, and dividing the *small* longitudinal tubes *D* into three sets or series. The *small* longitudinal tubes *D* are located at sufficient distance apart to form intermediate openings or spaces *e* for the circulation of air between them. Each section thus constructed is composed of a series of communicating tubes, forming a unitary rectangular hollow frame."

Now it is clear to us that the word "preferably" refers to the rectangular shape, and not to the relatively "large intermediate cross-tubes" and the "small longitudinal" or connecting tubes. No other sizes or modes of construction are shown or suggested, and the larger sizes are designated as "cross-tubes," and the smaller as "connecting tubes," and as such both are carried into the claims. The very fact that the two sets of intermediate tubes are called for in the claims, one "cross-tubes" and the other "connecting tubes," shows a purpose to differentiate them, and the only ground of differentiation is found in the figures and specification, in which latter the cross-tubes are described as "large intermediate tubes," and the connecting tubes as "small longitudinal tubes." These limitations, if carried into the claims, embody a different structure from that of the respondent, and the claims, so read, fail to sustain the charge of infringement.

So construing the claims, infringement is not shown, and the bill will be dismissed.

MANTON-GAULIN MFG. CO. v. DAIRY MACHINERY & CONSTRUCTION CO.

(District Court, D. Connecticut. March 5, 1913.)

No. 1,334.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR INTIMATELY MIXING MILK.

The Gaulin patent, No. 756,953, for a machine for intimately mixing milk, by which all the butter globules are broken up and the milk homogenized, was not anticipated, and covers a pioneer invention; also *held* infringed.

In Equity. Suit by the Manton-Gaulin Manufacturing Company against the Dairy Machinery & Construction Company. On final hearing. Decree for complainant.

Fish, Richardson, Herrick & Neave, of New York City, for complainant.

Gross, Hyde & Shipman, of Hartford, Conn., for defendant.

MARTIN, District Judge (orally). This is a bill in equity, brought by the complainant, a corporation organized under the laws of the state of Maine and having its place of business in Maine, alleging infringement of letters patent No. 756,953, granted April 12, 1904, to one A. Gaulin, for a machine "for intimately mixing milk." The defendant, the Dairy Machinery & Construction Company, is a New Jersey corporation, having its place of business at Derby, Conn. The defendant's answer denies infringement, and specifies several prior inventions as covering the complainant's device.

I have examined the state of the art at the time the letters patent in suit were issued, particularly upon the plaintiff's claim that it is a pioneer patent for homogenizing milk, or, in other words, for the breaking up of the butter globules in milk. Prior to the Gaulin patent, different machines had been invented for pulverizing and mixing liquids of different consistency, some by beating, some by mixing, and others by pressing through orifices; but I am unable to find any other patent adapted to the complete breaking down of all the globules of butter fat in milk. The pressing of the milk through small holes will break up such of the globules of butter fat as may come in contact with the surface of the hole; but those that are inside, while they may change in form, will resume their shape after passing through. The special object of the Gaulin patent is to break up all the globules, so there will be no separation in the milk thereafter, putting the milk in the condition that practically every part of it is exactly alike. When in that condition, the flavor of the milk is improved, and, if sterilized and sealed, it will keep in good condition for long periods of time. A process that does not break up all the globules of butter fat will not accomplish the result desired. I am unable to find any machine capable of doing that, prior to the Gaulin patent.

By this patent the milk is forced between adjacent surfaces, which are concave and convex, and so arranged as to be adapted exactly one

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the other. This process is pressing milk by means of pumps with great force in circular sheet form, and having that sheet of milk so thin that no globule of butter fat can escape being broken up. I think it is fairly established by the evidence that the complainant's machine was the pioneer in the complete homogenizing of milk.

The defendant's machine is also covered by patent, and is quite different in its mechanical construction; but I think, from the evidence before me, that it is plain enough that the inventor of that machine used the idea of completely breaking up the butter fat in milk that was developed in the Gaulin patent.

The exhibits of the two machines show quite plainly that the invention developed in the Gaulin patent is made use of by the defendant in its machine, and I should add nothing to the force of this opinion by entering into an analysis of the expert evidence bearing upon the prior art, or the different machines specified in the different patents by the defendant in its answer.

I understand that the defendant makes no claim but what the complainant's allegations as to the assignment of the Gaulin patent, and its ownership thereof, are as set forth in the complaint.

My conclusion is that the complainant is entitled to a decree.

D. B. MARTIN CO. v. SHANNONHOUSE.

(District Court, E. D. North Carolina. March 3, 1913.)

1. CLERKS OF COURTS (§ 70*)—CUSTODY OF FUNDS—DISPOSITION—STATUTES.

Rev. St. § 995 (U. S. Comp. St. 1901, p. 711), provides that all moneys paid into any court of the United States, or received by the officers thereof, in any pending or adjudicated cause, shall be forthwith deposited with the Treasurer, an assistant treasurer or designated depository of the United States, in the name and to the credit of the court, and section 996 declares that any money so deposited shall not be withdrawn except by order of the judge or judges of the court respectively in term or in vacation, etc. *Held* that, where defendant paid the amount of a judgment recovered against him to the clerk of the District Court in which the judgment was recovered, it was the clerk's duty forthwith to deposit the money as provided by section 995, regardless of the fact that the money as soon as paid was levied on under a writ issued out of the state court.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 109-118; Dec. Dig. § 70.*]

2. ATTACHMENT (§ 164*)—LEVY—MONEY IN CUSTODIA LEGIS—FORM OF LEVY.

Where the proceeds of a judgment recovered in the federal District Court was paid to the clerk, the sheriff, under a warrant of attachment issuing out of the state court, was not entitled to take the money into his actual possession, but the levy should have been made by the clerk, giving to the sheriff a statement of the amount in his hands, or in the registry of the court, stating the purpose for which it was held, etc.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 464-479; Dec. Dig. § 164.*]

3. COURTS (§ 497*)—STATE AND FEDERAL COURTS—ATTACHMENT—MONEY IN CUSTODIA LEGIS.

Where the amount of a judgment recovered against defendant in a federal District Court was paid to the clerk, it thereby passed into custodia

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

legis, and was not subject to attachment in another suit by defendant against plaintiff in the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. § 497.*]

Action by the D. B. Martin Company against H. T. Shannonhouse. On plaintiff's motion for an order for payment to him of money in the registry of the court. Granted.

Winston & Matthews, of Windsor, N. C., and R. H. Talley, of Richmond, Va., for plaintiff.

E. F. Aydlett, of Elizabeth City, N. C., for defendant.

CONNOR, District Judge. This is a motion made by plaintiff to order the payment to it of money in the registry. It appears from the record and affidavits filed: That at the October term, 1912, of this court, at Elizabeth City, plaintiff recovered judgment against the defendant for the sum of about \$2,100. That on or about the 16th day of January, 1913, defendant paid to the deputy clerk at Elizabeth City the full amount of the judgment and the costs taxed against him. That soon after the payment of said amount the sheriff of Pasquotank county served upon the deputy clerk a warrant of attachment sued out of the superior court of Perquimans county, in an action pending in said court, wherein the defendant H. T. Shannonhouse is plaintiff, and plaintiff D. B. Martin Company is defendant. The money was in his hands at the time said warrant was served upon said deputy clerk. It had not been deposited by him. He made with the sheriff an arrangement that the money should be deposited in the bank in the joint name of himself and said sheriff for the purpose of protecting both officers and to await the determination of the attachment proceedings. Plaintiff demanded of said deputy clerk that he pay to it the said money, which demand was refused for the reason that the same had been attached in his hands. Plaintiff, upon notice to defendant, moved the court to order the deputy clerk to pay over to it the said money notwithstanding the service upon him of the warrant of attachment. The circumstances under which the money was paid to the deputy clerk are undisputed.

[1] Before disposing of the question as to whether the money in the hands of the clerk was subject to attachment, it will be well to direct the attention of the clerk and his deputies to the statutory provisions prescribing their duty in regard to funds coming into their hands by virtue of judgments or decrees of the court:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court." Rev. St. 995 (U. S. Comp. St. 1901, p. 711); 5 Fed. Stat. Anno. 70; *Fagan v. Cullen* (C. C.) 28 Fed. 843.

It is further provided that:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the clerk; and every such order shall state the cause in, or account upon which, it is drawn." Id. § 996.

It was the uniform custom of the several clerks in this district, and, since the enactment of the Judicial Code, is now the custom of the clerk and his deputies, to immediately deposit money coming into their hands as directed by the statute. The deputy clerk at Elizabeth City, supposing that the service upon him, by the sheriff, of the warrant of attachment, imposed some other and different duty under the circumstances, deposited the money to the joint credit of the sheriff and himself. In this he was in error. Under any circumstances, assuming that the money paid to him in satisfaction of the judgment was subject to attachment, or himself to garnishment, the sheriff had no authority to take the money from his possession, or interfere with him in the discharge of his official duty, as prescribed by the statute.

[2] The method of levying a warrant of attachment upon "property incapable of manual delivery" is prescribed by the state statute. Pell's Rev. 1905. The deputy clerk should have given to the sheriff a statement of the amount in his hands, or in the registry, stating the purpose for which it was held, and, if he had not already done so, forthwith deposit it to the credit of the court, as directed by the statute. The identical money paid to him was not the property of plaintiff, and, in no event, liable to actual seizure by the sheriff. An order will be drawn directing the deputy clerk to forthwith deposit the amount received by him from defendant W. T. Shannonhouse on account of the judgment recovered by the plaintiff herein in the depository designated for that purpose. A copy of said order delivered to the bank in which it is now deposited will be sufficient authority for the withdrawal of the amount and its deposit as herein directed. The act of the clerk in depositing the money to the credit of the sheriff and himself, being without authority or warrant of law, does not affect the rights of the parties herein. The question then arises, Is the money deposited in the depository designated by law to the credit of the court subject to attachment by the sheriff of Pasquotank county? The decision of this question does not call into controversy or involve the validity of the process of the state court. This court has not any such authority or power.

[3] The sole question is whether the money in the custody of this court is subject to be attached or this court's control of it, in any degree, affected by the action of the sheriff in respect to the warrant of attachment. The warrant did not direct the sheriff to levy upon, or attach, this specific money, but only the property of the defendant in his county. The power and duty of a court to decide for itself whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy as, according to the law they may be entitled, and to enforce its judgments. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, says:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continued until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised."

It is therefore generally held that property in custodia legis is not subject to attachment. 3 Stand. Enc. Pro. 280. The question presented here has been decided in a well-considered opinion, in which all of the decided cases are cited, by District Judge Waddill, of the Eastern District of Virginia. In *Corbitt v. Farmers' Bank* (C. C.) 114 Fed. 602, he says:

"The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to defendant bank, is equally fallacious. A conclusion in favor of parties litigant, to any controversy, would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result as to money in the court's own registry would, indeed, leave it in a helpless and pitiable plight."

As clearly and forcibly pointed out by Judge Waddill, to hold otherwise would result in unseemly conflicts between state and federal courts, involve their officers and suitors in difficult, and frequently doubtful, questions and result in endless confusion. The courts generally hold that to permit funds in their possession to be subjected to attachment would be contrary to public policy. *Clarke v. Shaw* (C. C.) 28 Fed. 356; *In re Forsyth* (D. C.) 78 Fed. 296. The defendant relies upon what was said by the writer in *Le Roy v. Jacobosky*, 136 N. C. 443, 458, 48 S. E. 796, 801 (67 L. R. A. 977). There, the jurisdiction of the court had been invoked to sell lands for partition. After the confirmation of the sale, the proceeds were paid to the commissioner who had paid the clerk. It was attached in his hands. To the objection that the money, in the hands of the clerk, was not subject to attachment, the present writer, for the court, said:

"The sale had been confirmed, and the cash payment made to the commissioner, who had paid it to the clerk. He held it subject to the immediate demands of the defendant. The question is expressly decided in *Gaither v. Ballew*, 49 N. C. 488, 69 Am. Dec. 763," etc.

It is conceded that the decisions of the courts of the several states upon the question are not uniform, and it appears that this is especially true of the North Carolina court. Of course, the court in *Le Roy's Case*, supra, followed the decisions of that court, whereas here the question is controlled by the rulings of the federal court. It may be that a distinction may be drawn between the *Le Roy Case* and this. There the court, by its decree, simply directed the sale of the property of the parties for partition and the money in the hands of the clerk, was a part of its proceeds; there was no recovery of any money by judgment of the court. However this may be, the statute of North Carolina directs that money paid to the clerk shall be paid by him "to the party entitled to receive it," whereas, money paid to the clerk of the federal court is to be deposited by him in the depository designated to the credit of the court, and can only be drawn out by the order of the court. It remains under the control of the court, and is not subject to the orders or process of any other jurisdiction. The deputy clerk should not have canceled the judgment. His sole authority in the premises was to receive the money and deposit it, as directed. The

application and disposition of it could be made only by the court. The attempted levy of the attachment by the sheriff cannot affect its power or duty in the premises.

Let an order be drawn directing that a check for the amount deposited by the clerk on account of the judgment recovered by plaintiff against defendant in the cause be drawn and signed by the clerk and countersigned by the Judge as prescribed by the statute, payable to the attorney of record for plaintiff; that, upon the delivery of such check, he file with the clerk a receipt in full satisfaction of said judgment and that the same be entered of record. The plaintiff will recover of the defendant the cost incurred in this motion.

CONTINENTAL SECURITIES CO. v. INTERBOROUGH RAPID TRANSIT CO. et al.

(District Court, S. D. New York. February 27, 1913.)

MONOPOLIES (§ 24*)—STATUTE PROHIBITING—CONSTRUCTION.

The Stock Corporation Law of New York (Laws 1890, c. 564, § 7, amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1), which prohibits combinations between corporations or persons for the creation of a monopoly or in restraint or prevention of competition in any necessary of life, is not so clearly applicable to public service corporations, especially in view of a decision of a lower state court to the contrary, and where the Court of Appeals had indicated an approval of the proposition, as to warrant a federal court in granting a preliminary injunction to restrain a corporation from voting stock which it owns in street railroad companies operating competing lines.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

In Equity. Suit by the Continental Securities Company against the Interborough Rapid Transit Company and others.

This cause comes here upon motion for a preliminary injunction to restrain the Interborough-Metropolitan Company, one of the defendants which holds stock of the Interborough Rapid Transit Company, from voting on such stock at a stockholders' meeting of the latter company. Denied.

See, also, 183 Fed. 132.

J. Aspinwall Hodge, of New York City, for complainant.

Richard Reid Rogers, of New York City, for defendants.

LACOMBE, Circuit Judge. The foundation of this suit is a statute of the state of New York, known as the Stock Corporation Law, as amended by chapter 688, Laws of 1892, and chapter 384, Laws of 1897. It contains this provision:

"Sec. 7. Combinations Abolished.—No domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is averred that the acquisition by the Interborough-Metropolitan of the shares of stock in various street railroads in the city of New York is a violation of this provision. If the question came before me as one of novel impression, I should be inclined to hold that the section does not apply to public service corporations, partly because the phrase "any necessary of life" is an inapt description, and also because for a long period of time the Legislature by many different statutes has very clearly indicated that such corporations, notably railroads, formed a class by themselves specifically regulated by legislation, and to which general language such as above quoted would not apply, unless the intention to cover them was very clearly indicated. This same question came before Judge Holt, sitting in this court in July, 1907. *Burrows v. Interborough-Metropolitan Co.* (C. C.) 156 Fed. 389. He reached a different conclusion. If this were all, I should, after recording my dissent from his conclusion and indicating fully the grounds thereof, follow his opinion as the law of this case, because, although there is a different plaintiff, the subject-matter is identical. Subsequent, however, to his decision, the same question as to construction of this statute came before the Appellate Division (First Department) of the Supreme Court of the state in *Attorney General v. Consolidated Gas Co.*, 124 App. Div. 401, 108 N. Y. Supp. 823, February, 1908, and in *Attorney General v. Interborough-Metropolitan Co.*, 125 App. Div. 804, 110 N. Y. Supp. 186, May, 1908; the latter case involving the very acquisition of stock here complained of. That court held that section 7 above quoted did not apply to railroads. Subsequently, on demurrer to the bill in this case, the same question came before Judge Ray, sitting in this district, *Continental Securities Co. v. Interborough-Metropolitan Co.* (C. C.) 165 Fed. 945, December, 1908. Having before him the two conflicting opinions above referred to, he followed that of the court in which he sat, instead of that of the state Supreme Court, which was not the court of last resort.

Since then in *People ex rel. Edison Co. v. Wilcox*, 207 N. Y. 86, 100 N. E. 705, the Court of Appeals has indicated that it approves the proposition that corporations occupying through special consents or franchises the public streets and places and supplying the public with their utilities are a class by themselves to which the ordinary policy of the state with regard to unrestricted competition does not apply. With this indication as to what may be expected to be the decision of the court of last resort when the question how section 7 is to be construed may come before it, it seems that an injunction of the sort now asked for, which is not of right, but rests in the discretion of the court, which is asked to issue it, should not be granted.

The motion is denied.

THE GEORGE W. ELDER.

(District Court, D. Oregon. February 3, 1913.)

No. 5,162.

1. COLLISION (§ 125*)—SIGNALS OF APPROACHING VESSELS—WEIGHT OF EVIDENCE.

The testimony of the officers and men on a vessel, corroborated by other witnesses not on board, that she heard the first passing signal from an overtaking vessel, and answered by a danger signal, *held* entitled to greater weight than the negative testimony of those on board the overtaking vessel that they did not hear any answer to their signal.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266-279; Dec. Dig. § 125.*]

2. COLLISION (§ 94*)—CONSTRUCTION OF RULES—OVERTAKING VESSEL—VESSEL "UNDER WAY."

A vessel which, while not moving through the water, was neither anchored nor moored, but was engaged in making fast to tows, was "under way" within the meaning of the navigation rules, and another vessel approaching her from astern was an overtaking vessel, and under the Inland Rules of June 7, 1897, c. 4, art. 24, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883), it was her duty to keep out of the way of the one ahead, and she was forbidden by article 18, rule 8, to pass without an agreement.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 8, p. 7161.]

3. COLLISION (§ 95*)—OVERTAKING VESSELS—ATTEMPTING TO PASS WITHOUT AGREEMENT.

As the steamer Kern was making fast to her tow of stone barges at night in the channel of the Columbia river, where she changed tows with another downbound steamer, the steamer Elder approached from above and when half a mile distant gave a passing signal of one whistle. The pilot of the Kern, seeing that the Elder was apparently approaching head on at a speed of 12 miles or more, and had not changed her course, answered with an alarm signal. The Elder proceeded without changing course until about 1,000 feet distant, when the same signals were again exchanged, and the Elder then reversed, but too late to avoid a collision, in which the Kern was sunk. *Held*, that it was not a fault for the Kern to pick up her tow in the fairway, nor that she did not have a lookout on duty at the time, since she saw the Elder as soon as the latter came in sight, but that the collision was due solely to the fault of the Elder, which as the overtaking vessel was under the duty to keep out of the way, and might have avoided the collision by changing her course when the first signals were exchanged.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Columbia Contract Company, owner of the steamer Daniel Kern, against the steamer George W. Elder, Charles P. Doe, claimant. Decree for libellant.

The Columbia Contract Company was at the time of the collision herein complained of the owner of the Daniel Kern, and was engaged in conveying rock from Fisher's Quarry, situate on the north bank of the Columbia river above Vancouver, Wash., to the government jetty below Ft. Stevens, at the mouth of the Columbia river. Barges were employed in transporting the rock, three being lashed together side by side in such a way that the center

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

barge extended forward of the others nearly half its length. These barges, when so made fast to each other, were towed by steamers. The steamer made fast to the tow by mooring with her prow from the rear of the barges between those on the outer sides, and in this way the tow, consisting of the three barges, was navigated by pushing it ahead of the vessel. On the day of the accident libelant was operating two tows thus made up, with two steamers, the Daniel Kern and the Hercules. The Kern was engaged in navigating the tow, consisting of empty barges, from Ft. Stevens up the river to where she met the Hercules, navigating a tow consisting of loaded barges from the quarry. There the steamers would exchange their tows, and each proceed back to its starting point. Thus the Kern operated on the lower river and the Hercules on the upper. The reason for this was that the Kern was of deeper draft than the Hercules, and better suited to navigate the waters at the mouth of the Columbia, and the Hercules, being of lighter draft, could reach the quarry in greater safety. These vessels, during the time they had been thus operating in conjunction with one another, had generally met at some point between Waterford Light and Oak Point above. In making the exchange of tows the Kern on meeting the Hercules would proceed some distance above with her empty barges, when she would let go of them, and return to make fast to the loaded barges in tow of the Hercules.

The Kern is a vessel 153 feet in length and about 26 feet beam, and the barges which were being taken in tow at the time of the collision ranged from 142 to 152 feet in length and 35 to 36 feet beam.

On the night of the collision the Kern met the Hercules somewhat above the Waterford Light at about 12:30 a. m., the former proceeding up the river to a point abreast of or a little above Cooper's Point, where she let go of her tow well out of and to the south of the fairway or ship's course. The Kern then returned, meeting the Hercules, which had let go the loaded barges, between Cooper's Point and Waterford Light. The Kern approached, and began to maneuver to make fast to the loaded barges. In the meantime the barges had swung around until they assumed a position nearly crosswise to the stream, their bows pointing slightly down stream and towards the Oregon shore. The Kern came up by their stern, heading approximately downstream. Her bow had entered past the port barge quartering, so that her nose was pointing nearly to the port quarter aft of the starboard barge, but not touching it. Neither was she against the stem of the port barge. A line had been made fast to the starboard quarter of the port barge (the chief officer of the Kern says to the port quarter, and that the Kern's nose lay past the port quarter of the starboard barge), and, as it was about ready to be tightened up from the Kern, the Elder came into collision with her from the rear. There was at the time some slack in the line, one witness saying about five feet, others being not so definite.

The position of the Kern and her tow at this time was nearly opposite the Waterford Light, instream from the Washington shore approximately 1,000 feet, and practically in the fairway or ship's course for vessels of heavy draft. The stream was about a mile wide, and navigable for heavy draft ships up to within from 100 to 40 feet of the Washington shore, and for a half-mile on the other side of the Kern.

The Elder is a ship 250 feet in length, with 38-foot beam, running on the night of the accident with 17 or 18 feet of draft at the stern, and some 4 feet less at the bow. She is navigated by a screw propeller, and her helm is operated with hand gear. She was proceeding downstream, and struck the Kern on her starboard quarter, about 16 feet from her stern, at an angle near 34 degrees, protruding into her to near her middle line, and breaking her wheel-shaft. The Kern was thus jammed against the barges on her port side; the barges being thrown around until their bows were headed directly upstream. The Kern was shoved around until she stood across the stream, heading towards the Washington shore, where she sank from the injuries sustained. The night was dark, but clear, and the water slack, with no appreciable current, possibly the first of the flood. As to these facts there is no substantial controversy.

Michael Moran, the pilot in charge of the Kern, relates that, while standing in the pilot house on the starboard side, looking out of the window forward, he heard one whistle. On hearing it he went out the door on the starboard side, and saw the Elder coming right at him, and appearing to him to be a short distance away. He took note to ascertain if she changed her course, and, observing no change to shut out her "signal lights," went in and gave four short blasts of the whistle. This was probably a second or so after hearing the first whistle. His first thought was that the Elder was going to run him down. After blowing the four blasts he jumped outside again, by the starboard door, on the bridge, stood there for a few seconds, and got one whistle from the Elder. The Elder's course continued as before, and witness could see her green and red lights and her masthead light, having seen the same lights when he heard her first whistle. He could see no change in the Elder from the time he saw her before, and she was headed right for him. She was then getting so close that the witness stepped back into the pilot house, and gave four short blasts—"gave the danger whistle." He sprang outside again to watch the Elder. She was then coming right head on, and he noted no change in her course. Waiting awhile, he observed her swinging to port, and, concluding that she was backing, rang the Kern full speed ahead to avoid a collision. The Elder was then 25 or 30 feet away. The Kern's helm was apart. This when the boat got in action would swing her bow towards the Washington shore, and her stern in the opposite direction, and bring the Elder across on her starboard quarter. Only a few seconds elapsed between the time of the first four blasts given by the Kern and the second whistle of the Elder—"only a short time anyway, very short," and probably a second or so between the Elder's second whistle and the Kern's last four blasts. The effect of the collision was that the headline of the Kern came tight and swung the barges along her side, heading upstream. If no change had taken place in the Kern, the Elder would have struck her a little aft. Using witness' language: "I had to look right aft from the Kern's bridge, and the Elder was coming right directly astern of me, a little the starboard quarter as near as I knew, but as near as I could judge pretty well astern and headed right for me." The searchlight on the Kern was being used to assist the men on the barges, and was not thrown upstream at any time. The witness was then asked: "What reason, if any, Captain, did you have for responding to the one-blast signal of the Elder with four short blasts? A. Well, my reason was that I concluded there was nothing going to happen but a collision, that he was going to run right into me, and I thought I would warn him of the danger he was approaching. Q. Why did you think there was going to be a collision? A. Well, I could see by his lights—judging the way he was heading by his signal lights—he was heading right for me all the time. Not making any attempt to alter his course that I could notice. * * * Q. At that time will you state whether or not he was swinging or whether or not his lights were stationary or how they were? A. They seemed to me to be about steady. He seemed to be coming right head-on to me steady. I couldn't notice any change of his signal lights. If he was swinging, I couldn't notice it. Q. How was the room between you and the Washington shore? A. There was considerable room there, anyway from twelve to thirteen hundred feet of room, as near as I could judge. * * * Q. In view of these facts, why didn't you give him—respond with a one-whistle signal? A. Well, I would have if he had shut out his green light. I would have given him the regular passing whistle, but he didn't make the attempt to do it, and I thought it was my place to give him the danger whistle. On account of laying still and the rock barges on my port bow, I couldn't comply with his whistle to go ahead on the starboard helm, was my reason for doing it." Witness says, further, that the danger signal on the Columbia consists of four short and rapid blasts of the whistle. To the best of his judgment, the Elder would have run into the stern of the Kern if the Kern had not gone ahead on her engine at the time she did. On cross-examination witness said he thought the Kern probably moved 30 to 40 feet in the water from dead in the water until the Elder struck her, and that there was very little change in her position unless she swung around a little on account of her helm

being apart. When he first saw the Elder, she was probably 800 or 1,000 feet away. It was a dark night, and all he had to go by was the appearance of the masthead light. Then witness was asked: "What did you do when you first saw her? A. Well, the first time I saw her, I waited until I see whether he was altering his course or not, and he didn't appear to alter his course one particle by his signal lights, and I jumped in the pilot house and gave him four short blasts of the whistle in answer to his one whistle. Q. Did he have to alter his course before you had given him your answering whistle? A. Well, not necessarily. Q. Now, as a matter of fact, the rule requires that you shall give him an answering whistle before he alters the course, doesn't it? A. That is up to me, whether I think I am in danger of being run down. It is up to me to sound the danger signal or up to me to judge whether there is any danger." Further on he says: "When he was heading right for me, I thought it was well to indicate the danger he was approaching. That is what made me give the danger signals." Being asked, "And the only thing he could have done when he got the four-whistle signal was to reverse his propeller, wasn't it?" witness answered, "Well, he could have went either way or backed up then. It is up to him to judge, according to my notion and according to the rules, too." He further states that, after he let go the empty barges in going down to the Hercules, he got right close to the loaded barges; the Hercules having just backed out in order to let him go in. Being recalled, he testified: "Q. Now, as I understood you yesterday, you said the reason why you blew the four blasts was because you could not see him moving over to your starboard at the time he asked for permission to go over there with the one whistle signal; that is correct, is it not? A. That is correct; yes, sir. Q. And he had abundant time to have gone over there when he was a thousand feet away without striking you, had he not? A. He had if he had a mind to do it; yes. Q. And your theory of the case is that, before he got any response from you, he should have put his helm over to port and started to make that maneuver? A. That is what I understand the law, to accompany the whistle by the alteration of your helm so as the other man can know what you are doing."

J. E. Copeland, the master of the Kern, was in the pilot house at the time of the collision. He had retired to his room and gone to bed, but was awake. The first intimation he had of the approach of the Elder was a whistle which he heard from her. He says the Kern immediately blew four whistles—"almost immediately, as soon as the pilot could blow the four whistles he blew them." He then heard the Elder blow one whistle again, "almost immediately" after the Kern had blown the four whistles, and "the Kern blew four whistles again." This was also "almost immediately" after the Elder had blown her second whistle. He was on the floor of his room when the Kern blew her last four whistles, went from there into the pilot house, looked out the starboard door, saw the Elder coming astern of the Kern headed right for her, and could see all three of the Elder's lights burning. She appeared as if she were coming down past the stern of the steamer, but heading almost amidships—"maybe a little aft of midships." He turned to the wheel and found it over to port, and lashed. About that time the Elder struck the Kern. The latter was then working full steam ahead. She had probably moved 30 or 40 feet—not to exceed 40 feet, when struck. Her stern swung to port. Witness was of the opinion that had the Kern's helm been put hard to starboard, and the ship worked full steam ahead, she would not have gotten out of the way of the Elder at the time he saw her, as "they were too close. She (the Kern) could not possibly have gotten out of her way." He was then asked: "How soon did you see them after the last four whistles were blown? A. Well, it could not have been more than a few seconds, because just as the four whistles were blown he gave a bell to go ahead, and that was at the time I was stepping in the pilot house, and I immediately went to the starboard side, looked aft and saw the Elder. Q. How far aft would you think the Elder was away at that time? A. I would not think she was over 40 feet." He further says that on hearing the signal from the Elder he would have done as the pilot did in sounding four whistles, and he would have put her helm apart and turned

her full speed ahead; that if the Kern had succeeded in getting out of the way, with the Elder headed as she was when he first saw her, the latter would have struck the barges. At the time of the collision the Kern was swinging, which would bring her over at an angle with the Elder whether the latter was swinging or not. Using the language of witness a little further on: "The Kern's movement would have thrown us to the side of the Elder's bow whether the Elder would have been swinging or not. If the Elder had come directly ahead, you understand, the movement of the Kern would have directed the Elder right into our starboard side." Witness was of the opinion that, if the Elder had been on a swinging course to port for 1,000 feet, she would not have hit the Kern, because she would probably have stopped before she got that far. If she was on such a course for 500 feet, and had been directly behind the Kern, she would not have struck, but she was a little to the starboard of the Kern.

Joseph O. Church, the master on the Hercules, says he passed the Elder "just a little below Cooper's Point—not much, * * * probably a thousand feet off shore." The Elder exchanged one whistle with the Hercules; the Elder giving the first whistle. After passing the Elder, witness heard the Elder give a passing signal with one whistle, and the Kern responded with four short whistles. The signals were "pretty close" together—"about the usual time." Right afterwards the Elder blew another whistle, and the Kern again responded with four. The Kern answered supposedly a quarter of a minute after the Elder signaled. Witness heard the crash when the collision took place, and at that time was just about to his barges, "just about going in between" them.

George Hale, the mate on the Hercules, heard the exchange of signals between the Elder and the Hercules and the Elder give a passing signal afterwards, and the Kern give the danger signal, four short whistles. A little further on he says: "I heard the Kern blow her danger whistle twice. The Elder only blew once to my knowledge." The Elder blew her whistle to the Kern just as the Hercules was abreast of her.

Hans Jensen, assistant engineer on the Kern and in charge at the time, heard the signal from the Elder and reply from the Kern repeated as described by other witnesses. After the exchange of signals, he received signals from the bridge of the Kern full speed ahead, and acted accordingly. This was not over five or ten seconds after the second series of whistles was given, and it was not over 15 seconds until the collision occurred. Later the witness says about half a minute. The engine, he says, had probably made between 50 and 60 turns when it occurred, and the vessel would get some way at 25 revolutions.

Charles W. Spaulding, the engineer on the Kern, was in his room at the time, but heard the signal from the Kern with four whistles, and heard that repeated, and after that a succession of whistles, then the crash. He was of the opinion that one or two minutes elapsed between the time of the first and second four whistles of the Kern.

Arne Arneson was a deck hand on the Kern on the forecastle head at the time. He heard the signals exchanged between the Elder and the Kern, first a signal, one whistle, from the Elder, answered by four short blasts from the Kern, "and about—not quite a half a minute afterwards the Elder blew one whistle again." Then the Kern blew four short blasts again. The headline was at the gipsy head, and witness was about to "heave in on it," and the boat was going to back up, to swing the barges around so it could "get into them." Witness saw the Elder at the time he heard the first signals exchanged, and says she was about a half-mile above, "right astern of us," and that he could see all her lights. He saw her while she approached, and she did not change her lights until after she blew her second whistle, when "she kind of swung off to the Washington shore." At the time he heard the bells signaling the engineer the Elder was from 50 to 75 feet away, and was headed about midship of the Kern. On cross-examination, witness said he thought the Elder was "just abreast Cooper's Point" when he heard her first whistle, and that about two minutes' time elapsed before she struck the Kern—"between two and three minutes."

Arthur Nissen testifies that he was fishing at the time opposite Eureka cannery, perhaps a mile out, and heard the exchange of whistles between the Elder and the Kern. He says the Elder blew one whistle, the Kern answered with four, and this was repeated, and that an interval elapsed between the various whistles of perhaps a half-minute. He heard the collision, and knew that the Kern sank, as her lights disappeared.

Edward Anderson was chief officer on the Kern, and on the fore-castle head at the time of the collision, directing in getting a line to the tow. He saw the Elder approaching, saw all her lights, which indicated that she was coming head on, noticed her at Cooper's Point when she blew her first whistle. She was shifting her course from Cooper's Point, which would be about a quarter of a mile from the Kern. The Kern answered with four whistles immediately. Next the Elder blew one whistle, and the Kern blew four. A very short interval elapsed between the Elder's second whistle and the Kern's four, and the collision occurred very shortly after the Kern blew her second four whistles. It "might have been a minute—a minute or so." Witness continued to observe the Elder's approach, and the same lights were visible all the time. After the Elder blew her second whistle, he sang out to the men on the barges to let go the line, in trying to get clear, as he saw there was to be a collision. A signal full speed ahead was given the Kern about this time, which was a couple of seconds before the collision, but the Kern "didn't pick up much." The Elder, when he saw her astern, was running for the Kern's quarter.

On the part of the respondent W. H. Patterson, the pilot on the Elder, was called, and testified that the maximum speed of the Elder is 11 or 12 knots; that she minds her helm "first-class," has a left-hand propeller, and backs to the starboard, thus throwing her bow to port, and, if running under full speed, she will swing to port. When he rounded Cooper's Point, he saw a vessel ahead which proved to be the Kern. He could not see any side lights, which indicated to him that the vessel was going downstream. His course after passing Cooper's Point was down the Washington shore, aiming to keep off all the way from 600 to 800 feet in the locality where the Kern was lying. On that night, when he saw the Kern, his course would have taken him in the vicinity of 400 feet from shore. When he received the signals from the Kern, he testifies he must have been 1,500 feet or more away—"about 1,500, between 1,200 and 1,500 feet." The other vessel was then on his port bow. Witness further relates that, when he first came down by Eureka channel and came around Cooper's Point, he saw a vessel ahead and pulled his vessel around so he had the former on his port bow about a half-point, which position he maintained until he got a signal from her, the same being in response to a signal from him. He then ordered the officer on the bridge to stop his vessel, and put her engines full speed astern, which was done immediately. This threw her stern to starboard and her bow to port. The signal from the Kern he interpreted to be "either a cross whistle or a danger whistle," and he supposed there must be some obstruction in the water ahead. He struck the Kern at about right angles. The response he got from the Kern was to a second signal he had given. He had given one before the signal that the Kern answered.

On cross-examination he says he met the Hercules with the light barges in tow probably a quarter of a mile above Cooper's Point; that, when he got the danger signals and put his ship full speed astern, he knew there was danger ahead of some kind; that he could see an obstruction ahead, and knew a collision was imminent. He ported his helm just after passing Cooper's Point, so as to put the Kern on his port bow, which course was designed to put the vessel down by the Kern about 400 feet off the Washington shore. Supposedly this course would take him 200 feet from the Kern. Witness further says he ordered his helm to starboard at the same time he put his vessel full speed astern for the purpose of throwing the ship off as much and as quickly as possible. He blew one whistle after rounding Cooper's Point, and just after he ported his helm. To this he received no reply, and then he blew another whistle "a few minutes, almost immediately after," when he found the Kern did not answer. Using the language of the wit-

ness: "I seen I had plenty of room on the inside and I told the officer on the bridge to blow another whistle, for I seen I had plenty of fairway to go about my business clear." By backing and starboarding the helm he expected both to stop the vessel before reaching the Kern, and to steer clear of her. Witness further says he slowed his ship down when he blew the first whistle.

He was then asked, and answered as follows: "Q. Captain, if your steamer is running full speed ahead—exactly what I asked before—if your steamer is running full speed ahead, can you stop her within three-quarters of a mile? A. Well, as I said a minute ago, it depends entirely upon circumstances—depends upon— Q. Under the conditions that prevailed there that night we will say? A. Well, I ain't able to say. I might have said that there, but I don't know as I could tell exactly. As I said to Edwards at that time, I couldn't tell. Q. Did you say you could or no, sir, you couldn't do it? When you told Capt. Edwards you couldn't. He said, 'How long does it take the Elder backing full steam astern to check her headway? A. Well, I should judge in the neighborhood of probably three minutes. You see, we was making—well, yes, in the neighborhood of three minutes.' When you made that answer you had in mind the conditions prevailing that night? A. I might have said that. Q. (continues reading, 'Couldn't her headway be stopped and her going astern within three-quarters of a mile? A. No, sir. Q. It couldn't? A. No, sir. Q. You couldn't reverse and back her full speed astern, and check her headway in three-quarters of a mile? A. No, sir.' Now, you didn't misunderstand Capt. Edwards' question, did you? A. I don't suppose I did. Q. Now, then, you knew then that when you backed your engine full speed astern within a distance of 1,000 to 1,500 feet of the Kern it was absolutely hopeless to stop before you reached the Kern? A. No; I didn't. I thought it would swing her far enough so she wouldn't catch us. Q. To port? A. Yes. Q. You knew you couldn't stop the ship within that distance? A. I wasn't sure; might have stopped her." Later he further testified: "Q. Now, then, Captain, when you came around Cooper's Point and gave the first signal of one blast to the Kern, you didn't know whether it was safe for you to go by or not, did you? A. I did at that time, yes. Q. You did? A. Yes; because I could see I had this vessel on my port bow and there was an opening there, could have gone through on my own business. Q. Did you know the conditions ahead? A. No. As far as I could see at that time and the conditions in the— Q. You don't know whether it was safe or not? A. I could go there. Mr. Denman: Do you contend it wasn't safe in there? Q. You didn't know it, did you, Captain? A. Yes, the indication looked favorable to me—it was all right—I could go down with safety. Q. So you continued on your course? A. I did, certainly. Q. Despite the fact you received no response from the Kern? A. I kept on my course because she was on my port bow, and I knew I could go by safely, so far as I could see. Q. Nothing there so you couldn't get through? A. Not at that time." Later he answered: "We are supposed to blow a half a mile off, and, as far as my judgment would allow me, I blew a whistle a half a mile off [the first whistle] after I got around the point."

Edward Whiteman, the third mate on the Elder, says in effect that, after the Elder rounded Cooper's Point and sighted the Kern and got straightened out, she was steering down for Waterford Light, inside of the Kern and barges, so that the Elder had her on her port bow, in which course the Elder continued until she was cross-signaled, being about 1,200 feet away when the cross-signal came. The Elder's engines were reversed, she was put full speed astern with her helm starboarded, the purpose being to make her stern swing to starboard and her bow to port, which would give her a curving course through the water. She struck the Kern on that course. Witness was of the opinion that, if the Elder had been right behind the Kern and 500 feet away, there would have been no difficulty in clearing her to starboard, and unquestionably none if the Kern had been 1,000 feet away. Witness says he kept ringing the telegraph full speed astern because he could see they could scarcely avoid a collision. Being so close to the Kern, it was necessary to have all the steam possible to stop her. He was under the im-

pression that the Kern blew two whistles twice, though "there is room for a doubt." He saw the reflection of the towing lights on the Kern at the time he blew the first whistle, and knew she was there heading down the river, but did not know it was the Kern. The Elder blew one approaching passing signal as she was rounding Cooper's Point on the starboard helm. Immediately on blowing the first whistle, witness "slowed the ship down dead slow," and kept on his course. Getting no response whatever to the first whistle, he blew a second whistle, and then came "the two short whistles twice," which indicated that the Kern either wanted the Elder to go over on the other side, or else there was an obstruction in the river that he could not see, "that there was danger somewhere." "We were so close to him that the only thing we could do was to stop and reverse full speed astern. * * * On either theory we could not do anything else." On cross-examination he said he repeated the signal, he supposed, within about a couple of minutes or so. Witness says: "When he didn't give us a response to our first whistle, I slowed the ship down, and then blew again the same signal, one whistle to indicate that I wanted to pass on his starboard with our port side, between him and the Washington shore." The time elapsing between the two signals was anywhere from a minute to a minute and a half. Witness continued as interrogated: "Q. Well, then, which whistle was it you didn't get response to? A. The first whistle. Q. Then did you continue running on towards her? A. After slowing the ship down, yes, sir; but we were clear of him. We had him on the port bow. Q. You did? How far? A. Oh, about half or three quarters of a point. Q. And how far would that bring you off the Washington shore? A. Off the Washington shore? Q. Yes. A. Well, it would have brought us away off, clear of the Washington shore. We were all right as far as the Washington shore was concerned. Q. Bring you about 400 feet, would it? A. Yes. Q. And, if you had her a point or three quarters of a point on your port bow, that would shut out your green light from her wouldn't it? A. Our green light? Q. Shut out your green light from the Kern, wouldn't it? A. It should; yes. Q. And, if it didn't shut your green light out, then you didn't have her a point or three-quarters on your port bow? A. No; we didn't." Witness could see the Kern's lights when he was a little above Cooper's Point.

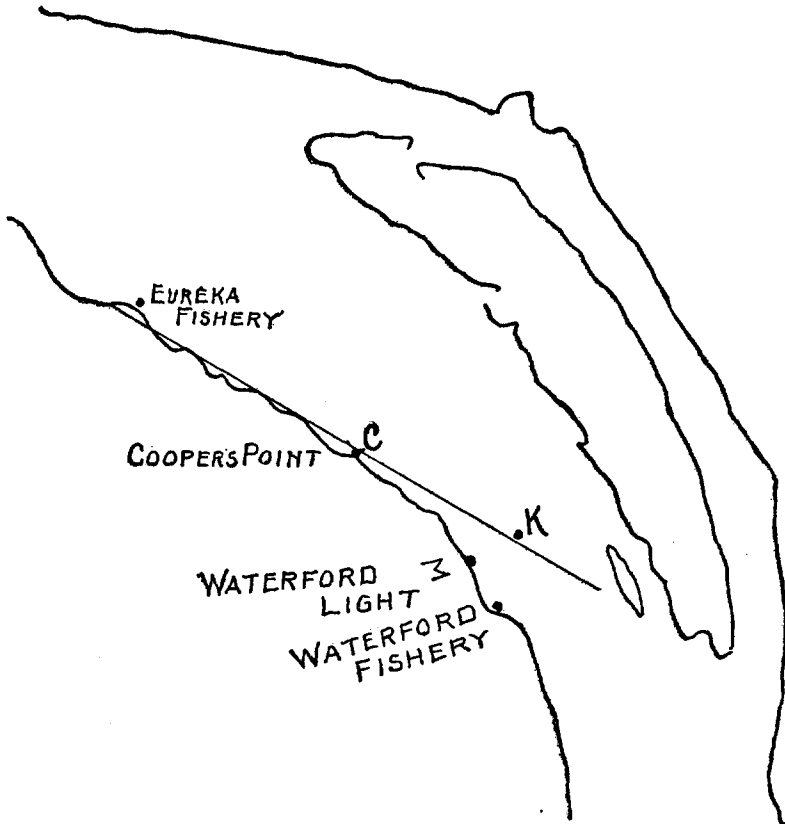
Harl Asktedt, the quartermaster, saw some lights after the Elder rounded Cooper's Point, and so far as he could remember the Elder had the Kern about a half-point on her port bow. He thought the Elder was about three-quarters of a mile from the Kern when she blew the first whistle, and about one-eighth of a mile when she blew the second. At that time he got command to put the wheel aport, and then hard to starboard, and to stop her full speed astern. The orders were executed. So far as he remembered, they got no response to the first whistle. Then the Elder blew another whistle, and the response was either two or four whistles. The Elder was put astern as soon as she got the response. She blew the second whistle immediately after the first. She struck the Kern almost immediately after he got his wheel hard over to starboard. The Elder did not swing much, so far as he remembered.

Louis Olson, a lookout on the Elder, testified the Elder blew one whistle when she was about three-quarters of a mile away from the Kern, then she blew another, and at the time the Kern was about a point on the Elder's port bow. The Elder was about 1,000 feet from the Kern when the second whistle was blown. The response was to the second whistle. The witness says: "The first they blowed one whistle. Then they blowed one more. They didn't answer the first whistle. Then they blowed one more, and then they answered with two."

Page, McCutcheon, Knight & Olney, of San Francisco, Cal., C. E. S. Wood, of Portland, Or., and Ira A. Campbell, of San Francisco, Cal., for libellant.

C. W. and G. C. Fulton, of Astoria, Or., and Denman & Arnold, of San Francisco, Cal., for respondent and claimant.

WOLVERTON, District Judge (after stating the facts as above). The question to be resolved is which of these two vessels was at fault in bringing on the collision, or whether both are blamable for their part in the affair. The following is a rough chart of the river and its shore lines at and near the place of collision:



"K" represents the place where the collision occurred. "C" is a designation for Cooper's Point, made by counsel in the examination of one of the witnesses. It is claimed by libellant's counsel that Cooper's Point is approximately five-eighths of a mile above the place of collision, which is probably near the correct distance. The line from "C" to "K" shows approximately the ship's course for vessels of the class and size of the Elder. As they round Cooper's Point and pick up Waterford Light, they bear away from the Washington shore on or near the line indicated until they pass the point where the collision occurred. I speak of rounding Cooper's Point. As a matter of fact, the change in course is only slight, as the vessels run near the Washington shore for some distance above. The Elder on the night of the accident, according to the testimony of her officers, had just rounded or passed Cooper's Point and had straightened up, not on her regular

course, but on a course a half-point to starboard of the Kern, the Kern's presence in the river below having been discovered at that time, and the pilot intending to bear off the Washington shore opposite the Kern some 400 feet, which would leave the Kern to the Elder's port from 300 to 600 feet, thinking, as he says, he could go in through there with safety. It was then that the officers say they blew one whistle as a signal to the Kern that the Elder intended to pass to her starboard, the ship running nearly at full speed. This would put the distance of the Elder above the Kern approximately half a mile when the Elder gave the signal. She slowed up, her officers say, but continued on her course a half-point to the starboard of the Kern, and, getting no response from the Kern, she subsequently blew another whistle, a single blast as before. At this time Patterson, the pilot on the Elder, puts his distance from the Kern at from 1,000 to 1,500 feet, and it was then, according to witnesses for the Elder, that they got the first response from the Kern. They were not certain whether the response was a cross or a danger signal. The vessel was at once ordered hard astarboard, and full speed astern. The Elder being constructed with a left-hand propeller, the effect of the execution of the order would be to throw her bow to port and her stern to starboard, thus giving her a curving course to port. The Elder was executing this maneuver when she struck the Kern.

On the other hand, the officers and deck hands of the Kern say they heard the first signal given the Kern by the Elder, and that the Kern answered at once with the danger signal, four short blasts. Very shortly the Elder gave another signal, which was also answered as before, with four short blasts. The Kern was heading approximately downstream. Such being her position, the Elder, if steering on her usual or the ship's course, would be approaching from an angle astern. This will be at once apparent from the above sketch. Moran, the pilot on the Kern, thinks the Elder approached directly for the stern of the Kern, as if she were going to split her up the center. The mate and the master concur in the view that the Elder was approaching, not directly from the stern, but heading for the Kern's starboard quarter or midships. All the witnesses on the Kern agree that the lights of the Elder—port, starboard, and masthead lights—were all plainly visible as she approached the Kern until after the Elder began swinging to port. It was almost at this instant that the collision took place, or so shortly after that it was difficult to estimate the time. In the course of her maneuver to get in between the barges constituting her tow, the Kern's helm had been thrown to port, and on observance of the near approach of the Elder she was ordered full speed ahead. The effect of the execution of this order would be to throw her stern to port and bow to starboard, thus increasing her angle with the usual ship's course. Moran says she had begun to execute this maneuver, and had proceeded ahead 30 or 40 feet when the Elder struck her. The Elder struck her starboard quarter at an angle of about 34 degrees. This is a physical fact shown by the course of the Elder's bow as it extended into the hull of the Kern.

Capt. Church, in charge of the *Hercules*, relates that while navigating his vessel up stream to pick up the empty barges he exchanged the passing signal with the *Elder*, and that the *Elder* signaled the *Kern* just as she was passing the *Hercules* below Cooper's Point, inside of 1,000 feet. First Officer Hale on the *Hercules* lends corroboration to this. Capt. Patterson's custom was to signal the vessel ahead when about half a mile distant. From these witnesses it would appear that the *Elder* sounded her first signal to the *Kern* when approximately half a mile distant, and this I am constrained to believe to be the fact. However, the *Elder* may have been nearer, and possibly somewhat farther away. No implicit reliance can be placed upon the estimate of the witnesses on board the *Kern* as to how far distant the *Elder* was when she blew her first whistle, as they were looking into the darkness, without physical objects by which to determine the fact with relative accuracy. At the distance of a half-mile away, if the *Elder* kept her speed, say from 10 to 12 miles per hour (she was probably running at a faster rate), she would reach the *Kern* in from 2½ to 3 minutes, the *Kern* being dead in the water. The *Elder*, however, I am led to believe, slowed down, which would increase the time relatively. It is further probable that her speed was not greatly checked until the pilot's order to put her full speed astern was executed, as there is no evidence that her engines were backing, so that she was running at a stiff rate up to that juncture.

All the witnesses on the *Kern* speaking as to the fact concur in the statement that the *Elder* was heading almost, if not directly, for the *Kern*, for they saw all the *Elder's* running lights, which is a demonstration in itself, and discredits absolutely the testimony of the officers on the *Elder* to the effect that she was running on a course having the *Kern* a half-point on her port bow. If she had been, the evidence would indicate that the *Elder's* green or starboard lights would have been shut out from the *Kern*, and as the *Elder* approached the angle would have been increased, more perfectly obscuring her green light. It is problematic as to just how near the *Elder* had approached the *Kern* when she blew her second whistle. The distance is variously estimated from 1,000 or 1,500 feet to very near at hand. Arneson says, "She was pretty close to us then." From either point of view, she kept her course until that time; that is, she was either running directly for the *Kern*, or with the *Kern* one half-point on her bow; in my view, directly for the *Kern*. A thing which appears to be practically certain is that the *Elder* at this point put her helm hard astarboard, and reversed her engines to full speed astern, which gave her a curving course to port, and yet she collided with the *Kern*. From the expert testimony it would seem that, if she had been 1,000 feet distant when she began to execute the maneuver, she would probably have cleared the *Kern* and her tow, or stopped before reaching her. If within 500 feet, the result would have been problematical. Possibly she even then would have cleared the *Kern*. This would make it appear that the *Elder* was not much, if anything, beyond 500 feet from the *Kern* when she began to execute her maneuver to port, and she might have been much less.

[1] As to whether the Kern gave response to the first passing signal of the Elder there is a sharp conflict in the testimony. The officers of the Kern, consisting of the pilot, first officer, mate, chief and assistant engineers, and a seaman, all concur in saying they heard the response given to both the first and the second signal of the Elder. Besides these witnesses, the captain of the Hercules and a fisherman testify that they heard all the signals—two from the Elder and two, consisting of four short blasts, from the Kern, and the mate on the Hercules heard both responses. All the witnesses on the part of the Elder testifying to the fact say they did not hear any response whatever to the first signal of the Elder. Applying the rule that the testimony of witnesses affirming that they heard or saw a thing is entitled to greater weight than the negative testimony of other witnesses who affirm that they did not hear or see it, the greater credence must be given to the testimony of libellant's witnesses. As applicable to collision cases, it has been held that:

"The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation." *The Alexander Folsom*, 52 Fed. 403, 411, 3 C. C. A. 165.

See, also, *The Alberta* (D. C.) 23 Fed. 807, 810; *The Sam Sloan* (D. C.) 65 Fed. 125, 127.

Further than this, I am impelled to the firm conviction that the Kern gave prompt response to the first signal of the Elder with four short blasts of her whistle; and, not only this, I am of the opinion that the officers of the Elder testifying, or at least one or more of them in authority, did hear such response from the Kern, and that the Elder is chargeable with positive knowledge that it was given. I base this latter deduction the more readily upon the testimony of the captain and mate of the Hercules and the fisherman, who were even less advantageously situated for hearing such signal than the officers of the Elder.

[2] Now, to apply the rules of navigation, which constitute a cardinal factor in determining the fault and to which of the two vessels it is attributable. As a preliminary statement to the rules adopted by Congress approved June 7, 1897 (Act June 7, 1897, c. 40, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]), relating to the prevention of collision upon certain harbors, rivers, and inland waters of the United States, it is premised that a vessel is under way when she is not at anchor or made fast to the shore or ground. According to this, the Kern was a vessel under way. An overtaking vessel "shall keep out of the way of the overtaken vessel." Article 24. "When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think

it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel." Rule 8 of article 18. "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Article 27.

[3] In view of these rules, it is clear that it was the bounden duty of the Elder to keep out of the way of the Kern. Having heard the response to the Elder's first passing signal, the duty was imposed upon the Elder not to attempt to pass the Kern until such time as it could be safely done, at which time the vessel ahead is required to signify her willingness by blowing the proper signal. This makes the vessel ahead the judge as to when the overtaking vessel can safely pass. The Elder slowed down, but kept her course—this in face of the fact that she was steering straight for the Kern, and approaching her at a rapid rate. Continuing in this way, the Elder again asked permission to pass. The Kern again refused; and then it proved too late to avoid the collision, for it occurred in spite of the energetic efforts of the Kern to prevent it.

The fact that the Elder struck the Kern at an angle of 34 degrees in no way conflicts with the theory that the Elder was steering straight for the Kern. It is altogether probable that the Kern was pressing ahead at the instant with her helm apart, which carried her stern somewhat to port, and the "curving" motion of the Elder would naturally bring her into collision at some angle. The Elder should have been eagerly mindful of her rapid approach to the Kern on the course she was steering, and should have avoided running so near to the latter as to put her in peril of a collision. Under the circumstances, she was at liberty to depart from the letter of the rules and steer to the starboard of the Kern, notwithstanding the refusal of the latter to let her pass—this to avoid "immediate danger." Article 27, Sup. See *The North Star*, 151 Fed. 168, 172, 80 C. C. A. 536.

The expert witnesses, including Moran and Anderson of the Kern, seemed to be of the view that if the Elder had steered to starboard at a distance of 1,000 feet, or even 500, she would have avoided the Kern. She would have avoided her absolutely, and without question, if she had been running on the course of a half-point to port of the Kern when the first signal was given, and continued on that course. Furthermore, if she had so continued until she gave her second signal, the probabilities are that she would by that time have so indicated her course to the Kern that the latter would have signified permission to pass as requested.

Supposedly at that time such would have been the case. Counsel for respondent suggest that the response given by the Kern indicated, not only that the Kern was in jeopardy, but that it was not safe for

the Elder to pass on any course to starboard of the Kern or between her and the Washington shore. The clear reply to this suggestion is that the Elder knew the river, and knew, also, that the Kern was engaged in navigating barges downstream, and it is not at all probable that she was so misled by the signals of the Kern. Such is my conviction. But, if it be that the Elder did not hear the response to her first signal, it was a grave fault to approach so near to the Kern on the course she was running as to jeopardize the situation. She should either have done what she did do in the extreme, or have departed from the rules and gone to starboard of the Kern. In either event, the collision would not have happened. This would be the case whether she knew the Kern was "dead in the water" or moving. The emergency was one which she ought to have been on her guard about. She knew that the Kern and Hercules were in the habit of exchanging tows in the river, and she met the Hercules almost at the very time that she sounded her first signal to the Kern, and ought to have known that the Kern was likely to be engaged in the very thing that she was trying to do at the time, namely, to pick up her tow. I do not deem that it was a contributing fault on the part of the Kern that she was picking up her tow in the fairway. The James T. Easton (D. C.) 27 Fed. 464. She certainly had a right to navigate with her tow in the fairway, and I have been cited to no authorities holding that she was remiss in using the fairway to make fast to her tow.

It is stoutly urged that the Kern was rendered in fault because Moran refused permission to the Elder to pass, under a mistaken interpretation of article 18, rule 8. Moran watched to ascertain whether the Elder changed her course after signaling for permission to pass before he acted, and, observing no change, he refused permission. He candidly concedes that his impression of the meaning of the rule was that it required the Elder to change her helm before the assent should be given. In this he was in error, for the rule requires the contrary; that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel—not before, but after, receiving such assent.

The question is a serious one, and not free from difficulty; but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision. I am satisfied that Moran did not refuse his consent to the Elder to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the Elder was heading directly for his boat, upon the mistaken idea that she ought to have changed her course at once after signaling for permission to pass the Kern. The Elder, nevertheless, should have heeded the signal from the Kern, and if she had, and had acted with the same energy that she did on getting the second signal from the Kern, there would have been no collision. The only damage that either boat would have sustained would be some delay to the Elder. Thus it is manifest that the proximate cause of the collision was the omission of the Elder to take prompt action upon getting the response from the Kern to avoid, if possible, any contact with the latter. I reach this conclusion the more readily from the circumstance that the Elder was the over-

taking vessel, charged not only with the duty of keeping out of the way of the Kern, but also with the burden of showing that the fault of the collision was with the Kern. The reasoning of Betts, District Judge, in *The Governor*, Fed. Cas. No. 5645, is apposite:

"If the Worcester and the Governor had been running in opposite directions, the collision might probably have been deemed to be so far the result of mere casualty and misadventure as to leave each vessel to bear for herself the consequences of the accident falling upon her. But the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the Governor. She was astern, and was seeking to run past the Worcester. She had a right to the advantage of her superior speed, and, under such circumstances, it would have been tortious and blamable conduct on the part of the Worcester designedly to intercept the Governor, to crowd her off, or to baffle her in that effort. But it devolves upon the Governor to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the Worcester. It was not the duty of the latter boat to veer from her course so as to open a passage for the Governor, or to lend her any facility in aid of her purpose to pass. We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior speed and endeavoring to get ahead from delay or difficulty in accomplishing that object. But the court is only empowered to adjudicate the legal rights of the one and the responsibility of the other."

See, also, the reasoning of the court in *The Fontana*, 119 Fed. 853, 856, 56 C. C. A. 365.

This leaves but one other contention to dispose of, which relates to the fact that the Kern had no designated lookout in service at the particular time. The absence, however, of such a lookout was void of any causative effect in bringing on the collision. The officers in charge of the Kern discovered in due time the approach of the Elder, and the action taken was in pursuance of such discovery, and of the movement and signals given by the Elder.

I hold, therefore, that the collision was due solely to the fault of the Elder, and that she must stand accountable for whatever damage was inflicted upon the Kern. The amount of the damages must be ascertained from testimony yet to be adduced.

OHIO RIVER & W. RY. CO. v. DITTEY et al., Tax Commission of Ohio.

MARIETTA, C. & C. R. CO. v. CREAMER, State Treasurer, et al.

(District Court, S. D. Ohio, E. D. February 15, 1913.)

Nos. 1,593, 1,600.

1. TAXATION (§ 117*!—'EXCISE' TAX ON PRIVILEGE—OHIO STATUTE.

The tax imposed by Ohio Act May 31, 1911 (102 Ohio Laws, pp. 224-260), on railroad companies and other persons and corporations engaged in operating public utilities, which is computed on the gross earnings

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of such companies from intrastate business, is an excise tax on the privilege of carrying on such business.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

For other definitions, see Words and Phrases, vol. 3, p. 2548.]

2. CONSTITUTIONAL LAW (§ 229*)—EQUAL PROTECTION OF LAWS—TAXATION—LIMITATION OF POWER.

While section 2 of the Ohio Bill of Rights, which guarantees the equal protection of the laws as broadly as does the federal Constitution, under the construction placed on it by the Supreme Court of the state, by implication limits the power of taxation of privileges and franchises to the reasonable value of the privilege or franchise as conferred originally, or to its continued value from year to year, the courts may not overthrow a law which imposes such a tax, as in violation of either the federal or state Constitution, merely because in isolated cases it may work a hardship, but such law, if uniform, must be judged by its general operation upon the class to which it applies.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.*]

3. COMMERCE (§ 72*)—TAXATION (§ 42*)—EXCISE TAX ON PUBLIC UTILITIES—OHIO STATUTE—CONSTITUTIONALITY.

The provisions of Ohio Act May 31, 1911 (102 Ohio Laws, pp. 224, 260), imposing an excise tax, based on gross earnings, on railroad companies and other persons and corporations engaged in operating public utilities, are not wanting in uniformity of operation because certain utilities of a given class pay one rate of tax and others of another class another rate, nor is the tax, being by express limitation levied on intrastate earnings only, unconstitutional as imposing a burden on interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 123-136; Dec. Dig. § 72;* Taxation, Cent. Dig. §§ 90-95; Dec. Dig. § 42.*]

4. CONSTITUTIONAL LAW (§ 229*)—TAXATION (§ 47*)—EXCISE TAX—EQUAL PROTECTION OF LAWS—DOUBLE TAXATION.

That a corporation pays an ad valorem tax on its property does not render an excise tax imposed on its privilege of doing business unconstitutional, as a denial of the equal protection of the laws by subjecting it to double taxation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229; Taxation, Cent. Dig. §§ 104-114; Dec. Dig. § 47.*]

In Equity. Suits by the Ohio River & Western Railway Company against Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio, and by the Marietta, Columbus & Cleveland Railroad Company against David S. Creamer, Treasurer of the State of Ohio, Edward M. Fullington, Auditor of the State of Ohio, Timothy S. Hogan, Attorney General of the State of Ohio, Robert M. Dittey, Frank E. Munn, and Christian Pabst, as the Tax Commission of Ohio, and the Tax Commission of Ohio. On complainants' application for preliminary injunction and demurrers to bills. Injunction denied.

Robt. J. King, of Zanesville, Ohio, for Ohio River & Western Railway Co.

F. A. Durban and Robt. J. King, both of Zanesville, Ohio, for the Marietta, Columbus & Cleveland R. R. Co.

Timothy S. Hogan, Atty. Gen., of Columbus, Ohio (Clarence D. Laylin, of Columbus, Ohio, of counsel), for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before WARRINGTON, Circuit Judge, and SATER and DAY, District Judges.

PER CURIAM. Jurisdiction of these cases is vested in this court through the presence of certain federal questions, no matter how it shall be found necessary to decide them, or whether to decide them at all. *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *Mich. Cent. R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —, decided January 20, 1913; *L. & N. R. Co. v. Siler (C. C.)* 186 Fed. 176. The plaintiff in each of the cases is an Ohio corporation, whose line of road lies wholly within the state. In each case the plaintiff challenges the constitutionality of certain sections of the act of May 31, 1911 (102 Ohio Laws, pp. 224-260), creating a tax commission, and providing for a system of taxation, and imposing a sum which the act recites is in the nature of an excise tax upon the privilege of carrying on intrastate business. A restraining order having been granted in each case, the respective plaintiffs seek a temporary injunction. The defendants, who are certain state officers and members of the Tax Commission, demur to each of the bills. The cases are for hearing on the plaintiffs' applications for interlocutory injunctions and upon the demurrers of the defendants.

The law under consideration is a re-enactment of the act of March 10, 1910. Its history is contained in the brief filed in behalf of the state, but its development need not be traced. The act raises the rate of the so-called excise taxation on certain utilities, substitutes a tax commission for a board of appraisers and assessors, assembles the various tax laws of the state, and incorporates them into one measure. The term "public utility," as used in the act and as defined in section 39, means and embraces each corporation, company, firm, individual, and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever referred to in such section—a railroad company being one of the many kinds of companies therein mentioned—and includes also any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals, or associations. By the provisions of section 40 any person or persons, firm or firms, copartnership or voluntary association, joint-stock association, company or corporation, wherever organized or incorporated, when engaged in the business of operating a railroad, either wholly or partially within the state, on rights of way acquired and held exclusively by such company, or otherwise, is a railroad company.

Section 42 defines the term "gross earnings"—

"to mean and include the entire earnings for business done by any person or persons, firm or firms, copartnership or voluntary association, joint-stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto, or in connection therewith. The gross earnings for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire earnings for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

Section 83 requires a statement to be filed by each railroad company with the Tax Commission containing the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the 30th day of June next preceding, from whatever source derived, for business done within the state, excluding therefrom, however, all earnings derived wholly from interstate business or business done for the federal government, such statement also to show as a distinct item the total gross intrastate earnings for such period. By the terms of section 97 the Auditor of State in the month of November is required to charge for collection against each railroad company a sum in the nature of an excise tax for the privilege of carrying on its intrastate business. The amount so charged is 4 per cent., and is computed on the gross earnings, as fixed and reported to him by the Commission, of the company's intrastate business for the year covered by its annual report to such Commission, but the tax shall not be less than \$10 in any case. The various public utilities named in the act are classified. The percentage charged for collection as an excise tax for the privilege of carrying on intrastate business is the same as to all utilities falling within any given class, but varies as among different classes.

[1] While the mere declaration of the General Assembly that the tax is an excise tax does not make it so, if it is apparent that it cannot be consistently so designated, nevertheless the declaration of the law-making body is entitled to much weight. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. In view of the decisions, state and federal, it is plain that the tax in question is an excise tax on the doing of corporate intrastate business; the gross intrastate business being the yardstick or measure of taxable value. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721; *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521; *Express Co. v. State*, 55 Ohio St. 69, 44 N. E. 506; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672; *Thomas v. U. S.*, 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481; *Cooley, Const. Lim.* (6th Ed.) 608; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164.

[2] Each plaintiff contends that, because it is unable to earn upon its investment a reasonable profit attributable to intrastate business, it possesses no privilege worth 4 per cent. of its gross intrastate earnings, and that such a tax is as to it both confiscatory and discriminatory. The Ohio River & Western Railway Company alleges that a tax of 4 per cent. of its gross intrastate earnings is excessive, because, though carefully managed, it does not produce, without the imposition of such tax, a profit equal to the return upon high grade investments at all times available in the money market. The Marietta, Columbus & Cleveland Railway Company charges that it is operated at an actual loss. Are the plaintiffs or either of them for the reasons stated exempt from the excise tax in question? It was held in *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 584, 30 L. R. A. 218, and is conceded by the plaintiffs, that the first section of the fourteenth amendment to the Constitution of the United States, which provides that no state shall "deny to any

person within its jurisdiction the equal protection of its laws," is no broader than the second section of the Ohio Bill of Rights, and that, therefore, a statute relating to an excise tax authorized by the bill of rights would not conflict with such section of the Constitution of the United States; but the plaintiffs, to maintain their contention, point to the following language in *Southern Gum Co. v. Laylin*, 66 Ohio St. at pages 578, 594, 64 N. E. at pages 564, 565:

"But upon the power to tax privileges and franchises there is no express limitation in the Constitution, but certain limitations upon that power must be implied from other provisions of the Constitution, so as to make the whole instrument harmonious and consistent throughout. The Constitution was established to 'promote our common welfare.' Preamble to the Constitution. Government is instituted for the equal protection and benefit of the people. Section 2 of the Bill of Rights. Private property shall ever be held inviolate, but subservient to the public welfare. Section 19 of the Bill of Rights. These provisions of the Constitution are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year. *Ashley v. Ryan*, 49 Ohio St. 504 [31 N. E. 721], *State v. Ferris*, 53 Ohio St. 314 [41 N. E. 579, 30 L. R. A. 218], and *Hagerty v. State*, 55 Ohio St. 613 [45 N. E. 1046], are examples of taxing the privilege or franchise conferred; while *Telegraph Co. v. Mayer*, 28 Ohio St. 521, and *Express Co. v. State*, 55 Ohio St. 69 [44 N. E. 506], are examples of taxing the continued value of the existing privilege or franchise from year to year. These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rest largely in the General Assembly, but finally in the courts."

An examination of that case as reported, as well as of the original file papers, discloses that no contention was made and no issue tendered that the statute then under consideration imposed a tax beyond the reasonable value of the privilege or franchise originally conferred or its continued value from year to year, nor do any of the cases cited in the above quoted excerpt touch that question. The limitation thus said to be imposed by the state Constitution on the legislative power to tax cannot, however, be safely treated as a dictum, for the reason that it is carried forward into the syllabus, which in Ohio states the law of the case. The court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts as final arbiters may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally. This is made clear by the same court in *State v. Guilbert*, 70 Ohio St. 253, 71 N. E. 638, 1 Ann. Cas. 25, where it is said:

"We are of the opinion that an excise tax which operates uniformly throughout the state and applies equally to all the subjects embraced within its terms cannot be said to deprive any one of the equal protection of the law, or in any manner to violate the Bill of Rights, or any section of the Constitution."

The earlier case of *Western Union Telegraph Co. v. Mayer*, 28 Ohio St. 521, is also instructive. A law of uniform operation, which imposed an excise tax at a rate equal to that on property on the gross receipts of foreign express and telegraph companies doing business in Ohio, and prohibited, under heavy penalties, any person from acting as agent of or transacting any business for any company that defaulted in the payment of such tax, was alleged to be violative of both the state and the federal Constitution. The tax was a charge on the privilege of such corporations exercising their franchises and powers within the state until the tax, interest, and penalties thereon were fully paid. It was computed on the gross receipts arising manifestly not only from distinctively intrastate business, but from business which began elsewhere and terminated within the state, or had its inception in the state and terminated beyond its limits. Thus reckoned, the amount was 3.34 per cent. of such receipts, but, if restricted as it should have been to the purely intrastate business, it equaled 31.2 per cent. of the total receipts from that source, or 93.6 per cent. of such receipts not absorbed by current expenses. It was charged that the tax was oppressive and unjust in its operation, but the tax was upheld; it being stated in the opinion regarding its provisions that:

"They are the conditions upon which the corporations named in the act are allowed to do business within the state. Whether this tax is warranted by a wise public policy, and whether it is too onerous, are questions for the Legislature and not for the courts. The burden is the price paid for transacting their business within the state. * * * Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor to a tax on the property of the corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think, within the legislative power of the General Assembly. The unbroken current of judicial authority is in support of such power in the state, and in our opinion public policy demands its exercise."

The court, it is true, was speaking of a law affecting foreign corporations only which could exercise none of their powers or franchises within the state, save through comity, or under legislative consent, and which the court found might have been excluded from the state altogether, with which theory we have nothing to do. But it is also true that it recognized the power to raise the necessary funds to defray the legitimate expenses of government by modes other than an ad valorem system of taxation on all property in the state and also the legislative power to create domestic corporations and prescribe the terms upon which they, as well as foreign corporations, might exercise their franchise. The right to extend the tax to domestic corporations undoubtedly existed, as was later held in the *Southern Gum Co. Case*, but the Legislature did not see fit to embrace such corporations within the law. It would therefore seem to follow that the language quoted is applicable to all corporations of a given class and that a law which is of uniform operation as to that class is not repugnant to any constitutional provision, state or federal, although it may bear heavily upon some given individual or individuals falling within its terms.

Some assistance is derived from *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672, which arose under a law the authority for whose enactment is based (1) upon the constitutional provision (Schedule, §

18, Constitution of Ohio) that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may by law provide against evils resulting therefrom," and (2) the general power of taxation granted in the same organic instrument. The law imposed a tax on the business of trafficking in intoxicating liquors and involved the exercise of both the police power (44 Ohio St. 563, 9 N. E. 672, and *McGuire v. State*, 42 Ohio St. 532) and the power to tax (44 Ohio St. 562, 568, 9 N. E. 672; *Anderson v. Brewster*, 44 Ohio St. 583, 9 N. E. 683). It served a double purpose—the restraint of the evils resulting from the liquor traffic, and the creation of a revenue to indemnify the general taxpayer for the increased burden imposed on him by the business. The tax was said to be in the form and nature of a tax upon the business (44 Ohio St. 563, 9 N. E. 672), and in the *Southern Gum Co. Case* it is affirmatively characterized as an excise tax applied to the liquor traffic on account of the additional burdens imposed on the state. In this respect it is assimilated to the tax here under consideration, whose object is to compensate the state and indemnify the taxpayer for the increased burden resulting from the special inconvenience and expense sustained and the supervisory power exercised by the government over corporate utilities and for the benefit of those who own and operate such. *Ashley v. Ryan*, 49 Ohio St. 504, 525, 31 N. E. 721; *Cincinnati Gaslight & Coke Co. v. State*, 18 Ohio St. 238, 243; *Baker v. Cincinnati*, 11 Ohio St. 534, 543; *Southern Gum Co. v. Laylin*, 66 Ohio St. 595, 64 N. E. 564; *Western Union Telegraph Co. v. Mayer*. The contention was made in the *Adler Case* that the enforced payment of the tax on the business of trafficking in intoxicating liquors would impose on many of small means such financial hardship as to drive them out of business. The court recognized that such would be the consequence, but it did not deem the law invalid on that account (44 Ohio St. 560, 561, 567, 9 N. E. 672), as such result would arise from extraneous circumstances, and not from the law.

Equality in regard to taxation of property is the great idea of the Ohio Constitution. *Baker v. Cincinnati*, 11 Ohio St. 541. The Legislature, conforming as nearly as may be to the purposes of the framers of the Constitution has intended to reach, for taxation, the property of every citizen, whatever its form may be, which is not by the organic law specifically exempt, to the end that all shall bear their just share of the public burdens. *Lewis v. State*, 69 Ohio St. 479, 69 N. E. 980; *Southern Gum Co. v. Laylin*, 66 Ohio St. 593, 64 N. E. 564. See, also, the earlier case, *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 11, 12. There can be no exemption of property from taxation, unless the right of exemption is clearly expressed. *Lander v. Burke*, 65 Ohio St. 532, 542, 63 N. E. 69. The estate of an insolvent decedent must contribute, and to the same relative extent as a prosperous enterprise or the estate of a wealthy decedent. Section 2734, R. S.; *McNeill v. Hagerty*, 51 Ohio St. 255, 265, 37 N. E. 526, 23 L. R. A. 628. The creditors of an insolvent's estate really pay the tax, just as the bondholders and other creditors of the money losing plaintiff, under the rule of equality, in fact must do, if it be required to pay the excise tax charged against it. But absolute equality and uniformity are not attainable under the Ohio

or any other system of taxation. An approximation thereto is all that is practicable. *Shotwell v. Moore*, 45 Ohio St. 646, 16 N. E. 470; *Ashley v. Ryan*, 49 Ohio St. 525, 526, 31 N. E. 721. Judge Cooley, in his work on *Taxation* (3d Ed.) 390, 391, with great force and accuracy, in speaking on this subject, says:

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical. * * * The Legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardship resulting from general rules, than is the individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case."

The rule of nonexemption on account of the impracticability of absolute equality of taxation thus recognized by the state court, and so clearly stated by Judge Cooley, was applied and enforced as to an excise tax in *Marmet v. State*, 45 Ohio St. 69, 12 N. E. 463, where Judge Spear, speaking for the court, held that absolute equality of burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws, and that the wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism. An excise tax is not a tax on property (*State v. Ferris*, 53 Ohio St. 326, 41 N. E. 579, 30 L. R. A. 218; *Cincinnati Gaslight & Coke Co. v. State*, 18 Ohio St. 243; *State v. Hipp*, 38 Ohio St. 225; *Ashley v. Ryan*, 49 Ohio St. 504, 525, 31 N. E. 721), but it must, to be valid, operate with equality and uniformity unaffected by any questions as to the solvency or insolvency of the person that is required to pay. That the rule announced in the *Marmet Case* persists appears from *Ashley v. Ryan*, 49 Ohio St. 525, 526, 31 N. E. 721, and *State v. Ferris*. In the *Ferris Case*, 53 Ohio St., at pages 337, 338, 41 N. E., at page 583, 30 L. R. A. 218, an inheritance tax law providing for an excise tax on the right to receive property was overthrown, because it violated the rule of equality, and did not afford to all upon whom its provisions operated equal protection and benefit. It was said:

"Our constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of \$200 to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the Legislature has the power to exempt personal property from taxation. The constitution must be regarded as consistent with itself throughout, and as section 2, of article 12, permits an exemption from taxation of personal property not exceeding \$200 a construction of section 2 of the Bill of Rights

is thereby evinced to the effect that in taxation of subjects other than property, an exemption up to \$200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent. must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all."

The above announcement is in harmony with the utterances of the federal courts. In *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, a law was under consideration which imposed a tax on the franchise, capital stock, business, and profits of the complaining corporations. One of the corporations was insolvent and in the hands of a receiver, its earnings not being sufficient to pay any of the interest on its bonded debt or anything beyond its necessary expenses for operation and repairs. Another of the companies met all of its expenses and interest on a large debt, and declared large dividends. Each owned a large amount of tangible property, and each possessed a franchise which was held, as in *Ashley v. Ryan*, 49 Ohio St. 525, 31 N. E. 721, to be valuable. They were both said to be alike subject to the law, for the reason that insolvent corporations could no more escape taxation than insolvent individuals, many of whom pay taxes on realty which is mortgaged in excess of the value of all their property, both real and personal, the court adding that no state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts. In speaking of the insolvent company, Mr. Justice Miller said (92 U. S. 606 [23 L. Ed. 663]):

"Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable—there remains what is valued as worth over \$2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose. It is this franchise which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarassed of its overweight of debt,

who shall say that it is not worth \$2,000,000? And who shall say that such is not the real value now of this franchise?"

See, also, *Flint v. Stone Tracy Co.*, 220 U. S. 165, 167, 168, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. We think it can be confidently asserted that the Supreme Court of Ohio meant by the language employed in the *Southern Gum Company Case* that only those excise tax laws, the result of whose operation is generally confiscatory and oppressive, are unconstitutional, and that it did not intend to say that a law, general and uniform in its operation, is invalid, because in exceptional cases it may impose a hardship.

The General Assembly was empowered not only to impose a tax on the gross receipts of the respective plaintiffs, as stated, but also to direct the application of the tax when collected to purposes of general revenue or any other purpose authorized by law (*Ashley v. Ryan*, 49 Ohio St. 525, 31 N. E. 721; *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; *State v. Guilbert*, 70 Ohio St. 254, 71 N. E. 636, 1 Ann. Cas. 25). Both of the plaintiffs require governmental protection and the exercise of its supervisory power, and each should in justice bear its fair share of the government's burden. Were either of them to escape taxation on account of its exceptional condition, all other unprofitable corporate enterprises would likewise be relieved, and thus a practical system of taxation would be rendered impossible, and the state be deprived of the power to meet its legitimate expenses.

The claim is made that the law in question is discriminatory in that it (1) does not include all public utilities engaged in business in Ohio, and (2) does not operate uniformly among the utilities named—the tax, for instance, imposed on the gross intrastate earnings of street suburban and interurban railroad companies being but 1.2 per cent. and on express and telegraph companies but 2 per cent. The claim is not supported by the decisions, state or federal. The inheritance tax law under consideration in *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. 1046, providing for exemptions in the amount of \$200, was assailed as discriminatory as among collateral kindred, the tax being imposed upon the value of the property received by some, and not upon that received by others. The law was sustained because the power exercised by the General Assembly in the enactment of the law was legislative and vested by the legislative grant as expressed in the first section of the second article of the Constitution, and, as the right to receive property by inheritance is not guaranteed by the Constitution, that instrument prescribes no limitation upon the power of the General Assembly to designate the persons who may thus receive. The discrimination was based upon and held justified by the fact that there are degrees in collateral kinship. In commenting on that case in *State v. Guilbert*, the state court approved the language employed in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, regarding a similar law, that the states may tax the privilege of taking property by devise or descent, may discriminate between relatives, and between them and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective

state Constitutions regarding uniformity and equality in taxation. In the Guilbert Case, which also involved an inheritance tax law, the conclusion was reached (and we understand it to be the statement of a rule applicable to excise taxes) that:

"When it is determined, as was determined in the Ferris Case * * * that the tax is an excise tax, and as in the Hagerty Case * * * that the authority to impose the tax is conferred by the general grant of legislative power, then the selection of the subjects on which the tax will be imposed must be within the legislative competency."

Many illustrations may be found in the statutes and reported cases of the rule thus announced. In *Marmet v. State* an ordinance was upheld imposing a license fee on the owners of all vehicles used upon the streets of Cincinnati excepting farmers marketing the products of their own farms. In the *Adler Case* the tax on the business of trafficking in liquors was sustained, although it did not bring within its provisions the manufacture of intoxicating liquors or the sale of them by the manufacturer in quantities of one gallon or more at any one time. The line was drawn between the distillery and the brewery on the one hand and the saloon on the other. In *Western Union Telegraph Co. v. Mayer*, a corporation franchise tax imposed on foreign express and telegraph companies and on no other public utility companies was sustained. Section 2780—17, Rev. St., imposed an excise tax for state purposes only of 1 per cent. per annum upon the gross receipts of steam railroad, street, and interurban railroad, express, telegraph, and telephone companies when engaged in business either wholly or partially within the state, but it did not apply to water transportation companies, unless the whole of their business was done within the state. Under the *Nichols Law* (section 2778a, R. S.), the property of express, telegraph, and telephone companies was subjected to taxation, the value of such property being determined not merely by the consideration of the visible property, as in the case of all other corporations whose property is taxed, but by the value of the entire capital stock and by such other evidence and rules as would enable the boards fixing such valuation to arrive at the true value in money of the entire property of the companies in the state. A tax levied on such valuation was upheld in *State v. Jones*, 51 Ohio St. 492, 37 N. E. 945, and *Adams Express Co. v. Ohio*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965. Notwithstanding the establishment of the validity of that method of taxation, it was not extended to any other corporations in the state. The General Assembly has seen fit to determine, in the enactment of the law now before us, what occupations or lines of industry are public service enterprises and invested with those attributes which pertain to public interest or public service, and has omitted, for instance, grain elevator companies, warehousing, stockyards, ferries, bridge companies, and innkeepers; but it had a right so to do, and the selection made by it will not be disturbed by the courts unless the determination of the legislative body was clearly arbitrary. The law imposes no burden upon one class of utilities from which others similarly situated are exempt, and, as it does not affect any right of the plaintiffs differently from that of others in the class to which they belong, it is not

obnoxious to the Constitution. *Snell v. St. Ry. Co.*, 60 Ohio St. 269, 54 N. E. 270; *State v. Guilbert*, 70 Ohio St. 229, 245, 71 N. E. 636, 1 Ann. Cas. 25, 37 Cyc. 746. The same rule is recognized by the federal courts. In *Kane v. Erie R. Co.*, 133 Fed. 681, 685, 67 C. C. A. 653, 657, 68 L. R. A. 788 (C. C. A. 6), in which a provision of an Ohio statute relating to railways was involved, it was said:

"The doctrine is well settled that the General Assembly, in the absence of an applicable prohibition, has power to classify subjects of legislation, conferring rights or imposing burdens on the created classes, according to the views of what is just and expedient and will promote the general welfare, subject only to the limitation that there must be some reasonable ground for the classification made."

The rule so announced has been recognized in *Magoun v. Illinois Trust & Savings Bank*, supra, and in *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, in each of which a statute was under consideration which involved an excise tax. Other cases in point are *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228, 17 Sup. Ct. 305, 41 L. Ed. 683. The law is well expressed in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 237, 10 Sup. Ct. 535, 33 L. Ed. 892, where it is said:

"The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature, or the people of the state in framing their Constitution."

[3] In view of what has heretofore been said and the authorities cited, it is clear that there is no merit in the contention that, because certain utilities of a given class pay one rate of tax and others of another class a different rate, the law is wanting in uniformity of operation.

Another insistence is that the act, as applied to railroads, lays a burden on interstate commerce. The tax by express provision is levied on gross intrastate earnings only. Those derived wholly from interstate business and business done for the federal government are specifically excluded in computing the amount to be paid. The rule announced in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 424, 425, 8 Sup. Ct. 1127, 32 L. Ed. 229, is that where the subjects of taxation can be separated, so that that which arises from interstate commerce

can be distinguished from that which arises from commerce wholly within the state, the state will be permitted to collect that arising upon the latter. As the gross intrastate earnings can be readily separated from all others, the law is not open to the objection urged. *Ratterman v. Express Co.*, 49 Ohio St. 618, 32 N. E. 754; *Express Co. v. State*, 55 Ohio St. 69, 81, 44 N. E. 506; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 31, 32, 30 Sup. Ct. 190, 54 L. Ed. 355; *Kehrer v. Stewart*, 197 U. S. 60, 67, 25 Sup. Ct. 403, 49 L. Ed. 663.

[4] The further charge is made that, inasmuch as plaintiffs each pay a property tax, the tax provided by the act in question is not permissible, in that it denies them the equal protection of the law by subjecting them to double taxation. This cannot be true, because the exaction of 4 per cent. of the gross intrastate earnings is not a property tax, but is an excise tax, the amount of which is fixed and measured by the amount of such earnings. Double taxation in a legal sense does not exist, unless the double tax is levied upon the same object within the same jurisdiction. *Bradley v. Bauder*, 36 Ohio St. 28, 35, 38 Am. Rep. 547. The plaintiffs pay but one tax on property, and another as an excise tax. The taxation, therefore, is not double. *Southern Gum Co. v. Laylin*, 66 Ohio St. 596, 64 N. E. 564.

The act is also said to be unconstitutional, in that it seeks to prevent judicial inquiry into its constitutionality and enforce obedience to its terms and the administrative acts thereunder, irrespective of their validity. To sustain this claim, allusion is made to the provision for the recovery of a 15 per cent. penalty on unpaid taxes (section 103), to the power to cancel the articles of incorporation of a delinquent corporation (section 120), to the penalty imposed on any one who shall exercise or attempt to exercise any powers, privileges, or franchises under the articles of incorporation after the same are canceled (section 120), to the power to enjoin the transaction of any business by any delinquent public utility (section 123), to each day's willful failure to observe and comply with any order or direction of the Tax Commission or to perform any duty enjoined by law which the Tax Commission is authorized to administer, as constituting a separate and distinct offense (section 158), and to the provision that the holding of any section or part thereof void and ineffective shall not affect any other section or part thereof (section 160). We are not concerned with the validity or operation of any of such sections, for the reason that the pleadings tender no issue regarding them. Moreover, the penalties are clearly a separate part of the act, and, whether collectible or not, may be determined in a case involving an attempt to enforce them. *Flint v. Stone Tracy Co.*, 220 U. S. 177, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *Willcox v. Consolidated Gas Co.*, 212 U. S. 53, 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034.

We have noticed such objections made to the constitutionality of the law, as it is deemed necessary to consider. We do not find the statute to be obnoxious to either the state or the federal Constitution.

It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be

desired by the plaintiffs, pursuant to the special provision found in section 266, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered.

That the right of appeal directly to the Supreme Court from our decision may not be embarrassed, we refrain at the present time from passing upon the demurrers.

In re TRUITT.

(District Court, D. Maryland. March 14, 1913.)

1. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—OBTAINING SECURITY—“TRANSFER.”

Bankruptcy Act July 1, 1898, c. 541, § 3 (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that, where a person while insolvent transfers any portion of his property to one or more of his creditors with intent to prefer such creditors over others, he commits an act of bankruptcy, and section 1 defines “transfer” as including the sale and every other and different mode of disposing of, or parting with, property or possession thereof as a payment, pledge, mortgage, gift, or security. *Held* that, where a creditor obtains a judgment which becomes a lien on his debtor's property, he thereby obtains security, so that if the debtor aids a creditor to obtain a judgment which has the effect of transferring property to the creditor by way of security, with intent to prefer the creditor while the debtor is insolvent, the second act of bankruptcy has been committed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 83; Dec. Dig. § 58.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7064–7070.]

2. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—CONFESSION OF JUDGMENT.

For a debtor while insolvent to confess a judgment with intent to prefer a creditor is to aid the creditor to obtain a preference and constitutes an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 83; Dec. Dig. § 58.*]

3. BANKRUPTCY (§§ 58, 59*)—ACTS OF BANKRUPTCY—PROOF.

Bankruptcy Act July 1, 1898, c. 541, § 3 (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that an insolvent shall have committed an act of bankruptcy if he has transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditor, or (3) suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same. *Held* that, where a creditor relies on the commission of the second act in order to establish bankruptcy, he must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor, and this though the act constitutes a part of a chain of events which culminated in the commission of the third act also, but neither can be committed unless the debtor is insolvent, nor unless a preference has actually resulted from it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 81–83; Dec. Dig. §§ 58, 59.*]

4. BANKRUPTCY (§§ 58, 59*)—ACTS OF BANKRUPTCY—ACTS OF CREDITOR.

In determining whether the second act of bankruptcy has been committed (Bankruptcy Act July 1, 1898, c. 541, § 3 (2), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), it is not important to inquire what the creditor did or intended, it being the debtor's act and purpose that is material; but the third act may be proved without showing that the debtor ever did or tried to do anything, or even that he had ever given the matter a thought.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72-79, 81-83; Dec. Dig. §§ 58, 59.*]

5. BANKRUPTCY (§ 81*)—ACTS OF BANKRUPTCY—PETITION.

A bankruptcy petition, alleging that the debtor was the owner of certain described real estate in W. county, and that within four months before the filing of the petition he had while insolvent, and with intent to prefer certain named creditors, transferred to them by way of security his interest in such real property by permitting confessed judgments in their favor and against him to be docketed in the circuit court of that county, sufficiently charged the commission of the second act of bankruptcy; Bankruptcy Act July 1, 1898, c. 541, § 3 (2), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), providing that, if a person while insolvent transfers any portion of his property to one or more of his creditors with intent to prefer such creditors over others, he shall have committed an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

6. BANKRUPTCY (§ 81*)—ACTS OF BANKRUPTCY—JUDGMENT LIEN—FAILURE TO RELEASE.

An allegation that a debtor, while insolvent, and on a particular date, which was two or three days less than four months before the filing of a petition in bankruptcy, permitted certain named creditors to obtain judgments against him, and thereafter did nothing to satisfy or discharge the judgments or the liens created by them, and that within less than five days before the filing of the petition the lien created by them would become absolute and unavoidable by the trustee in bankruptcy and the property become finally disposed of and sequestered by the judgment creditors, was insufficient to show commission of the third act of bankruptcy; Bankruptcy Act July 1, 1898, c. 541, § 3 (3), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), providing that it shall consist of the debtor having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and in having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

In Bankruptcy. In the matter of Elisha Wilmer Truitt, alleged bankrupt. On demurrer to involuntary petition. Sustained in part, and overruled in part.

Jay Williams, of Salisbury, Md., for petitioning creditors.

Ellegood, Freeny & Wailes and F. Leonard Wailes, all of Salisbury, Md., for alleged bankrupt.

ROSE, District Judge. Certain creditors of one Truitt are seeking to have him adjudicated a bankrupt. He has demurred to their petition. He says it does not charge that he has committed any act of bankruptcy. They contend that it avers facts which show the commission of both the second and the third acts. The petition alleges

that the debtor is the owner of certain described real estate in Wicomico county, Md.; that within four months before its filing he had, while insolvent and with intent to prefer certain named creditors, transferred to them by way of security his interest in such real property by permitting confessed judgments in their favor and against him to be docketed, entered, and recorded in the circuit court for that county.

[1] The second act of bankruptcy is committed whenever an insolvent transfers "any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." Section 1 of the act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) defines "transfer" as including "the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift or security."

A creditor who obtains a judgment which becomes a lien upon the debtor's property thereby obtains security. *Clark v. Iselin*, 21 Wall. 372, 373, 22 L. Ed. 568.

[2] A debtor, who aids his creditor to obtain a judgment which has such effect, transfers property to him by way of security within the meaning of the act. If such aid is given with intent to prefer the creditor and while the debtor is insolvent, the second act of bankruptcy has been committed. To confess a judgment with such intent is to aid the creditor to obtain a preference. Even under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), the Supreme Court said that:

"Undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction." *Wilson v. City Bank*, 17 Wall. 487, 21 L. Ed. 723.

The thirty-ninth section of the Bankruptcy Act of 1867 specified some nine acts of bankruptcy. The eighth of these declared that an act of bankruptcy is committed when one, "who, being bankrupt, or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or give any warrant to confess judgment or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors."

A debtor did not, within the meaning of the words quoted, procure or suffer a judgment unless he in some way actively aided in obtaining it. *Wilson v. City Bank*, *supra*.

The word "transfer" is given by the present law a much broader meaning than it had under its predecessor. It follows that the second act of bankruptcy under the act of 1898 is substantially the same as was the eighth under that of 1867.

There may be some cases which will fall under the former and not under the latter, or vice versa. Speaking generally, however, under the law of 1867 the eighth act of bankruptcy was committed whenever an insolvent debtor with intent to prefer one of his creditors did anything which gave that creditor a preference or which aided such creditor in obtaining a preference. Under the law of 1898, under like cir-

cumstances, the second act of bankruptcy is committed. In so holding, the second act is not confused with the third.

The words "procure or suffer his property to be taken on legal process," used by the act of 1867 in defining the eighth act of bankruptcy, have a suggestive resemblance to "suffer or permitted while insolvent any creditor to obtain a preference through legal proceedings," which in the act of 1898 formed part of the description of the third act. Nevertheless, the acts themselves are radically different.

Under the law of 1867 the act of bankruptcy was not committed unless the debtor actively and knowingly had a part in it. Under the act of 1898 it is not essential that he shall do anything at all. *Wilson Bros. v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147.

In its nature the third act of bankruptcy under the present law is more closely related to the sixth and seventh of its predecessor. Those acts were committed when a debtor had been arrested or held in custody or had been actually imprisoned in civil actions.

[3] As the law now is, a creditor who relies on the commission of the second act must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor. If such showing is made and the effect of what the debtor did was to give a preference, the commission of the second act of bankruptcy has been established. It may be that what is proved constituted a part of a chain of events which culminated in the commission of the third act also. They have features in common. Neither of them can be committed unless the debtor is insolvent nor unless a preference has actually resulted from it. In other respects they are radically different.

[4] In determining whether the second act has been committed, it is not important to inquire what the creditor did or intended. It is the debtor's act and purpose which is material. On the other hand, the third act may be proved without showing that the debtor ever did or tried to do anything, or even that he had ever given the matter a thought.

[5] It follows that the petitioning creditors have sufficiently charged the commission of the second act of bankruptcy. In so holding I assume that the reference made in paragraph "b" of article 4 of their petition to paragraph "c" sufficiently incorporates in the former the allegation that the judgments in question were confessed. In the interest of clearness, however, it will be desirable for the petitioning creditors to amend paragraph "b" by incorporating such allegation expressly in it instead of making it by reference only.

[6] A much more difficult question is raised by the demurrer to paragraphs "a," "c," and "d" of the fourth article of the petition. They charge in somewhat varying phraseology that the debtor owned real estate in Wicomico county, Md., and that while insolvent and on a date particularly specified, which was two or three days less than four months before the filing of the petition in bankruptcy, he permitted named creditors to obtain judgments against him in the circuit court for that county; that he has done nothing to satisfy or discharge such judgments or the liens created by them; and that within less than five days after the filing of the petition the lien created by them will become absolute and unavoidable by the trustee in bank-

ruptcy and the property will thereby become finally disposed of and sequestered by such judgment creditors. It is not necessary to set forth the wording of this portion of the petition any more precisely. It is carefully modeled on the language used in the creditors' petition in *Folger v. Putnam*, 194 Fed. 793, 114 C. C. A. 513.

Stated briefly, the contention of the petitioning creditors is that whenever a creditor of an insolvent debtor secures a preference by obtaining a lien through legal proceedings upon the property of his debtor, and the latter does not within five days before the expiration of four months thereafter pay, discharge, satisfy, or vacate such lien, an act of bankruptcy has been committed. This contention has been made before. It was held unsound in *Seaboard Steel Casting Co. v. Trigg* (D. C.) 124 Fed. 75; *In re Vastbinder* (D. C.) 126 Fed. 417; *In re Vetterman* (D. C.) 135 Fed. 443. It has been upheld in *Re Tupper* (D. C.) 163 Fed. 766, and in *Folger v. Putnam*, 194 Fed. 793, 114 C. C. A. 513. The last is a decision of the United States Circuit Court of Appeals for the Ninth Circuit. I understand that on March 1, 1913, the Supreme Court of the United States granted a writ of certiorari to bring up the record in it. The question at bar has thus been put in the way of final and authoritative decision. In regular course eighteen months or two years will doubtless elapse before the answer can be given. A decision in the case at bar cannot be so long postponed.

In *Folger v. Putnam*, the United States Circuit Court of Appeals analyzes the law and reviews the decided cases fully and ably. It is unnecessary here to go over any of the ground there traversed. If the law is not as it is there held to be, a creditor will often have the power to obtain preferential security upon the property of a passively friendly debtor and to hold such security no matter what the other creditors may do or try to do. All that will be necessary will be for the favored creditor to obtain a lien through legal proceedings and then so to arrange matters that such lien shall not be enforced by actual sale or other final disposition of the property until the expiration of four months and five days after it has been acquired. Where the debtor happens to have property upon which a judgment so soon as entered becomes a lien, all that the creditor will have to do in the first instance is to obtain a judgment. If, in order to secure a lien, an attachment or execution is necessary, that may issue. Even in that event a creditor will be able to hold his preferential rights if it is possible under the state law or practice to delay a sale for the period mentioned.

An act of bankruptcy has certainly been committed whenever a creditor causes his debtor's property, upon which he has secured a lien by judgment, execution, or attachment, to be sold within four months and four days after the date of such lien. In the nature of things it does not seem that he should be any better off if he postpones the sale two days longer. Such considerations argue strongly in favor of the conclusion reached by the United States Circuit Court of Appeals for the Ninth Circuit and by Judge Ray in *Re Tupper*, *supra*.

The question has another side. Congress defines the third act of

bankruptcy as consisting in the bankrupt having "suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

If the petitioning creditors are right, this language means the same thing as if Congress had used the words "suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before (a) the expiration of four months after the obtaining of such preference, or (b) a sale or final disposition of any property affected by such preference vacated or discharged such preference."

Should such construction be put upon the language actually employed? The words "final disposition," it is true, may have the import which the petitioning creditors would give to them. The connection in which those words are used does not naturally suggest that they should receive such an interpretation. It is highly desirable that the creditors generally should be able to prevent one of their number from securing a preference by a lien obtained through legal proceedings of a character which would be vacated if bankruptcy ensued within four months after the lien was first fastened upon the debtor's property. Such would be the result of upholding the petitioner's contention. The courts might well give such construction to the language used if there was no reason to suppose that Congress had deliberately refrained from saying what they contend it in effect did say. But is there not such reason? The language used by Congress in defining the third act of bankruptcy is very different from that employed to describe the others.

By the general scheme of the law, creditors have four months after the commission of the act of bankruptcy within which to file a petition for an involuntary adjudication. Such act must therefore consist in some definite and precise thing which happens at a particular time. The fraudulent conveyance under the first act, the preferential transfer under the second act, the general assignment under the fourth, and so on, are definite acts. They are committed on a particular day. From that day the four months' period begins to run. There are difficulties in applying any such rule to the securing by the creditor of a preference through judgment. It was unnecessary, as has already been held, to deal specially with those instances in which the debtor, with intent to prefer a creditor, actively participated in securing him by confessing the judgment to him. When that took place the second act was committed.

Some provision, however, had to be made for those cases in which the creditor, without the assistance of the debtor and against his passive or active resistance, obtained a preference through legal proceedings. Congress would doubtless have been unwilling to declare that an insolvent debtor had committed an act of bankruptcy whenever such a lien was obtained against him. That he was insolvent might be due entirely to the judgment which constituted a lien. If he was liable on it, his debts exceeded his assets. If he was not, he might be

able to pay all that he owed and have a surplus besides. He might be entitled to take the case to an appellate court. Until the judgment or decree below had been affirmed it might be unjust to hold him bankrupt. Sound policy requires that something more than the mere rendition of a judgment or the levy of an attachment must take place before it can be said that an act of bankruptcy has been committed. There are difficulties in the way of drawing a definition both just and workable of an act of bankruptcy which will prevent a creditor from obtaining a lien upon the debtor's property through legal proceedings. A creditor should not be able to get a preference out of an insolvent debtor's estate. A debtor should not be adjudicated a bankrupt because he does not pay what he says he does not owe and which he may still be in a position to show he does not owe.

If both these ends are to be obtained, it will be necessary to make the act of bankruptcy take place when and not before the debtor's last opportunity of reversing the judgment or quashing it has passed away. If the debtor appealed or took a writ of error against the decree or judgment, the time at which the act of bankruptcy should as against him be held to have been committed would be when that decree or judgment had been affirmed above or his appeal or writ of error had been dismissed. If he had a right to take such appeal or to sue out such a writ of error, it would not be fair to hold that he had committed an act of bankruptcy until the time limited by law for taking his appeal had passed, unless he had in some way before that time precluded himself from appealing. Even then a third class of cases might occur. Appellate proceedings might have been instituted in due time, but the judgment below for all that might not have been superseded. The interests of the creditors would there require that the act of bankruptcy should be held to be committed when the judgment creditor actually enforced his judgment against the debtor's property. A statute which would define this act of bankruptcy would, if exact justice was to be done to all parties, have to provide that an adjudication of bankruptcy based on such consummated act should have the effect of dissolving the lien of the original judgment or attachment, although it had been obtained very many months, or perhaps years, before the adjudication was made. It may be that it is possible to draw an act which would satisfactorily provide for all these difficulties without involving the subject in any others. It does not appear that it has ever been done. In the English act of 1890, 53 and 54 Victoria, c. 71, the corresponding act of bankruptcy consists in the debtor's goods having been sold by the sheriff or having been held by him for 21 days. In that act it was found necessary to provide for the contingency of a controversy as to the ownership of the goods, a contingency which was met by declaring that the time consumed in interpleader proceedings should be excluded from the 21 days.

There was reason why Congress should not have seen its way clear to provide that the failure of a debtor to pay or otherwise extinguish or remove a lien obtained through legal proceedings within four months from date of the obtaining of such lien should be an act of bankruptcy. If that be so, the strongest argument for giving to the

words "final disposition" the construction contended for by the petitioning creditors becomes inapplicable. To decide against those creditors is to lay down a rule of law under which the general purpose of the Bankrupt Act to prevent preferences may be easily defeated. In this particular case the bankrupt is really but little concerned. It was frankly admitted by counsel at the bar that it made no difference to him whether he was adjudicated or not. The contest is really between the petitioning and the judgment creditors. If the latter can defeat the adjudication on this petition, the lien of their judgments cannot otherwise be disturbed. They will be preferred over the other creditors of the debtor. It is quite probable that the instances in which any harm would practically result from the construction given to the act by the United States Circuit Court of Appeals for the Ninth Circuit would be rare. For all that Congress appears to have had such cases in mind and was not prepared to ignore them.

The courts may not change what Congress did on the theory that the general purpose of Congress will be more nearly carried out by construing the act to mean something which Congress was unwilling to say.

Under the act of 1867 the courts were asked to put a rather strained interpretation upon some of its language in order to carry out the supposed intent of Congress to secure equality of distribution in all cases of insolvency. The Supreme Court did not see its way clear to comply with this request. *Wilson v. City Bank*, *supra*. In that case the court declared that, before any one may be adjudicated an involuntary bankrupt, the precise circumstances or facts in which this is authorized to be done should not only be well defined in the law but clearly established in the court. This general rule of law Congress may well be supposed to have had in mind when it passed the present act. It had a right to assume that the courts would not by construction hold things to be acts of bankruptcy which it had not been willing clearly to declare to be such. It is true that in *Wilson v. City Bank* it was held that under the law of 1867 it was not an act of bankruptcy for a debtor passively to permit a creditor to obtain a judgment against him. It is equally true that the same high tribunal has held that, if a creditor causes his debtor's property to be levied upon in legal proceedings and advertised for sale, the debtor has under the present law committed an act of bankruptcy if he does not vacate or discharge the preference thus obtained at least five days before the date fixed for the sale. That decision, however, was placed expressly upon the ground that Congress had changed the language used in the earlier act. Nothing which was said in the case of *Wilson Bros. v. Nelson* in any way modifies the general rule of construction laid down in *Wilson v. City Bank* to the effect that, a proceeding in involuntary bankruptcy being against common right, all substantial doubts must be resolved in favor of the debtor.

It follows therefore that the demurrer must be sustained so far as concerns the allegations of acts of bankruptcy made by paragraphs "a," "c," and "d" of article 4 of the creditors' petition, and overruled so far as concerns the allegations of paragraph "b."

**FRENCH MUT. GENERAL SOCIETY OF MUTUAL INSURANCE AGAINST
THEFT v. UNITED STATES FIDELITY & GUAR-
ANTY CO. OF BALTIMORE CITY.**

(District Court, D. Maryland. March 25, 1913.)

1. JUDGMENT (§ 831*)—FOREIGN JUDGMENTS—VALIDITY—PROCESS—SERVICE—NECESSITY.

A judgment obtained in France without proper service on defendant in that country is a nullity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1519-1522; Dec. Dig. § 831.*]

2. INSURANCE (§ 684*)—REINSURANCE—LIABILITY ON POLICY.

A French brokers' society insured each of its members against three-fourths of any loss through embezzlement by an employé, not exceeding 1,333,333 francs. Reinsurance was effected in plaintiff company, which, in turn, obtained reinsurance in several companies, including defendant, for shares of the risk. From time to time during the carrying of the original risk there were substitutions of plaintiff's reinsurers; defendant, among others, withdrawing. A member of the brokers' society sustained loss through embezzlements by an employé; the dates when the various amounts were taken being ascertainable. *Held*, that defendant was not relieved from liability to plaintiff on the theory that the total amount embezzled while defendant was a coinsurer did not equal 333,333 francs, which had to be taken before liability attached under the policy issued by plaintiff; the uninsured portion of the loss being properly deducted once for all from the total loss when ascertained and as of the date of its ascertainment, and each successive reinsurer benefiting by such deduction in proportion to the total amount embezzled during the time he was on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1817; Dec. Dig. § 684.*]

3. INSURANCE (§ 679*)—REINSURANCE—CONSTRUCTION OF POLICIES.

The rule that rights under a plain contract are to be enforced, however unwise the agreement may appear to be, and that general terms and phrases will be construed in the light of the circumstances surrounding the parties, applies to reinsurance contracts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1811, 1812, 1818, 1819; Dec. Dig. § 679.*]

4. INSURANCE (§ 686*)—REINSURANCE—LIABILITY OF REINSURER.

An insurer may recover from a reinsurer before the former has actually paid the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1823; Dec. Dig. § 686.*]

At Law. Action by the French Mutual General Society of Mutual Insurance Against Theft against the United States Fidelity & Guaranty Company of Baltimore City. Verdict for plaintiff.

Hyland P. Stewart and Warren A. Stewart, both of Baltimore, Md., for plaintiff.

Bartlett, Poe, Claggett & Bland, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff is a French, the defendant a Maryland, corporation. There was, and doubtless still is, in Paris a body corporate styling itself Société d'Assurances Mutuelle des Agents

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

de Change de Paris. For brevity, it will be called the Brokers' Society. It had some 70 members. It insured each of them against three-fourths of the loss, not exceeding in any one case 1,333,333 francs, suffered by him from the theft or embezzlement of his employés. Three-fourths of the maximum sum insured against amounted to 1,000,000 francs. To pay so much would unduly tax the resources of the Brokers' Society. It protected itself by reinsurance against any liability, exceeding in a single case a quarter of a million francs. As it was bound for only three-fourths of what was wrongfully taken, it could not be called upon to pay as much as that amount, unless the sum abstracted reached at least 333,333 francs. It therefore did not want any reinsurance against the consequences of embezzlement not exceeding the last mentioned amount, and then only as against its liability for the excess thereover. Such excess could not exceed the difference between a quarter of a million francs and its own maximum liability of 1,000,000 or 750,000 francs. To secure this reinsurance, it entered into negotiations with the plaintiff. It seemingly did not feel that the latter was by itself financially able to give it all the protection needed. It insisted that 90 per cent. of the risk to be assumed by the plaintiff should be reinsured in other companies approved by it, the Brokers' Society. Plaintiff communicated with other insurers, including the defendant. It found that it could effect reinsurances to the desired extent. On March 13, 1903, the plaintiff, by a policy bearing that date, reinsured the Brokers' Society for five years against the excess over a quarter of a million francs, and not exceeding three-fourths of a million, for which the latter might become liable on any one embezzlement. The policy covered only sums taken and discovered during its continuation. It provided that, in case of successive or continuous thefts, the guarantee should not be retroactive, but should apply only to those committed from and after its date. The Brokers' Society retained the right alone to direct the investigation and settlement of the losses. Its decisions in such matters were to be obligatory upon the plaintiff. The latter had no right to refuse or delay the payment of its proportion of the indemnity paid or to be paid by the Brokers' Society. At the end of the five years for which the policy was made, it was to be renewed by tacit agreement, unless either party had given six months previous notice by registered mail of a contrary desire. It was provided that the policy could not be canceled, unless the aggregate amount of losses of the year exceeded the premium. The latter was to be at the rate of 38,000 francs a year payable annually. The plaintiff bound itself to provide three reinsurers acceptable to the Brokers' Society. Such reinsurers were in the aggregate to become liable for at least 90 per cent. of the risk assumed by the plaintiff. They were to countersign the policy and to accept its articles. The plaintiff remained, however, always liable for the full performance of the entire contract. For a consideration of the annual payment of 7,600 francs, less than 10 per cent. for the benefit of the plaintiff, the defendant, on the same day and apparently at the foot of the policy, reinsured two-tenths of the risks assumed by the plaintiff. It was provided that such risk was assumed according to the conditions and usages of Paris in matters of rein-

surance. Four other companies in varying proportions reinsured in the aggregate seven-tenths of the plaintiff's risk. The transaction had a distinctly international flavor. The headquarters of the plaintiff were at Paris; of the defendant at Baltimore; of the other reinsurers at Munich, Zurich, Vienna, and Brussels, respectively. About January 1, 1906, the plaintiff allowed the Vienna Company to cancel its policy as of that date. A Berlin corporation took the vacated place. The defendant decided to wind up its business in France. It canceled such of its outstanding French risks as it could. It asked the plaintiff to accept a cancellation of the particular one in question. Plaintiff consented. On the 19th of January, 1906, it was agreed that the defendant's contract of reinsurance should terminate as of March 13, 1906, that is, at the expiration of precisely three years after it was entered into. This cancellation was made and accepted "subject to losses incurred prior to said date (March 13, 1906) in case they be known and declared afterwards in conformity to the conditions of the contract" between the plaintiff and the Brokers' Society. The defendant received and retained three full annual premiums. The Berlin Company, which had previously taken over the 5 per cent. of the risk originally reinsured by the Vienna Company, now assumed defendant's place, and, in consideration of the same annual premium, became bound from the date of defendant's retirement for two-tenths of the plaintiff's risk. On March 13, 1907, the Brussels Company was allowed to retire. The plaintiff itself assumed the 2½ per cent. previously carried by it. On March 18 or 19, 1907, it was discovered that a trusted employé of one of the insured members of the Brokers' Society had embezzled large sums from his employer, and had committed suicide. The amount of his defalcation was ascertained to be 669,274.90 francs. Interest on such sum amounted to 13,564.55 francs. The total claim presented by the broker was therefore 682,839.45 francs. Plaintiff disclaimed liability for interest.

| | |
|--|--------------|
| Of the principal sum embezzled the | |
| original sufferer was liable for one-fourth..... | \$167,318 72 |
| The Brokers' Society for..... | 250,000 00 |
| The plaintiff for the balance..... | 251,956 18 |
| Total | \$669,274 90 |

Plaintiff, however, was hopeful of recovering through the broker a salvage of 35,000 francs. It accordingly in the first instance admitted immediate liability for 216,956.18 francs only. This last mentioned sum was 32.4166 per cent., of the broker's total loss. It was possible to determine the date at which the dishonest employé had taken each particular sum. There was, therefore, no difficulty in arriving at the total amount stolen during the period in which the reinsurance group remained as at first constituted, and the amount which was abstracted during each subsequent period in which there was no change in the reinsurers existing at the beginning of the period. The method of adjustment adopted by the plaintiff was to hold each group of insurers liable as a whole for 32.4166 per cent. of the amount embezzled during the time such group remained unchanged, and then to

apportion the sum so ascertained among the insurers in proportion to the share of the risk they had for that period assumed. Thus the amount embezzled during the time for which the defendant was one of the coinsurers was 301,185.90 francs. Thirty-two and four thousand, one hundred and sixty-six ten thousandths per cent. of such sum amounted to 97,834.228 francs. The defendant was bound to pay one-fifth of the losses incurred while it was reinsurer. One-fifth of the total loss so determined was 19,526.842 francs. All the coinsurers other than the defendant finally acquiesced in this method of adjustment, and made the payments called for by it. The two who, like the defendant, had canceled their policies before the loss was discovered, did so reluctantly, and only after suit had been brought or threatened against them. Defendant denied its liability, and refused to pay anything. The plaintiff brought suit against it before the Tribunal of Commerce of the Department of the Seine sitting at Paris, and there by default obtained a judgment for the amount claimed, viz., 19,526.842 francs. Upon this French judgment this suit was originally brought in this court. There was difficulty in settling the pleadings. There were several hearings thereon. In the end a stipulation was made that all errors of pleading should be waived; that the plaintiff should be entitled to recover, if at all, upon any cause of action it might have against the defendant without regard to pleadings; and that the defendant should be entitled to set up any defense it might have without reference to forms of actions or pleas. A jury trial was waived by both parties, and the cause came on to be heard before the court sitting as a jury. At the close of the evidence the defendant offered three prayers; the plaintiff none.

[1] By the defendant's first prayer the court was asked to rule as a matter of law that upon the uncontradicted evidence the French judgment was a nullity. I grant this prayer. The uncontradicted testimony as to the French law proved that no proper service had ever been made upon the defendant in France.

[2] The defendant's second prayer sets up the most important contention in the case. That prayer asks me to rule, in effect, that the defendant is not liable at all because the total amount embezzled during the period for which it was a coinsurer did not equal the 333.-333 francs which had to be taken before liability attached under the original policy issued by the plaintiff to the Brokers' Society. It contends that on the 13th of March, 1906, when the cancellation of its policy became effective, the total amount of the embezzlement was only 301,185.90 francs. If such loss had been then discovered, the plaintiff would not have been liable for anything to the Brokers' Society, and therefore no liability could have attached to the defendant. The plaintiff says that this contention is unsound. In its view the obligation originally assumed by it to the Brokers' Society was in point of time undivided. When a loss was discovered, the broker's one-fourth was to be determined as of that date, and it was then that the 250,000 francs were to be met by the Brokers' Society. Such deductions its claims were not, and could not be, properly made or considered until the loss was known. The defendant, by the terms of

its cancellation agreement, was not discharged from liability in any and all events. It still expressly remained bound for losses incurred prior to March 13, 1906, in case they became known and were declared afterwards in conformity to the conditions of the contract between the plaintiff and the Brokers' Society. From plaintiff's standpoint the defendant as to losses so incurred remained liable to the same extent as the company that took its place was for losses thereafter incurred, with the same right to share in the benefits of the deductions of the amounts for which the broker and the Brokers' Society were liable. It calls attention to the fact shown by the evidence that, when the defendant's contract was canceled, defendant retained the full annual premium for the time during which it was upon the policy. The company which took defendant's place received compensation at the same annual rate.

The difficulty is in determining how, under the special circumstances of this case, the benefit of the exemption from liability from at least 333,333 francs of any one embezzlement affects the obligation of successive reinsurers. The contract is French. By its express terms it is to be governed by the usage of Paris in matters of reinsurance. It follows that the French law controls if there is any such applicable law, and, if not, it is regulated by the custom of Paris if such custom exists. Experts in the French law and in the insurance practices of Paris have been examined. They do not in my judgment profess to state what the law of France or the usages of Paris on this matter are. The witnesses express their individual opinion as to what that law should be declared to be whenever the courts of France are called upon to make a declaration upon the subject, or as to what should be the usage of Paris, whenever any usage upon the subject shall be established.

Sitting as a jury, I find as a matter of fact that it is not proved that there is any applicable French law or custom. The learned and diligent counsel for the respective parties have not been able to find that the precise question now under consideration, or any one having any marked analogy to it, has ever been passed upon in any reported case. My own researches and inquiries have had the same negative result.

There are at least three possible theories which may be adopted:

First. That the uninsured portion of the loss shall be deducted once for all from the total loss when ascertained and as of the date of its ascertainment, and that each successive reinsurer shall benefit by such deduction in proportion to the total amount embezzled during the time he was on the policy. This is the contention of the plaintiff.

Second. That each insurer shall have the full benefit of the total deduction to the extent of at least 333,333 francs. This theory treats each contract of reinsurance as complete in itself, and as having no privity or connection with that which went before it or that which may come after it. Each of such contracts is given its most strictly literal interpretation. A reinsurer has nothing to do with any sums embezzled before it assumed the risk or with any that may be embezzled after its policy was canceled. It is bound only for its share

of the liability of the plaintiff during the time it is a reinsurer of the plaintiff. The plaintiff, however, is not liable at all, unless the sum embezzled exceeds 333,333 francs. A reinsurer, therefore, cannot be called upon to pay, unless the amount taken during the term its policy was in force exceeded that sum. If this theory is sound, the defendant is not liable. It, however, does not make this contention. The parties could not have intended that their rights and liabilities should be determined in this way. That the Brokers' Society as well as the plaintiff should be protected by reinsurance to the extent of 90 per cent. of the risk assumed by the latter was of the very essence of the whole scheme and of all the transactions connected with it. If each successive reinsurer could successfully assert that he was liable for nothing more than his share of the amount by which the sum embezzled during the time he was on the policy exceeded 333,333 francs, it might well have happened that, although the plaintiff would be liable for a large sum, it would not be entitled to collect any, or at the most a small, part of its loss from its reinsurers. Three hundred and one thousand francs were embezzled, while the defendant was on the policy; 368,000 francs afterwards. According to the theory now under discussion, defendant would not be liable at all, for the amount embezzled while it was a reinsurer was less than 333,333 francs. Its successor's liability would be worked out as follows:

| | |
|---|------------------|
| Sum embezzled while successor was a reinsurer..... | 368,000 francs |
| The broker bears one-fourth of which..... | 92,000 " |
| The Brokers' Society..... | <u>250,000</u> " |
| Balance, for two-tenths of which reinsurer would be liable... | 26,000 " |

The net result would be that, while the plaintiff is liable for nearly a quarter of a million of francs, it would have had reinsurance for not much more than one-tenth of that sum. Had there been three successive reinsurers of the same portion of the risk, it might have found itself without any reinsurance. The consequences to which this theory leads are so manifestly fatal to the whole purpose of everything which the parties did that it may be rejected without further consideration.

The defendant takes its stand upon what may be called the third theory. This assumes that, while the broker's one-fourth and the Brokers' Society's 250,000 francs can be deducted but once, they are, when the loss is finally discovered, to be treated as if such deductions had been made from day to day, or from period to period as the money was actually taken. Each successive reinsurer becomes bound for its share of the liability which attached to the plaintiff during the time it was upon the policy. As applied to the facts of this case, the defendant was never liable because when its policy was canceled, as was discovered, when the embezzlement took place, the amount taken was not sufficient, had the plaintiff's own policy then terminated, to impose any liability upon the latter. During the five days over a year that its successor, the Berlin company, was on the policy of reinsurance, the broker's clerk kept on stealing, and as a consequence during this period, and during this period only, the plaintiff's liability attached. For its

share of whatever liability came upon the plaintiff while it was a co-insurer the Berlin company was liable.

Which of these theories is the one which the court should adopt? If the language of the contract between the plaintiff and the defendant plainly points to one of them, the discussion is closed. Like other contracts of insurance, it is "to be construed according to the sense and meaning of the terms which the parties have used." *Insurance Co. v. Coos County*, 151 U. S. 463, 14 Sup. Ct. 379, 38 L. Ed. 231.

Defendant claims that its position is sustained by the language of the cancellation agreement. Its policy terminated on the date upon which the cancellation took effect "subject only to the losses incurred prior to that date in case they be known and declared afterwards in conformity to the conditions of the contract" between the plaintiff and the Brokers' Society. At the hearing, it was suggested that the phrase, "in conformity to the conditions of the contract," had reference to those provisions of the original agreement by which plaintiff was exempted from liability for a theft which did not exceed 333,333 francs. Obviously, however, the words in question have quite another purpose and significance. In spite of the cancellation, the defendant was to remain liable for losses previously incurred, provided they were known and declared afterwards in conformity with the contract—that is, were known and declared before the expiration of the five-year term of the policy issued by the plaintiff to the Brokers' Society. By that policy the plaintiff did not assume liability for any thefts not discovered and declared during its existence. The reservation in question, therefore, means precisely the same as if it had read, "Subject to losses incurred prior to March 13, 1906 in case they be known and declared on or before March 13, 1908." This language throws little light upon the question at issue. It certainly falls far short of clearly answering it.

The strongest argument in support of defendant's contention is the simple and unquestioned fact that the contract was canceled. The purpose and effect of cancellation was to release it from all responsibility or liability for anything which might happen thereafter. If at the time of the cancellation it was not liable, it could not be made so by anything which might subsequently take place. Doubtless the defendant might expressly have bound itself, in spite of what it and the plaintiff called a cancellation, to answer for certain defaults which might be committed in the future, but in defendant's view the language of the reservation which was actually made does not either by expression or by implication seek to hold it for anything for which it was not at the time of the cancellation liable if all that had then taken place had been then known.

[3] As arguments go, this argument is very strong. Nevertheless, it is impossible to believe that the words used could have been intended to decide in advance the present controversy in favor of the defendant. If the parties had so desired, they could have made such a purpose very plain. The original contract between them shows how careful they could be to make their meaning plain by concrete illustrations. In interpreting contracts, courts seek to put themselves in the place of the parties at the time the bargains between them were made, and

from that viewpoint look at what the parties did and said. Of course, if those who enter into an agreement have expressed themselves plainly, their rights are to be governed by the words they use, no matter how unwise the courts may think one or both of them must have been to have entered into such an agreement. Where, however, they have not closed the controversy by the use of plain and unequivocal language, the courts must construe general terms and phrases in the light thrown upon them by the situation in which the parties were at the time they were used. General as this rule of construction is, many courts of high authority have held that it is peculiarly applicable to contracts of reinsurance. Such agreements are often made on printed blanks intended for other purposes, or, if not, in the making of them the parties are prone to use stock words or phrases having little or no real pertinency to the matter in hand. *Philadelphia Life Ins. Co. v. American Life & Health Ins. Co.*, 23 Pa. 65; *Union Ins. Co. v. American Ins. Co.*, 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; *Manufacturers' Ins. Co. v. Western Assurance Co.*, 145 Mass. 419, 14 N. E. 632; *South British Fire & Marine Ins. Co., of New Zealand v. Dacosta*, L. R. (1906) 1 K. B. 456; *Frost on Guaranty Ins.* § 37. That contracts of reinsurance should be so interpreted is about the only relevant thing that the adjudged cases have to say as to the question now under consideration. All the circumstances existing at the time defendant's contract was made and when it was canceled show that the purpose of all the parties was that the plaintiff should, except as to about 10 per cent. of its undertaking, be fully reinsured during the entire five years, and that, when cancellation was permitted, another reinsurer was at once to step into the place of the one who retired. Every one acted upon the assumption that there was no difference between the risk assumed by one who was a reinsurer during the first portion of the five-year period and one who was a reinsurer during the latter part of it.

The Brokers' Society paid the plaintiff an annual premium of 38,000 francs. Plaintiff retained 10 per cent. of this as a compensation for the general responsibility accepted by it, and perhaps in some part as brokerage for getting the business for the other companies. The balance of 34,200 francs it divided among the reinsurers in the exact proportion to the percentage of the risk assumed by each of them and the time the policy of each remained in force. Thus the defendant assumed two-tenths or one-fifth of the risk. The annual premium in each of the three years its policy remained in force was two-tenths of 34,200 francs, or 6,840 francs. When the policy was canceled, it did not return any part of this sum, nor was it asked to. Its successor was offered and accepted the same annual premium. To everybody it appeared that the risk of being a reinsurer for the last two years of the original five was no greater than that of being a reinsurer for the first three. Obviously, however, if the defendant's present contention is sound, there was a great difference. The reinsurer for the earlier period had the full benefit of the broker's one-fourth and the Brokers' Society's 250,000 francs, so far as they were necessary for its complete exoneration. All that remained available for the protection of its successor was so much of these, if any, as it did not need for its

own. At the time nobody acted as if there was any difference whatever in the risk assumed. Such fact is strongly persuasive evidence that at that time no one intended that any such difference should be made.

The first of the three possible theories of adjusting the loss among successive reinsurers, therefore, seems to have been that which was in contemplation of the parties. It is a perfectly simple and logical theory. It requires nothing further than the assumption that the parties intended that the sum to be borne by the broker himself and by the Brokers' Society should not be deducted until the total loss was ascertained, and then from the total loss. Obviously that is the only time at which the broker's one-fourth could as against him be calculated. To my mind as applied to the facts of this case, it is far the most equitable of the three possible theories. It contravenes no positive rule of law. So far as I am aware, there is not a single authority opposed to it, although it is equally true that there is none in its favor. The defendant's second prayer will accordingly be refused.

It will be remembered that the plaintiff did not at first pay 35,000 francs of the portion of the loss for which it was liable hoping that such sum could be recovered as salvage. It finally made an adjustment by which it received credit for 15,000 francs in lieu of such claim for salvage. It accordingly paid the Brokers' Society an additional 20,000 francs. It claims from the defendant 1,776 francs as the latter's share of this 20,000 francs.

[4] Defendant's third prayer asks me to rule as a matter of law that the plaintiff cannot recover this sum in this action because plaintiff did not pay the 20,000 francs until after this suit had been brought. The authorities, however, are clear that an insurer may recover from a reinsurer before the former has actually paid the insured. Defendant's third prayer is therefore refused. *Allemannia Ins. Co. v. Firemen's Ins. Co.*, 209 U. S. 332, 28 Sup. Ct. 544, 52 L. Ed. 815; note to *Traders' Ins. Co. v. Aachen & M. T. Ins. Co.*, 8 L. R. A. (N. S.) at pages 857, 858; *Norwood v. Resolute Fire Ins. Co.*, 47 How. Prac. 43; *Gantt v. American Central Ins. Co.*, 68 Mo. 503. The result is that a verdict will be entered in favor of the plaintiff for the sum of \$5,339.70, of which \$4,974.74 represents the 19,526,846 francs paid by the plaintiff for the defendant's share of the coinsurance before the institution of this suit, and interest thereon from the time of such payment to the day of trial and \$364.96 represents the 1,776 francs subsequently paid, with interest thereon from the date of payment to the day of trial.

KELLY v. VIRGINIA BRIDGE & IRON CO.

(District Court, E. D. North Carolina. February 4, 1913.)

No. 611.

1. REMOVAL OF CAUSES (§ 86*)—TIME FOR FILING PETITION.

Where a cause in a state court was not removable when commenced, but becomes so by a substitution of plaintiffs, which creates a diversity of citizenship between the parties, the defendant may then exercise his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right of removal, although the time for filing his petition as fixed by the terms of the statute has expired.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

2. REMOVAL OF CAUSES (§ 102*)—GROUNDS FOR REMAND—DOUBT AS TO JURISDICTION.

Where, owing to a general order of a state court extending the time to plead in a cause, without fixing any definite time, it is doubtful whether a petition for removal was filed within the time required by the statute, the federal court will decline to take jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.*]

At Law. Action by Bryant Kelly, administrator of the estate of D. J. Kelly, deceased, against the Virginia Bridge & Iron Company. On motion to remand to state court. Motion granted.

E. L. Travis, of Raleigh, N. C., and W. E. Daniels and T. C. Harrison, both of Weldon, N. C., for plaintiff.

James H. Pou, of Raleigh, N. C., and George C. Green, of Weldon, N. C., for defendant.

CONNOR, District Judge. The motion is based upon the following facts, all of which are of record:

D. J. Kelly died intestate in Halifax county, N. C. Bryant Kelly, a resident and citizen of the state of Virginia, was, on the 1st day of February, 1911, appointed administrator of his estate by the probate court of said county. On the 8th day of March, 1911, said Kelly, as administrator, instituted an action in the superior court of Halifax county, in said state, against defendant, the Virginia Bridge & Iron Company, a corporation chartered and organized under and by virtue of the laws of the state of Virginia, having its principal office in said state, in which the summons was returnable to the March term, 1911, of said court. At the said term a general order was made by said court extending the time for filing pleadings. On January 15, 1912, 14 days before the opening of the January term of said court, the said Bryant Kelly, as administrator of D. J. Kelly, deceased, filed his complaint against defendant corporation, alleging that his intestate came to his death, while in the employment of said company, by reason of the negligence of defendant's agents and employes, whereby he sustained \$20,000 damage, for which amount he demanded judgment.

On January 31, 1912, the said Bryant Kelly resigned to the probate court of said county his said office of administrator, and the same was duly accepted on February 2, 1912. Elliott B. Clark, a citizen and resident of Halifax county, in the state of North Carolina, was duly appointed administrator de bonis non of said D. J. Kelly, deceased, by the said probate court, and duly qualified according to law. At the January term, 1912, of the superior court of said county, to wit, on February 2, 1912, being the fourth day of said term, the resignation of said Bryant Kelly, administrator, having been made to appear to the judge presiding, and the appointment of Elliott B. Clark, as administrator de bonis non of said D. J. Kelly, deceased, having been duly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

certified to said judge, an order was made, upon motion of said Elliott B. Clark, administrator de bonis non, that "he is allowed to become and is made a party plaintiff in this action." No amendment was made to the complaint, nor was any answer filed by defendant at that term.

On March 22, 1912, being the fourth day of the March term, 1912, of the superior court of said county, and the next intervening term after the January term, 1912, defendant filed its petition in the superior court of said county, accompanied by a bond, as prescribed by the statute, for the removal of said cause into the District Court of the United States for the Eastern District of North Carolina, the county of Halifax being in said district, which was denied by the judge of said court. On the 31st day of May, 1912, the defendant caused a transcript of the record in said cause, together with said petition and bond, to be docketed in this court. Plaintiff in due time lodged this motion to remand said cause to the superior court of Halifax county. Said motion is based upon the following grounds: (1) That the petition for removal was not filed within the time prescribed by law. (2) That there was no diversity of citizenship between the parties hereto at the commencement of this action. The plaintiff and the defendant, as they existed at the time of commencement of the action and the filing of the complaint herein, were both residents and citizens of the state of Virginia.

[1] While it is true, as insisted by plaintiff, that it is held in many cases that, to entitle a defendant to remove a cause, brought in the state court, into the District Court of the United States, because of diversity of citizenship, it must appear in the record that such diversity existed at the time of the institution of the action, and also at the time of filing the petition for removal, it appears, from a careful examination of the facts in the cases cited, that they are not controlling authorities in disposing of this motion. It is not very material to inquire, or to decide, whether the grant of letters of administration to Bryant Kelly, a resident of the state of Virginia, was void, because not within the jurisdiction of the court, under the provisions of the North Carolina statute (Revisal 1905, § 5, subsec. 2), or was voidable and subject to be vacated upon a motion before the court granting them, and, therefore, not open to collateral attack. It would seem that the last is the correct view. The present plaintiff, administrator de bonis non, comes into the case, by order of the court, by way of succession. It is manifest that the action by the first administrator was not removable. There was no diversity of citizenship; both plaintiff and defendant being residents of the state of Virginia. It is clear that, so soon as Kelly resigned and the present plaintiff, administrator de bonis non, was substituted as the sole party plaintiff, the action immediately became one in which there was a diversity of citizenship. None of the cases cited by plaintiff are based upon such state of facts as we have here. In *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 100, 18 Sup. Ct. 264, 267 (42 L. Ed. 673), it is said:

"The reasonable construction of the acts of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when

necessary to carry out the purpose of the statute, yield to the principal enactment as to the right, and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which the case was brought."

It is also said that, while the statute clearly manifests the intention that the petition shall be filed at the earliest possible opportunity, "so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that 'any party entitled to remove any suit' 'may make and file a petition for removal at or before the time when he is required to make answer to the suit,' cannot be literally applied." Mr. Justice Gray says that the question whether a defendant may file, in the state court in which the suit was commenced, a petition for removal, after the time mentioned in the act of Congress has elapsed, in a case which was not removable when the time expired, "is now directly presented for adjudication." He notes the fact that it had not theretofore been presented or decided. This decision was rendered at the October term, 1897, by a unanimous court. It is not suggested in the opinion that any of the cases relied upon by plaintiff to sustain this motion, decided prior thereto, are overruled or questioned. The case has been frequently cited with approval. *Lathrop Shea & Co. v. Int. Const. Co.*, 215 U. S. 246, 251, 30 Sup. Ct. 76, 54 L. Ed. 177.

I have, as a matter of convenience, disposed of the second ground assigned in the motion to remand, not overlooking the first.

[2] By reason of the loose practice prevailing in the state courts in regard to the time of filing pleadings and the orders made in that respect, a large number of cases removed into this court have, upon motion to remand, presented perplexing and difficult questions as to whether the petition for removal was filed "before the defendant is required, by the laws of the state, or the rule of the state court, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." Jud. Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) § 29. The Code of Civil Procedure of North Carolina requires the plaintiff to file his complaint in the clerk's office on or before the third day of the term to which the action is brought. *Pell's Rev.* 1905, § 466. It is also provided that the defendant shall appear, and demur or answer, at the same term to which summons shall be returnable; otherwise, the plaintiff may have judgment by default. Section 473.

"The judge may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made * * * after the time limited, or by an order *enlarge such time.*" Section 512.

The Supreme Court of North Carolina, in accordance with the decisions of other state and some federal courts, has uniformly held that an order enlarging the time to file pleadings does not extend the time to file the petition for removal to the United States court. *Howard v. R. R. Co.*, 122 N. C. 944, 29 S. E. 778; *Lewis v. Steamship Co.*, 131 N. C. 652, 42 S. E. 969; and other cases. Judge Dillon

says that the decided cases upon the question "are in much apparent conflict." *Dillon on Removal*, 156. The authorities holding variant views are collected in the note to *Wilson v. Coal Co.*, 135 Iowa, 531, 113 N. W. 348, in 14 Ann. Cas. 266. The question was presented in this district in *Avent v. Lumber Co. (C. C.)* 174 Fed. 298. I felt constrained, by the opinion of Judge Simonton in *Guano Co. v. Insurance Co. (C. C.)* 60 Fed. 929 (4th Circuit), to hold that the enlargement of time, by order of the court, to answer, extended the time until, under the terms of the order, "the answer was due." I felt bound by this decision, both because it was made by a Circuit Judge of the Fourth circuit and by my very great respect for the ability and learning of the judge writing the opinion. The same conclusion has been reached and followed in other circuits, notably in the Second circuit. The New York Code contains the same provisions in regard to time for filing pleadings, and the power of enlarging such time, as the North Carolina Code. See cases cited in note, 14 Ann. Cas. 266, *supra*. If the question were open in this circuit, I should be inclined to hold to the contrary, because, upon the reason of the thing, the argument is about equally balanced, and such ruling would produce uniformity in the practice and harmony between the ruling of the state and federal court; both being matters of very great importance in the due administration of justice.

To hold that counsel must file the petition for removal at the first term at which they are required to plead, if well understood, would work no hardship, and would bring the parties to an issue at the term of the court to which the summons was returned. The question here, however, is whether, giving to the general order enlarging the time to file pleadings, no definite time being fixed, a fair construction, the petition for removal was filed at the term at which it was the duty of defendant to demur or answer. The complaint was filed some days prior to January term, 1912, disclosing the cause of action and amount of damages claimed to be more than \$3,000. At the same term, on February 2, 1912, the present administrator was permitted to make himself party plaintiff. It is not suggested that any other than a formal amendment of the complaint was necessary—simply to allege his appointment and the order of the court making him a party. This would have been treated upon the trial as done, and the record made to conform to the fact, upon mere suggestion, or by the court *ex mero motu*. Treating the January term, 1912, as that to which the time to file pleadings was, by order of the court, enlarged, why was not the defendant required to answer at that term? In *Avent's Case*, *supra*, the complaint was filed and an order made enlarging the time to file answer to 40 days. The question as to whether the petition was filed within the time at which the answer was due, under the rule of the court enlarging the time, was free from doubt. Here it is not. It appears to be the uniform practice of the federal courts, where their jurisdiction is doubtful, to remand the case to the state court. In *Johnson v. Wells Fargo & Co. (C. C.)* 91 Fed. 1, Morrow, Circuit Judge, discussing the facts in that case, says:

"It is certain that the jurisdiction of the Circuit Court on removal is not clear in this case, and it is only when the jurisdiction is clear that it is

justified in assuming cognizance of the cause on removal." *Plant v. Harrison* (C. C.) 101 Fed. 307, and other cases cited in 4 Fed. Stat. Anno. 372.

Guided by this practice, and in view of the doubt whether the time to file answer did not, under a reasonable construction of the order, require the answer to be filed during the January term, I am of the opinion, that the motion to remand should be granted. I wish to call the attention of the attorneys practicing in this district to the fact that, in *Avent's Case*, supra, it was held, on the authority of the *Guano Co. Case*, supra, that when a definite time was fixed for filing the answer by a rule of the court made in the instant case, and not by a general rule of the court, or stipulation of the parties or counsel, the time to file the petition for removal will be regarded as extended to such definite time. Whether or not this rule is in harmony with the language of the statute, it is at least definite and certain, and will not be extended to cases where the time to file answer is enlarged by a general order, or where it is doubtful and uncertain when the answer is due.

Cause remanded.

CAMPBELL v. FARMERS' MFG. CO.

(District Court, E. D. North Carolina. March 4, 1913.)

No. 332.

1. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—INVALID EXECUTION SALE.

A sheriff's deed, conceding its recitals to be prima facie evidence of the facts recited, will not sustain a suit to quiet title, where the judgment on which it is based, as appears from the record thereof, was rendered in an action of attachment, in which the defendant was not personally served and did not appear, and the land was not attached, but the attachment was served on a garnishee, against whom judgment was entered.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

2. QUIETING TITLE (§ 12*)—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

A court of equity is without jurisdiction of a suit to quiet title, where neither complainant nor his grantors ever had possession of the land, and the real purpose of the suit is to determine the title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.*]

In Equity. Suit by John K. Campbell against the Farmers' Manufacturing Company. Decree for defendant.

Winston & Biggs, of Raleigh, N. C., and Charles Whedbee, of Hertford, N. C., for plaintiff.

E. F. Aydlett, of Elizabeth City, N. C., for defendant.

CONNOR, District Judge. Plaintiff alleges that he is the owner of a certain tract of land lying and being situate in the county of Gates, in the Eastern district of North Carolina, which he describes by metes and bounds. He deraigns his title as follows: (1) A grant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the state to Kedar Powell, bearing date August 18, 1783. (2) A judgment rendered by the court of pleas and quarter sessions of Gates county, August term, 1789, in the case of Josiah Granberry v. Kedar Powell. (3) Deed from Seth Eason, sheriff of said county, to Thomas Granberry, dated September 4, 1790. (4) Deed from Thomas Granberry to John Campbell, dated June 29, 1796. (5) Descent from John Campbell to plaintiff and his grantors. He alleges that defendant claims title to said land under a deed executed by W. Lynch and wife, dated January 12, 1911, and duly recorded. This deed, plaintiff alleges, is a cloud upon his title, which he asks the court to remove, etc.

Defendant denies that plaintiff has title to the land, and thus presents an issue which must be met and disposed of at the threshold; for, of course, if plaintiff has no title, he has no standing in this court. Plaintiff relies entirely upon a paper title. He does not claim to have shown that he, or any person under whom he claims, has at any time been in the actual possession of the locus in quo. He avers that neither defendant nor its grantees has been in possession. This the defendant denies. It is conceded that the land is swampy woodland, and valuable chiefly for the timber standing upon it.

[1] Plaintiff, for the purpose of showing title, introduces the grant to Powell, which, *pro hac vice*, may be conceded to cover the locus in quo. He next introduced a certified transcript of the civil docket, No. 2, of the county court of Gates county, May term, 1789, containing the following entry:

"Causes Entered to Gates County Court, May Term, 1789. Josiah Granberry v. Kedar Powell. Attachment Judgt. by default and inquiry."

"Causes for Trial, Gates County Court, August Term, 1790. Josiah Granberry v. Kedar Powell. Attachment. Judgment by default and inquiry. Judgment for the amount in the hands of the garnishee. Stay ex' on three months."

"Executions returnable to Gates County Court, May Term, 1790. Josiah Granberry v. Kedar Powell. Fi Fa.

| | |
|-----------------------------|---------|
| Judgment | £107. |
| Clerk fee..... | 0.14.9 |
| Sheriff a/c Atto., etc..... | 2. 8. 8 |

"Satisfied £42.11.06."

Deed from Seth Eason, sheriff of Gates county, to Thomas Granberry, dated April 4, 1790, containing the following recital:

"Witnesseeth, that by a certain writ to me directed from the court of Gates county authorizing of me to sell a certain peac or parcel of land the property of Kedar Powell in order to pay his just debts, there being not personal property enough for that purpose, after due notice I, Seth Eason, sheriff, did expose the same to public sale, in order to satisfy the above said Powell's debts. At the day of sale Thomas Granberry appeared and did purchase the said land for the sum of three pounds, twelve shillings current money and was the highest bidder for the same land."

W. T. Cross, clerk of the superior court of Gates county, testified that, as the custodian of the records of the county court of Gates county, he has made a search in his office for the original execution against Kedar Powell; that his search was thorough, made three or four times, through all of the records, where such executions should

have been filed; that he found the dockets referred to, but could find no executions or other original papers in the case. He is asked whether any of the records have been destroyed. He says: "Not so far as I have any personal knowledge." "Is there any reputation of their having been removed?" To which he answers: "Yes." He says that he has not been able to find any executions prior to 1800.

Plaintiff contends that, upon these records and this testimony, the recitals in the sheriff's deed constitute prima facie evidence of his authority to sell and convey the land. In the exhaustive brief of plaintiff's counsel the cases decided by the Supreme Court of North Carolina, upon this question, are carefully collected and reviewed. In *Wainwright v. Bobbitt*, 127 N. C. 274, 37 S. E. 336, Mr. Justice Montgomery reviews the North Carolina decisions. From an examination of those cases it appears that the court has, after much consideration, reached the following conclusion:

"That the recitals in a sheriff's deed are prima facie evidence of the facts therein stated, and will be sufficient evidence upon which the plaintiff can recover, unless it is rebutted by proof to the contrary."

This language may, in the light of the facts in the several cases cited, be rather broad and subject to some limitation. See 3 Wigmore, Ev. § 1664, notes, citing *Rollins v. Henry*, 78 N. C. 342. In none of the cases cited and commented upon are the recitals so vague and indefinite as in the deed from Eason, sheriff, to Granberry. If this deed can be sustained by the recitals, it must be because it is an ancient deed, and the evidence of the clerk that, after a thorough search, he has been unable to find the execution issued in the case of *Josiah Granberry v. Kedar Powell*. His statement that there is a reputation that the records, prior to 1800, have been removed, is not sufficiently definite to sustain a finding that they have been "destroyed by fire or otherwise" to enable plaintiff to have the benefit of the remedial provisions of sections 341, 342, Pell's Revisal. I do not think, however, that this is very material, as there is sufficient evidence that the executions issued from the county court of Gates county are lost. The clerk has made such search as entitles the plaintiff to introduce secondary evidence, especially in view of the antiquity of the deed. *Everett v. Newton*, 118 N. C. 919, 23 S. E. 961. I am of the opinion that the recitals in the deed constitute prima facie evidence of their truth.

The difficulty, however, consists in the fact that these recitals do not correspond with the record introduced. No execution could lawfully issue upon that judgment, authorizing the sale of the land. It will be observed that the docket entry shows that the suit of *Josiah Granberry v. Kedar Powell* was begun by attachment. The only step taken at the May term, 1789, was the entry of judgment by default and inquiry. This was followed at the August term, 1789, by a "judgment for the amount in the hands of the garnishee," with a "stay of execution three months." At the August term, 1790, the judgment for £107 is marked satisfied "£42.11.06"—in addition to the cost. At the date of the rendition of this judgment, the attachment law, in force in North Carolina, is found in Acts 1777, c. 2 (*Martins' Dig.* p.

212) being section 25 of an "Act for establishing courts of law and for regulating the proceedings therein." This statute, brought forward in Rev. Stat. c. 6, provides that:

"Upon complaint being made on oath, etc., that any person hath removed or is removing himself or herself out of the county privately, or so absconds or conceals himself or herself that the ordinary process of law can not be served on such debtor, and if such plaintiff * * * further swears to the amount of his claim * * * it shall be lawful for such justice * * * to grant an attachment against the estate of such debtor, whenever the same may be found, or in the hands of any person or persons indebted to, or having any of the effects of such debtor, etc., which attachment shall be returned to the court where the suit is cognizable and shall be deemed the leading process in such action, and the same proceedings shall be had thereon as on judicial attachments."

The two following sections prescribe that bond shall be taken and that any justice of the county courts may, upon complaint being made as prescribed, issue attachments and make the same returnable to the court where the same is cognizable.

The next section gives like remedy to creditors of any person who shall be an inhabitant of any other government. The next succeeding section prescribes the course and practice to be pursued upon the return of the attachment. When the sheriff or other officer shall serve an attachment in the hands of any person supposed to be indebted to, or supposed to have any of the effects of, the party absconding or residing out of this state, he shall, at the same time, summon such person or persons as a garnishee to appear at the court to which the attachment shall be returnable, then to answer upon oath what he or she is indebted to the defendant, and, when any attachment shall be served in the hands of any garnishee in manner aforesaid, it shall be lawful, upon his appearance and examination, to enter up judgment and award execution against any such garnishee for all sums of money due the defendant, etc. It is further provided that, if the garnishee, summoned in the manner prescribed, fail to appear, it shall be lawful for the court, after solemnly calling the garnishee, to enter a conditional judgment against the garnishee, and to issue a scire facias against such garnishee, returnable to the next term, to show cause why judgment shall not be entered, etc. The next succeeding section extends the remedy by attachment against the lands and tenements of debtors residing in other states and governments, etc. 24 Stat. Rec. 55.

It is apparent that the attachment, to which the docket entry produced by plaintiff refers, was served upon, and judgment entered, "for the amount in the hands of the garnishee." The idea that the attachment was levied upon any lands of the defendant is excluded by the record. The provisions of the statute, we may assume, were complied with, and the judgment against the garnishee "satisfied," as the record shows. No judgment in personam, affecting any other property than that upon which the attachment was levied, could be rendered, there being no personal service on defendant. It may be that Granberry procured another attachment, which was levied upon the lands of his debtor, under which the land in controversy was sold; but of that there is no evidence, nor can there be any presumption because plaintiff claims under this judgment. It will be observed that the amount

for which the judgment against the garnishee was satisfied was much less than the judgment against Kedar Powell. It may be that an execution was run out for the balance, and levied upon the land. This would have been, not only irregular, but without warrant of law. No other land than that upon which the attachment was levied could be sold under any process issuing upon a judgment rendered in that case. The effect of a judgment in an attachment is stated, with his usual clearness, by Mr. Justice Miller in *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931. He says:

"If the defendant appears, the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is evidenced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or any other proceeding not affecting the attached property."

The question is exhaustively discussed in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. The only effect of a judgment in a proceeding begun by an attachment, where there is no personal service, nor appearance by defendant, is to subject the property attached to the payment of the demand which the court may find to be due the plaintiff. 3 Am. & Eng. Enc. 186. As to garnishment proceeding, see 14 Am. & Eng. Enc. 742.

Giving full effect, therefore, to the recitals in the deed, aided by the docket entries, and, accepting as true plaintiff's contention that the sale by the sheriff was made under execution issued on the judgment rendered in the case referred to in the docket entries, the conclusion is irresistible that such sale was not warranted by such judgment and no title passed to the purchaser. This conclusion does not involve any collateral attack upon the judgment, but gives to it the force and effect to which it is entitled. When it was satisfied by payment of the amount in the hands of the garnishee, its force was expended. No other or further process could lawfully issue upon it.

There is another view which I think would be fatal to plaintiff's title. Defendant introduced the record, showing a deed from John Campbell, Sr., to John Campbell, Jr., and Andrew Joyner, dated December 12, 1827. This deed was made upon an express trust to sell the land for the purpose set out. Why did not this deed take the legal title out of John Campbell, Sr., the ancestor of plaintiff? It is true that John, Jr., was also the ancestor of plaintiff; but by the deed he became a tenant in common with Joyner, and this title plaintiff does not claim to own. It will be observed that this deed contains no clause of defeasance; there is no equity of redemption left in the grantor; the direction to sell is unconditional.

[2] While, for the first cause assigned, the bill must be dismissed, it may be well enough to say that the pleadings and evidence here show a case in which plaintiff has a plain, complete, adequate remedy at law, which excludes the equitable jurisdiction of this court. Conceding that plaintiff has the paper title, he, or those under whom he claims, never had any other—were never in possession. Defendant asserts ownership acquired by an ouster by his grantor, followed by seven years' possession under color of title. This is the sole question in controversy, bringing the case clearly within the decision rendered in *New Jersey Land & L. Co. v. Gardener-Lacy L. Co.* (C. C.) 190 Fed. 861. As was said by Judge Goff, in *Buchanan v. Adkins*, 175 Fed. 692, 99 C. C. A. 246, the real object of the suit is to obtain by the decree of a chancellor that which, under our jurisprudence, can only be had by a judgment rendered upon the verdict of a jury.

A decree will be drawn dismissing the bill at plaintiff's cost.

In re ZEPHYR MERCANTILE CO.

(District Court, N. D. Texas. March 1, 1913.)

No. 148.

BANKRUPTCY (§ 184*)—CONTRACT—CONDITIONAL SALE OR BAILMENT.

A bankrupt having ordered certain flour and meal from claimant, the latter refused to ship, except on "consigned terms" declaring that claimant would not pass the possession of the goods to the bankrupt, or to any one. This being agreed to, the material was shipped, without any express reservation of title in the claimant; nor was there any stipulation for a return to claimant of the unsold portion. It was provided, however, that the material should be sold at retail in the course of trade, the bankrupt to pay therefor in money as the goods were sold, and being required to check up and settle every 15 days. It was also provided that the bankrupt should insure the material for the claimant and in its name, but this was not done. *Held*, that the transaction was not a bailment, but a conditional sale, and, not having been filed for record as required by the state law, was invalid as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of the Zephyr Mercantile Company. On certificate of a referee to review an order denying the claim of the Krum Mill & Elevator Company for reclamation of goods or the proceeds of their sale. Affirmed.

Leake, Henry & Robertson, of Dallas, Tex., for claimant.

MEEK, District Judge. The Krum Mill & Elevator Company (hereinafter called the mill company) filed its petition with the referee for the reclamation of certain flour and meal it claimed to have shipped on consignment to Zephyr Mercantile Company (hereinafter called the bankrupt), and which was on hand at the date of bankruptcy, or, in the alternative, for the payment to it by the trustee of the bankruptcy estate of the proceeds of the sale of such flour and meal. The trustee contested the right of the mill company to reclaim this merchandise,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or the proceeds. After hearing, the referee entered an order denying the mill company this relief. A review of this order is sought.

The summary of the evidence contained in the certificate of the referee includes the letters and telegrams, passing between the mill company and the mercantile company, which resulted in the shipping to the bankrupt of the flour and meal. It must be determined, from this correspondence and from the acts of the parties with regard to this shipment, as to whether the merchandise was consigned to the mercantile company for sale on behalf of the mill company, or whether it was conditionally sold to the mercantile company. The correspondence passing between the parties and their acts in the premises are as follows:

"October 11, 1912.

"Zephyr Mercantile Company, Zephyr, Texas—Gentlemen: Relative to your order given to our Mr. Glen, wish to say that we cannot confirm same, only on consigned terms. By this we mean that we will not pass possession of the goods to you, nor any one, but will expect you to pay for same as sold, at price per sales ticket, and to take out insurance policy covering the same in our name, we to pay cost of such insurance. If you are doing a cash business, this plan should appeal to you, as you will not have to pay only as the goods leave your possession. But we will expect you to check up your stock at least every 15 days, and remit for all goods not in your stock. If the above terms are satisfactory to you, and you are needing the goods, you may wire, at our expense, the following wire: "Letter received, ship car per same"—and we will make the shipment at once.

"Yours truly."

"That the following telegram was received in response to the above letter, viz.:

"Zephyr, Texas, October 12th.

"Krum Mill & Elevator Company, Krum, Texas. Letter received, ship car per same. Zephyr Mercantile Company."

"That the meal and flour were shipped upon receipt of said telegram, and that the following memorandum was mailed to the Zephyr Mercantile Company, to wit:

"Krum, Texas, October 14, 1911.

"Consigned to the Zephyr Mercantile Company, Zephyr, Texas. To be sold as the property of the Krum Mill & Elevator Company. [Then follows a description of the goods.] In acceptance of this invoice, the consignee agrees that they are consignment goods, and property of the Krum Mill & Elevator Company, of Texas, and are to be sold for their account, and remitted for at above prices."

"That this notation was not signed by the said Zephyr Mercantile Company; that the Zephyr Mercantile Company did not take out the insurance as contemplated; that this meal and flour was placed with the stock belonging to the said Zephyr Mercantile Company daily exposed for sale. That the Zephyr Mercantile Company wrote the following letter relative to a shortage, to wit:

"Zephyr, Texas, October 25, 1911.

"Krum Mill & Elevator Company, Krum, Texas—Gentlemen:—Find inclosed policy. In checking up the flour [word omitted] to be short 80 sacks. The drayman kept tab; also found 80 short.

"Yours very truly,

Zephyr Mercantile Company."

"That the Krum Mill & Elevator Company wrote the following letter in regard to the insurance, to wit:

"October 16, 1911.

"Zephyr Mercantile Company, Zephyr, Texas—Gentlemen: Inclosed you will find invoice and bill of lading for car of flour products, shipped as per

our agreement by wire and letter. You will note that we failed to get the amount of meal your order called for. This we regret, but to have filled the order in full would have caused us to have held the car another day. The car left here yesterday morning, and should reach you by the time this does. Kindly have the goods covered by invoice immediately on arrival, and have same insured in the Krum Mill & Elevator Company's name. Mail us the policy, and charge the amount of premium to us. If there is any representative of the London & Globe Insurance Company in your city, would prefer it insured in that company. Kindly check up your stock of flour about every 15 days, and remit for all not in stock, as you doubtless know the law on disposing of consignment goods. Relative to the quality, we are behind anything you may want to say. Thanking you for the order, we are,

"Yours very truly,

Krum Mill & Elevator Company."

"October 26, 1911.

"Zephyr Mercantile Company, Zephyr, Texas—Gentlemen:—Inclosed you will find insurance policy, which we are returning to you, asking that you make the following corrections: First. This policy must be in our name, as per our instructions to you. It may appear to you that the loss payable clause covers this; but it does not, and we want the policy to cover flour and mill products only, and make the amount only \$500. Relative to the shortage which you report, will say that we loaded by double check 350 48-lb. Rainbows, 180 48-lb. Creams, 65 35-lb. meal and 25 17-lb. If you did not check out this many there is bound to be a mistake somewhere, and we positively know that this flour was put in the car, and, if the car went through to your station with the same seals it left here on, it is bound to have been in and all arrived. Kindly investigate this at once, as our agent can certify that this amount of flour was in the car at the time of sealing. Kindly attend to the insurance matter at once.

"Yours very truly,

Krum Mill & Elevator Company."

"November 2, 1911.

"Zephyr Mercantile Company, Zephyr, Texas—Gentlemen: We ask that you kindly favor us with a reply to ours of the 26th, as this insurance matter is important, as we trust that you will give it your immediate attention. Awaiting your reply, and trusting that you have found your error in counting the flour out, we are,

"Very truly yours,

Krum Mill & Elevator Company."

"That the Krum Mill & Elevator Company received no communications from the Zephyr Mercantile Company, except those mentioned above. That the said Zephyr Mercantile Company sold some of the meal and flour, and made two deposits in the First State Bank at Zephyr, Tex., one on the — day of October, A. D. 1911, for the sum of \$2.60, and another on the 30th day of October, A. D. 1911, for the sum of \$2.05, in favor of the Krum Mill & Elevator Company. That it has been agreed by the receiver that the flour and meal described in the reclamation petition is the flour that was on hand and received by him as receiver of the estate. That he received 429 sacks of flour, 53 sacks of meal, and 22 one-half sacks of meal, which he found to be in a rat-eaten condition, and considered necessary to be sold to preserve the main part, which he did sell at the best price he could get, for \$448.37, which amount is subject to the orders of the referee herein, and the petition in reclamation filed in this proceeding. That none of the letters or telegrams or any contract has been filed in the county clerk's office of Brown county, Tex. That the said Krum Mill & Elevator Company claimed that it was entitled to the flour and meal, or the money, until it was paid for. That the Zephyr Mercantile Company had and has its residence in Brown county, Tex., and was engaged in the general merchandise business, buying and selling flour, meal, and other merchandise, at retail, and was so engaged when it procured the flour in question in this suit; and it was understood between the Krum Mill & Elevator Company and the Zephyr Mercantile Company, at the time of the contract between them, and at the time the said mercantile company received said flour, that said flour was to be by said mercantile company daily exposed for sale in said business at re-

tail, and to sell it in the usual course of business, and the said Zephyr Mercantile Company did keep said flour in its stock, and daily exposed and offered it for sale by retail in Zephyr, Brown county, Tex., from the time it received said flour until said R. H. Foster, receiver, took possession thereof. At the time the contract herein referred to was made, the Krum Mill & Elevator Company was doing a general business of selling flour and meal to retail merchants in Texas.

The terms upon which the flour and meal were shipped to the bankrupt are set forth specifically in the letter of the mill company of date October 11, 1911. The bankrupt, by telegram of date October 12th, assented to and accepted these terms. The mill company stipulates that the goods will be shipped only on "consigned terms." Explanation of the phrase "consigned terms," as set forth in its letter, includes some, but not all, of the elements usually found in contracts covering consigned goods for sale by a factor. It will be noted the mill company declares: "We will not pass the possession of the goods to you, nor to any one." The physical possession of the goods was in fact passed to the bankrupt. It may be the writer of the letter intended the bankrupt should hold and exercise possession for the mill company. While proof of possession of chattels is *prima facie* evidence of title to them, it is not more. The mill company did not stipulate that the title to the flour and meal should be reserved in it. There is, therefore, an absence of express reservation of title in the mill company. Nor does the letter stipulate for the return to the mill company of any unsold portion of this merchandise. So far as I have investigated the authorities, this is a quite universal provision in contracts held to be good as consignment contracts. *Sturm v. Boker* 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, and cases there cited; *In re Marx Tailoring Co.* (D. C.) 28 Am. Bankr. Rep. 147, 196 Fed. 243; *In re Galt*, 120 Fed. 64, 56 C. C. A. 470.

It is insisted by the mill company that the return of any unsold portion is simply an incident which follows ownership; but in the absence from the contract of any expressed retention of title to goods shipped to another, to be sold in the course of trade, it would be presuming an incident of ownership in the absence of a declaration thereof. The mill company provides for the payment in money for all goods shipped. The time of payment is deferred until the goods are sold; "but we will expect you to pay for same as sold." Again:

"But we will expect you to check up your stock at least every 15 days, and remit for all goods not in your stock."

The mill company stipulates that the bankrupt shall "take out insurance policy covering same in our name, we to pay the cost of such insurance." This is an accustomed provision in consignment contracts; but, as in the matter of the return of any unsold portion, it is a mere incident indicating ownership, which in the absence of a specific declaration of ownership loses much of its significance. An insurance policy was taken on the goods by the bankrupt, but not in the name of the mill company. The memorandum of the mill company, mailed to the bankrupt at the time of the shipment of the goods, would have assisted to make clear and fix the status of the parties as consignor

and consignee respectively of this shipment; but this memorandum seems not to have been assented to by the bankrupt, at least it was not signed by it. It is not for the court to make a contract for the parties; its duty is to interpret the legal significance of what has been done by the parties. Unquestionably the effort on the part of the mill company was to give the shipment of flour and meal the qualities and characteristics of a shipment of goods on consignment; but with the nice distinctions obtaining between a sale of goods and a shipment on consignment, and in the absence from the contract of the essential elements above referred to, I am of opinion it failed to accomplish its purpose, and am therefore constrained to hold that the flour and meal were conditionally sold to bankrupt. In the absence of the filing for record of the contract of conditional sale prior to the institution of bankruptcy proceedings, the trustee of the estate is entitled to the proceeds arising from the sale of the shipment.

The order of the referee will be affirmed.

RICE v. BOSTON & M. R. R.

(District Court, N. D. New York. March 17, 1913.)

REMOVAL OF CAUSES (§ 3*)—REMANDING*—EMPLOYER'S LIABILITY ACT.

Where a complaint for injuries to an employé of an interstate railroad alleged facts which might warrant a recovery either at law, under a statute of Massachusetts, or under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), such complaint having been held by the New York state courts to state but a single cause of action based on several grounds of liability, a removal of the action to the federal courts for diversity of citizenship could not be sustained; the cause of action, so far as it depended on the Employer's Liability Act, being nonremovable, as expressly provided by section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 141]).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

At Law. Action by Ronald J. Rice against the Boston & Maine Railroad, involving a cause of action for injuries under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). On motion to remand cause, same having been removed to the federal court from the Supreme Court of the state of New York, where commenced. Granted.

Leary & Fullerton, of Saratoga Springs, N. Y., for the motion.
Jarvis P. O'Brien, of Troy, N. Y., opposed.

RAY, District Judge. In this case there is the necessary diversity of citizenship and amount in controversy to warrant removal to and retention of the case in the federal court, but the plaintiff insists it is a case arising under the federal act of April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), "An act relating to the liability of common carriers by railroads to their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

employés in certain cases," and that it lawfully could not have been removed from the Supreme Court of the state, and must be remanded.

Section 28 (chapter 3, "District Court, Removal of Causes") of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 141]), after providing for the removal of causes, says:

"Provided that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The plain reading and effect is to prohibit the removal of a case arising under that act into the federal court. The complaint in this action states facts showing a cause of action under the federal act referred to; but it goes further, and states facts not necessary to the statement of a cause of action under the federal act, and which make out a liability of defendant at common law, and also under an act of the Legislature of the state of Massachusetts. The result is that, if the case is remanded as the pleadings stand, the plaintiff at the trial in the state court may not find it necessary to make out a cause of action under the federal act, one not removable, but may prove a cause of action sustainable at common law, or one under the Massachusetts statute, etc., a removable cause of action, and prevail on that cause of action, thus depriving the defendant of the right to remove as to such a cause of action to the federal court and have the case on that issue tried there. In short, by pleading facts bringing the case within the federal act, and facts bringing the case within the common-law liability, and facts bringing it within the state statute liability, not necessary to be alleged or proved to make a case under the federal act (and the facts alleged bringing it within the federal act not being necessary to the cause of action under the common law or state statute), in the state court, the plaintiff may succeed on either one of three theories; that is, he may abandon all pretense that the case is within the federal act and yet succeed. By artful pleading he defeats removal.

This question of removal has been up in the following cases: *Van Brimmer v. Texas & P. R. Co.* (C. C.) 190 Fed. 394; *Symonds v. St. Louis & S. E. R. Co.* (C. C.) 192 Fed. 353; *Lee v. Toledo, St. L. & W. R. Co.* (D. C.) 193 Fed. 685; *Hulac v. Chicago & N. W. R. Co.* (D. C.) 194 Fed. 747; *McChesney v. Ill. Cent. R. Co.* (D. C.) 197 Fed. 85; *Ullrich v. New York, N. H. & H. R. Co.* (D. C.) 193 Fed. 768. The *Ullrich Case* is nearest in point here, and assumes that three causes of action are pleaded, which under the New York Code seems not to be the case. See later.

If, on the trial in the state court, the plaintiff shall abandon the theory that the case arose under the federal act, or shall fail to show a case within that act, and that court has power at once to send the case back to the federal court, the rights of the defendant to removal will be protected and preserved. However, it is plain the New York courts cannot do this. Section 29, Judicial Code of the United States. In *Payne v. N. Y. S. & W. R. R. Co.*, 201 N. Y. 436, 95 N. E. 19, the Court of Appeals (New York) has held in effect that this complaint

states but a single cause of action, although based on three several grounds of liability, viz., the federal statute, the common-law liability, and the Massachusetts statute. The syllabus of the case is as follows:

"In an action to recover damages for personal injuries claimed to have been caused by the negligence of defendant, the plaintiff may allege in a single cause of action all the facts which he claims contributed to or caused the accident.

"Where a complaint in such an action sets forth facts which would render a defendant liable to an injured employé under the common law, and also under a state employer's liability statute, as well as a federal statute to the like effect, there is but a single cause of action stated, although based on several grounds of liability, and the plaintiff may not be compelled to separately state and number the facts relied upon to support an action on each ground of liability as a separate and distinct cause of action."

It follows, it seems to me, that this court cannot compel the plaintiff to elect, as a condition of remanding, that he will at the trial stand on the federal act. This court cannot regulate pleading in an action at law contrary to the decisions of the Court of Appeals of the state of New York as to the meaning and effect of the Code of Civil Procedure of that state regulating pleadings in the state court, and which practice must be followed, so far as may be in all actions at law, in the United States court.

Can the federal court change the rule of the Payne Case to protect the right of removal? As under the New York Code of Civil Procedure the plaintiff has stated but a single cause of action (*Payne v. N. Y. S. & W. R. R. Co.*, supra), founded on three grounds of liability, the federal act, the state act, and the common-law right, and has alleged that the defendant, with its train, was engaged in interstate commerce, and that plaintiff, at the time of receiving the injury complained of, was in its employ on such train, and also engaged in interstate commerce, the cause must be remanded. As the pleading is proper under the New York Code and decisions, and states but a single cause of action, and this court is dealing with a case brought in the courts of the state of New York, and a cause of action properly pleaded under the procedure of the courts of that state, I do not see that this court can impose any condition on remanding the case. It seems to me the state court, when it comes to deal with the case at the trial, will treat it as one arising under the federal act, and that, if the plaintiff fails to show that it arose under that act—that is, that the plaintiff and defendant were engaged in interstate commerce at the time of the injury complained of—it will dismiss the case. In short, it would seem that the state court ought to hold the plaintiff to proof of the allegations necessary to bring the case within the federal act, and not allow a recovery unless he does.

But this court cannot direct or control the action of the state court, and should not attempt to do so. Neither can it regulate or control a pleading properly framed in an action commenced in that court. It is presumed that the state court, so far as it can, will do everything necessary to protect the rights of the defendant, and not allow its forms of pleading to be used to deprive a defendant of the substantial right to remove a cause to the federal court for trial, when that case turns out to be a removable one, and removal was attempted and defeated

at the instance of the plaintiff, for the reason the plaintiff, by pleading and assertion, had declared it to be one within the federal act. It may be that some further legislation will be deemed wise and necessary; but, if the New York courts hold that with the "several grounds of liability" pleaded it is still "a single cause of action," and one under the federal act, the plaintiff will be held to proof bringing it within that act, and as a result removal will be defeated in the excepted case only, and properly.

Motion to remand granted.

In re GREENBERGER.

(District Court, N. D. New York. March 14, 1913.)

1. BANKRUPTCY (§ 348*)—PREFERENCES—"WORKMAN, CLERK, OR SERVANT."

The fact that the manager of a branch store of a bankrupt, in addition to his duties as manager, sold goods, kept the store clean, and kept the accounts did not make him a "workman, clerk or servant," so as to entitle him to a preference as to his claim for unpaid services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

2. BANKRUPTCY (§ 166*)—"PREFERENCES"—DISALLOWANCE OF CLAIM.

Where, at the time a servant of a bankrupt received part payment for services, he did not know and had no reasonable cause to believe that his employer was insolvent and intended to give him a preference by making a payment, such payment did not constitute a "preference," as defined by Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), sufficient to require its surrender, in order to enable the servant to prove the balance of his claim for services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498-5499; vol. 8, p. 7759.]

In Bankruptcy. In the matter of bankruptcy proceedings of Frank Greenberger. Application by Samuel Cohen, a creditor, to review a referee's order allowing his claim of \$198 as a general claim, but denying its priority, and also by certain creditors asking to review the same order allowing the claim as a general one; they claiming that it should not be allowed, because the claimant received a preference and refused to surrender the same. Affirmed.

Herman Metzner, of Glens Falls, N. Y., for Cohen.

J. Ward Russell, of Glens Falls, N. Y., for trustee.

Henry W. Williams, of Glens Falls, N. Y., for creditors.

RAY, District Judge. [1] The bankrupt ran two stores, one at the city of Glens Falls, N. Y., and for about 11 months prior to June 6, 1912, he ran a branch store in the city of Rutland, Vt. The claimant, Samuel Cohen, was manager of this branch store in the city of Rutland, and so testified repeatedly. It appears that lady clerks were employed in this store. Cohen kept the accounts and managed the business, ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cept that he did not hire or discharge help or pay the bills for goods, as a rule. However, he was the manager, and managed the business. He had a regular salary as such manager, and at the time the petition in bankruptcy was filed there was a balance due him on such salary of \$198. It appears from his testimony that, in addition to the performance of his duties as manager, he sold goods and kept the store clean, for the reason he would not turn this duty over to the lady clerks. It appears fairly from the evidence that the clerical work performed by him, as well as the work done in keeping the store clean, was merely incidental to the performance of his duties as general manager of the store. He was not employed as a cleaner or workman or clerk, and so far as appears all that he did in selling goods and cleaning the store was voluntary on his part.

This court has recently passed on this question. In *re* Crown Point Brush Co. (D. C.) 200 Fed. 882. In that case *In re* Albert O. Brown & Co. (D. C.) 22 Am. Bankr. Rep. 496, 171 Fed. 281 was approved. See, also, *In re* Gurewitz, 10 Am. Bankr. Rep. 350, 121 Fed. 982, 58 C. C. A. 320.

It can make no material difference that Greenberger was carrying on this business as an individual. Cohen was neither a workman, clerk, traveling or city salesman, nor servant. The fact that, as incident to the performance of his duties as general manager of this store, he kept it clean and did some clerical duty does not change the character of his employment. He was not employed to do that work, but to manage the business, and he was paid for managing it, and not for performing such menial service as he did perform as incident to the management. The claim is for salary and for salary as manager, not for services as a clerk or general workman and compensation as such.

The referee was right in holding that the claim of Cohen could not be allowed as one entitled to priority. It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the bankruptcy act giving priority to workmen, clerks, salesmen, and servants.

[2] I do not think the appeal of the trustee and creditors can be sustained. Subdivision "g" of section 57 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides that the claims of creditors who have received preferences voidable under section 60, subd. "b," shall not be allowed, unless such creditors shall surrender such preferences. By subdivisions "a" and "b" of section 60, it is provided, in substance, as applied to this case, that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class; and if a bankrupt shall have given a preference, and the

person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee. The preference, if given, to defeat allowance of a claim, must have been a voidable one, and to be voidable the person receiving it must have had *reasonable cause to believe* that it was *intended* thereby to give a preference. I agree with the referee that Cohen is not shown to have had such knowledge of Greenberger's business—main business, or business as a whole—as to show that he (Cohen) had reasonable cause to believe that a preference was intended. He did know the business of the branch store at Rutland was running behind, and that Greenberger was at times hard up for ready money; but he knew substantially nothing of the business at Glens Falls or of Greenberger's financial condition. A merchant may be hard up for ready money and still solvent. Cohen had at times loaned money to his employer, but it had been paid. Cohen, it seems to me, was unlettered, but honest. One or two of his answers would indicate, standing alone, that Cohen knew Greenberger was insolvent and about to fail, and demanded and received his money for that reason; but his evidence is to be read all together and effect given accordingly.

"Q. When you saw things were going to the bad here, you thought you would ask him for it? A. I didn't see until the last minute; didn't pay any attention to it. Always had great confidence in Mr. Greenberger."

Then later:

"Q. But you thought his affairs had gotten to a point where he couldn't pay, and you thought you would get yours, if possible? A. Yes, sir."

On his whole evidence I concur with the referee in the conclusion that Mr. Cohen did not understand the purport of some of these questions. So far as the evidence discloses, he had no reasonable cause to believe that Greenberger was insolvent, unable to pay his debts, and that in paying his (Cohen's) he intended a preference. It has been many times held that mere suspicion of insolvency is not sufficient. And the referee saw and heard Cohen when he gave his evidence, and was better able to arrive at a correct conclusion than is the court.

The order of the referee, disallowing the claim as entitled to priority and allowing same as a general claim, is affirmed.

In re KEITH-GARA CO.

(District Court, E. D. Pennsylvania. March 13, 1913.)

No. 4,579.

BANKRUPTCY (§ 350*)—CLAIMS—PRIORITY—"DEBT OWING TO ANY PERSON"—"DEBT."

Where a lease of real property in Pennsylvania by a bankrupt contained a provision that, if the lessee became a bankrupt, the whole rent for any unexpired portion of the term should be at once due and payable, and be first paid out of the proceeds of any sale of the tenant's assets, etc., which provision was valid under the Pennsylvania law, and effective to give the landlord a priority of payment, the landlord's claim for unaccrued rent on the bankruptcy of his tenant became a "debt owing to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any person," within Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that priority shall be given to debts owing to any person who by the laws of the state or the United States is entitled to priority; the term "debt" being defined by the act to include "any debt, demand or claim provable in bankruptcy."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7268.]

In Bankruptcy. In the matter of bankruptcy proceedings of the Keith-Gara Company. On certificate of a referee presenting for review an order allowing a landlord's claim for priority in the payment of rent. Affirmed.

Henry T. Dechert, of Philadelphia, Pa., for claimant.

Benjamin H. Ludlow and Humbert B. Powell, both of Philadelphia, Pa., for trustee.

J. B. McPHERSON, Circuit Judge. The order now under review allowed a landlord's claim for priority in the payment of rent. By agreement of counsel the amount claimed before the referee has since been reduced to \$515.60; this being the sum that would have been due for the period from December 23, 1912, to March 31, 1913, if the bankrupt had continued to occupy the premises under the lease. The relevant facts are as follows: The adjudication was entered November 6, 1912, upon a voluntary petition. At that time the bankrupt was a tenant of the claimant under a year to year lease that would expire on March 31, 1913. The trustee continued the occupation and paid the rent for a few weeks, and on December 22d offered to surrender the premises, but the landlord refused the offer and has not yet (March 13, 1913) retaken possession. The bankrupt's goods on the premises—which, of course, were liable to distress—were sold by the receiver (who afterwards became the trustee) and produced a larger fund than is needed to pay the landlord's claim in full. The rent was payable in advance on the 1st day of each month, and confessedly one month's rent at least was due when the adjudication was entered. But the trustee paid the actual arrears in full, and, as he has also paid all that became due for use and occupation up to December 22d, the only question for decision is whether priority should be allowed for the remainder of the unexpired term. The landlord asserts that by virtue of the following provision in the lease the rent, not only for one month, but also for the remainder of the term, had become due at the date of adjudication and (being for a shorter period than one year) was entitled to priority under the Pennsylvania law:

"If the lessee shall become embarrassed, make an assignment for the benefit of creditors, commit an act of bankruptcy, become bankrupt, or be sold out by sheriff's sale, or under any other compulsory procedure, or order of court, then the whole rent for any unexpired portion of the term of this lease, or any continuance thereof, shall at once become due and payable as if by the terms of this lease it were payable in advance, and shall be first paid out of the proceeds of any such assignment, sale or procedure, any law, usage, or custom to the contrary notwithstanding."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This contention is fully supported by the decisions of the Supreme Court of Pennsylvania. In *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877 (a case that is recognized in *Teufel v. Rowan*, 179 Pa. 408, 36 Atl. 224), that court holds as follows:

"A stipulation in a lease for years that if the lessee shall become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, the whole rent for the balance of the term shall become due and payable in advance of other claims, is not against public policy, and will be sustained in favor of the landlord on a distribution of the proceeds of a sheriff's sale of the lessee's property, to the extent of giving the landlord priority for one year's rent."

If, therefore, the landlord's claim to priority depended solely upon the law of Pennsylvania, nothing more would be needed. But, of course, it remains to consider whether the Bankruptcy Act forbids the application of the Pennsylvania law; for the act is supreme in its own field, and where its provisions conflict with the laws of a state these laws must give way. In our opinion, however, the Bankruptcy Act is not only not in conflict with the law of Pennsylvania on this point, but is in harmony therewith. Section 64b(5) provides that among the debts to have "priority, shall be * * * (5) debts owing to any person who, by the laws of the state or the United States, is entitled to priority." If, then, the landlord's claim now in dispute is a "debt owing to any person," the question must be answered in the landlord's favor. Now, a "debt" is defined by the act to mean "any debt, demand, or claim provable in bankruptcy"; and the question, therefore, may be stated in this form: Is the foregoing claim to priority provable in bankruptcy? At this point the decisions diverge and cannot be reconciled. Some courts hold that a landlord's claim under such a provision in the lease is essentially contingent, and therefore is incapable of proof. *Roth & Appel, In re*, 24 Am. Bankr. Rep. 588, 181 Fed. 667, 104 C. C. A. 649; *Shapiro v. Thompson*, 24 Am. Bankr. Rep. 91, 160 Ala. 363, 49 South. 391; *Re Collignon (D. C.)* 4 Am. Bankr. Rep. 250. While other courts permit the claim to be proved, holding that section 63a(4) is broad enough to cover it. *Moch v. Bank*, 6 Am. Bankr. Rep. 11, 107 Fed. 897, 47 C. C. A. 49; *Martin v. Orgain*, 23 Am. Bankr. Rep. 454, 174 Fed. 772, 98 C. C. A. 246; *Re Gerson (D. C.)* 5 Am. Bankr. Rep. 89, 105 Fed. 891; *Re Orne (C. C.)* 12 Fed. 779; *Re Smith (D. C.)* 17 Am. Bankr. Rep. 112, 146 Fed. 923; *Re Pittsburgh Drug Co. (D. C.)* 20 Am. Bankr. Rep. 227, 164 Fed. 482; *Re Dunlap Co. (D. C.)* 20 Am. Bankr. Rep. 882, 163 Fed. 541; *Re Caloris Co. (D. C.)* 24 Am. Bankr. Rep. 609, 179 Fed. 722. In this circuit, as I think, the latter opinion has been more frequently followed, although dissatisfaction is apparent now and then. *Wilson v. Trust Co.*, 52 C. C. A. 374, 114 Fed. 742; *Winfield Mfg. Co. (D. C.)* 140 Fed. 185. Of course, if a landlord retakes possession of the property, his right to claim priority can no longer be enforced. *Wilson v. Trust Co.*, supra; *Re Herrick (C. C. A.)* 200 Fed. 50; *Re Winfield Mfg. Co. (D. C.)* 137 Fed. 984.

In the present case, therefore, following what I understand to be the prevailing current of decision, I hold that when the adjudication was entered the landlord had a valid provable claim for the remaining

portion of the term, that he did not destroy or impair his claim by resuming possession of the premises, and that under the Pennsylvania law he is entitled to priority of payment for the period referred to.

The order of the referee is affirmed.

H. CLARK & SONS, Inc., v. SOUTHERN EXPRESS CO.¹

(District Court, E. D. Virginia. March 11, 1913.)

INJUNCTION (§ 137*)—MANDATORY INJUNCTION—TRANSPORTATION OF LIQUOR—RESTRAINING ORDER.

Where complainant, operating a mail order liquor business in Virginia, had been in the habit of shipping liquor by means of defendant express company to its customers in South Carolina, but after the passage of the Webb-Kenyon law defendant refused to receive further shipments of liquor for transportation into South Carolina, on the ground that if it did so it would violate the criminal laws of that state, complainant was not entitled to a temporary restraining order, requiring the express company to accept further shipments of that character, in a suit to which the state of South Carolina or its representative was not a party.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307, 309; Dec. Dig. § 137.*]

In Equity. Bill by H. Clark & Sons, Incorporated, against the Southern Express Company, for a temporary restraining order in a suit for mandatory injunction restraining defendant from refusing to transport liquor in interstate commerce from Virginia to South Carolina. Temporary restraining order denied.

Smith & Gordon, of Richmond, Va., for complainant.

Thomas Wall Shelton, of Norfolk, Va., for defendant.

WADDILL, District Judge. Complainant, suing in its own behalf and of others similarly situated, files its bill, praying an injunction against the defendant to prevent it from refusing to accept shipments of spirituous liquors for the state of South Carolina, and to require it by mandatory order to transport the same there, averring as a cause therefor that it conducts a large mail order business in liquors in that state, to private individuals, and not for resale, and that the action of the defendant in refusing, since the 5th day of March last, to accept its shipments, has greatly injured it, and that unless restrained from so doing its action will prove destructive of its business. The Express Company, by counsel, replies that it has heretofore received such goods from the complainant, and transported the same, and would be glad to do so now, but that it is apprehensive, especially since the passage of the recent act of Congress known as the Webb-Kenyon bill, that if it did so it would violate the criminal laws of the state of South Carolina, and subject itself to heavy fines, and its officers and employees to imprisonment.

It will be seen at a glance that the question presented is whether the court, because of the business needs and necessities of the complainant, should attempt, in a proceeding to which the state of South

¹For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Carolina is not a party, to authorize the complainant, by the aid of a mandatory injunction on a preliminary hearing, to invade the territory of that state and do business in contravention of its Constitution and laws. The statement of the proposition is to answer it. The refusal to grant the relief asked for does not prevent the complainant from doing business in South Carolina, if it has the right to do so, but simply withholds the sanction of the court by the granting of the affirmative permission so to do, in advance of the ascertainment of what the law is, in an orderly and proper manner, in a proceeding to which the state of South Carolina or its representative should be a party. Complainant likewise is not denied redress as the result of the conclusion reached, because there is no averment that the Southern Express Company is not solvent, and as a public carrier liable for omission properly to perform its duty; and, moreover, if such averments were made, it may be said to be a matter of the gravest doubt whether, in a proceeding in which, on the one hand, the private interests and property rights of the citizen are involved, and, on the other, the power and authority of a sovereign state, in the matter of the control and regulation of its domestic affairs, and the peace and happiness of its people are concerned, the private claims and demands of the citizen should not give way, or at least be held in abeyance, pending the ascertainment of the true status of the parties; in other words, if complainant is denied the right to bring its commodities into the state, under its laws, it should, under the circumstances here, await the result of the contest over the right to evade the law, rather than have the same suspended pending such controversy.

In determining questions affecting local laws on the subject of the transportation of whiskies, etc., into a state, since the passage of the Webb-Kenyon bill, in terms leaving such articles of commerce subject to the local, as distinguished from the national, law, different propositions arise, to be determined upon considerations other than those formerly controlling.

The temporary restraining order prayed for will be denied.

In re SCHNEIDER.

(District Court, E. D. Pennsylvania. March 14, 1913.)

No. 4,243.

BANKRUPTCY (§ 140*)—TITLE OF TRUSTEE—CONDITIONAL SALES—STATUTES—AMENDMENT.

Act Cong. June 25, 1910, c. 412, 36 Stat. 838,† amending Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), providing that trustees in bankruptcy, as to all property in or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, did not invalidate a conditional sale antedating the amendment, as to the buyer's trustee in bankruptcy, which was otherwise valid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† U. S. Comp. St. Supp. 1911, p. 1491.

In Bankruptcy. In the matter of bankruptcy proceedings of August Schneider. On certificate of a referee to review an order directing a delivery of certain personal property to the trustee, as against the holder of an alleged lien under a conditional sale. Reversed, with instructions.

Elwood H. Deysher, of Reading, Pa., for petitioner.

John A. Keppelman, of Reading, Pa., for intervener.

J. B. McPHERSON, Circuit Judge. The bankrupt, who was a brewer, bought certain machinery from the Wittemann Company in May, 1909, which was delivered and installed a few weeks thereafter. Inter alia, the contract contained the following provision:

"The consideration on your part to be the payment of the following amount, \$4,340, payable as you may be able to do in installments within the next ensuing two years. The outfit to remain our property and no right of property thereto to pass to you until fully paid for in cash, you to waive all legal exemptions; you to defend our property and to hold us harmless against claims of third parties. The outfit to be insured by you against all damage."

Only part of the consideration had been paid in December, 1911, when the adjudication was entered. In the following March the referee decided that the contract was a conditional sale, and refused a petition of the company to reclaim the property, putting the decision upon the ground that the amendment of 1910 had clothed the trustee in bankruptcy with the rights, remedies, and powers of an execution creditor. The referee's order was entered on March 14th, and is now under review. It was probably made before *Arctic, etc., Co. v. Armstrong, etc., Co.* (C. C. A. 3d Circuit) 192 Fed. 114, 112 C. C. A. 458, was reported; at all events, that case, which holds that the amendment of 1910 does not affect rights vested under a contract that was made before its passage, evidently did not come to his attention. The facts there were, in substance, the same as the facts now before the court. Therefore, if it be assumed, but without decision of the point, that the contract in question was a conditional sale, it was nevertheless good between the parties; and, as the law stood in 1909, was good, also, against the trustee in bankruptcy. For this proposition many cases might be referred to; it is enough to cite *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and *Davis v. Crompton*, (C. C. A. 3d Circuit) 158 Fed. 735, 85 C. C. A. 633.

This is the only question raised by the referee's certificate, and I can decide no other. It is true that the referee has filed within the last few days what is entitled a—

"Supplement to certificate on review of referee's order dismissing the petition of the Wittemann Company praying that the trustee be directed to turn over to petitioner certain machinery."

And it is also true that in this supplement he expresses the opinion that Katharine B. Stocker, who became the first mortgagee of the brewery plant in 1907, and afterwards, in May, 1912, bought the plant from the trustee, may treat the machinery as fixtures, and has a right, under certain terms of the mortgage, that is superior to the right of

the company. But an opinion, without an order or a judgment, presents nothing to review. I am sure counsel will see, upon further reflection, that a court can only review an order or a judgment or a decree that takes some step in a cause, and not a mere opinion upon a question of law. The dispute between the company and the trustee was a distinct and separate matter; it has now been decided by this court, but the decision does not carry with it a decision of the other dispute between the company and Katharine Stocker. That is also distinct and separate; she has now taken possession of the machinery, and asserts that she bought a complete title thereto from the trustee at the public sale in May held under the referee's order, although the dispute between the trustee and the company had not then been finally decided, and although the order of sale expressly reserved the company's rights. Evidently, as it seems to me, I cannot decide this dispute effectively in the present condition of the record. If the referee be right, nevertheless there is no order to be enforced, either against Katharine Stocker or against the company; if I should disagree with his opinion, I can make no order myself (and compel obedience thereto) that would take the property out of her adverse possession and put it into the possession of the company. I am therefore obliged to remit the parties to such remedies, either in this court or elsewhere, as they may be able to invoke. Perhaps they may see their way to a settlement without further litigation.

The order of the referee, under date of March 14, 1912, is reversed, with instructions to grant the petition of the Wittemann Company.

NORTH v. HERRICK et al.

(District Court, N. D. New York. March 11, 1913.)

EQUITY (§ 352*)—APPOINTMENT OF EXAMINERS—GROUNDS.

That the trial of an equity case will occupy several days does not show such "good and exceptional cause for departing from the general rule," as authorizes appointment of an examiner to take evidence out of court of witnesses residing within the jurisdiction, within federal equity rules 46, 47 (198 Fed. xxxi, 115 C. C. A. xxxi), effective February 1, 1913, which require testimony to be taken orally in open court, except for good and exceptional cause, etc.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 736; Dec. Dig. § 352.*]

In Equity. Action by Charles F. North, trustee, against George M. Herrick and others. On motion by complainant to appoint an examiner to take evidence out of court. Motion overruled.

Walter H. Wertime, of Cohoes, N. Y., for the motion.

Thos. S. Fagan, of Troy, N. Y., opposed.

RAY, District Judge. This action was commenced in August, 1912. The answer was served in September, 1912. A replication was filed and served January 24, 1913. The transactions complained of arose at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or near Cohoes, N. Y., quite near the city of Albany, where a term of this court commencing February 11, 1913, has just closed. The case was not placed on the calendar of the court. The recent new rules which went into effect February 1, 1913, are in the interest of the speedy trial of causes, and look to the production in court of the witnesses whose attendance may be procured; that is, those within the jurisdiction of the court. Cohoes is but a few miles from Albany. It is all-important that the court or jury both see and hear the witnesses who speak on disputed questions. Here we have questions of insolvency, preference, and fraud and conspiracy, all in dispute, and it is a case where court and jury should have the benefit of the presence in court of the witnesses so far as possible. The trustee has been in a position to examine the bankrupts and other parties before the referee in bankruptcy, and cannot be ignorant of the evidence he can produce or of most of the witnesses who are to speak on these subjects. It would seem not difficult to ascertain and agree upon the weight of certain cases of goods and their contents. If in serious dispute, the court should see and hear the witnesses.

The court suggested an adjournment of the Albany term in case a trial at that place is desired, but neither party seemed desirous of this. There is a term of this court at Syracuse, commencing April 1, 1913, and another in June, 1913, at Binghamton. I see no reason for departing in this case from the spirit and letter of the new equity rules promulgated by the Supreme Court, the wisdom of which cannot be seriously questioned. The judges are generally quite opposed to such departures. When witnesses are present in court, objections can be made and rulings had by the court, and much better justice administered, than when the evidence is taken out of court before an examiner, without power to rule on the questions presented.

Rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) provides:

"In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."

And rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi) provides:

"The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court, or upon a reference to a master to be taken before an examiner or other named officer, upon the notice and terms specified in the order."

These rules do not interfere with taking depositions as provided by sections 863, 865, 866, and 867, Rev. St. (U. S. Comp. St. 1901, pp. 661-664). See rule 54 (198 Fed. xxxiii, 115 C. C. A. xxxiii). I cannot hold that "good and exceptional cause for departing from the general rule" has been shown. The only real reason alleged is that the trial will probably occupy several days. This is not at all unusual.

Application denied.

JACOB DOLL & SONS, Inc., v. RIBETTI.

(Circuit Court of Appeals, Third Circuit. March 13, 1913.)

No. 1,630.

1. MASTER AND SERVANT (§ 320*)—PERSON FALLING FROM BUILDING—INJURY TO PEDESTRIAN—INDEPENDENT CONTRACTOR.

Where the tenant of a building, the outside wall of which was constructed flush with the sidewalk and six stories high without safety appliances to hold persons engaged in cleaning windows on the outside, engaged an independent contractor to clean the windows, and one of his servants, while at work, by reason of the absence of such safety appliances, fell to the street, and struck and injured plaintiff as he was passing on the sidewalk, the work required of the servant being inherently dangerous, the servant would be regarded as the servant of the tenant who was liable for the injuries sustained, regardless of the employment of the independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1261; Dec. Dig. § 320.*]

2. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSONS—EXERCISE OF CARE—QUESTION FOR JURY.

Where defendant, a tenant of a building erected flush with the sidewalk, permitted the servant of an independent contractor to stand on window ledges to clean windows on the outside without providing scaffolding or other safety appliances, and the servant fell and injured plaintiff, who was walking past the building, whether the tenant was negligent in not providing scaffolds or safety appliances was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

3. MASTER AND SERVANT (§ 330*)—INJURY TO THIRD PERSON—BODIES FALLING FROM BUILDING—RES IPSA LOQUITUR.

Where a pedestrian walking on a sidewalk was struck and injured by a servant falling from an adjoining building while engaged in cleaning windows on the outside without safety appliances, proof of the happening of the accident was sufficient to raise a presumption of negligence on the part of the occupier of the building under the rule *res ipsa loquitur*.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by Giovanni Tommaso Ribetti against Jacob Doll & Sons, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

William S. Dalzell, of Pittsburg, Pa. (J. F. Tim and Dalzell, Fisher & Hawkins, all of Pittsburg, Pa., of counsel), for plaintiff in error.

Arthur O. Fording, of Pittsburg, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The defendant in error (hereinafter called the plaintiff) brought an action of trespass in the court below against the plaintiff in error (hereinafter called the defendant), to recover

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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damages for personal injuries received by him while passing along the sidewalk in front of the building occupied by defendant, in the city of Pittsburgh. The statement of claim sets forth the following:

That on the 14th day of February, 1910, and prior thereto, defendant was the lessee and occupant of a certain building on Penn avenue, one of the principal streets in the said city of Pittsburgh and devoted chiefly to business purposes. The building was six stories in height and stood flush with the sidewalk of Penn avenue, with windows of the ordinary type, intended to be opened and closed by sliding their sashes up and down. Along the side of the said street next to this building was the usual sidewalk, which, being in a frequented part of the city, was in constant use by pedestrians at all hours of the day.

That in the said city of Pittsburgh, it had been a custom to have the windows of such buildings cleaned by persons standing outside of the sash and on the sills of the windows, secured from falling by a stout belt worn about the waist, with a strap on each side thereof, fastened to a hook or other fixture set for the purpose in the side frames or casing of each window. That it was also a custom for persons engaged in the cleaning of windows, whether for themselves or under contract for others, to provide their workmen so engaged with belts and straps and the appropriate hooks or fixtures, for use in connection therewith, for the obvious purpose of protecting, as well the persons passing along the sidewalk as the cleaners themselves, and that windows on high buildings were generally equipped by the owners or occupiers thereof with such hooks or other fixtures.

It is then averred that the building occupied by the defendant was not and never had been provided with such hooks, or with any other fit or appropriate fixtures, for the purpose stated.

That at sometime before said 14th day of February, 1910, defendant entered into a contract with one Hearn, for cleaning the windows of the said building at stated intervals. That on that day, the windows opening upon said avenue were being cleaned under said contract by the agents and servants of Hearn. H. C. Burrell, one of said agents or servants, while so engaged, was standing on the outer sills of the windows while doing his work, without using a safety belt or other adequate safety appliance, as theretofore referred to, to prevent him from falling.

The defendant, long prior to said 14th day of February, 1910, "knew, or by the exercise of reasonable care should have known, that the windows of the building were not equipped with the customary hooks or other appropriate fixtures hereinbefore referred to; and knew, or by the exercise of reasonable care should have known, that some of the windows giving upon Penn avenue were so defective * * * that they could not be cleaned on the outside, except by persons standing on the outer sills thereof."

That on the day last aforesaid, while plaintiff was lawfully walking upon the sidewalk on Penn avenue, and passing the said building, the said Burrell, then engaged in so cleaning a window on the fourth story front thereof, above said sidewalk, and without the knowledge of the plaintiff, accidentally lost his balance and fell upon plaintiff, thereby injuring him, as thereafter set forth.

The plaintiff was a physician and surgeon, practicing in the city of Pittsburgh, and was severely and permanently injured by this accident.

The facts alleged in the statement of claim are for the most part undisputed, and there was evidence tending to support all of the allegations of fact upon which were based the charge of negligence of the defendant. The case was submitted to the jury, with a charge by the court, and to the judgment upon the verdict in favor of the plaintiff, this writ of error is taken.

[1] The only question raised by the assignments of error (apart from the one founded on the refusal of the court to direct a verdict for the defendant), is as to the legal responsibility of the defendant, as occupant of the building, for such neglect or default of an independent contractor undertaking to clean defendant's windows, as made the work unreasonably dangerous to those of the public lawfully using the sidewalk beneath. It was insisted by the defendant in the court below, as here, that the window cleaning contractor, being a man skilled and experienced in that line of work, had taken the responsibility for the conduct thereof out of the hands of the defendant into his own, and that he alone, and not the defendant, was liable for any negligence in the conduct of that work.

In this case, however, we agree with the court below, that the fact that the work was in the hands of an independent contractor cannot be interposed as a defense to the liability with which the defendant is sought to be charged.

The defendant was a lessee and occupier of the building in question. As such, he was in control thereof, and the law imposes upon such occupier a very positive duty to those using the highway upon which the building abuts, to use the care requisite, according to the circumstances, to guard them against injury resulting from the condition of the premises, or from what is being done in or about the same, by the direction or permission, or, for the convenience and benefit, of the occupier. In cases like the present, the exigence of such duty is not affected by the fact that the faulty conditions, from which resulted the damage complained of, were due to the negligence of an independent contractor in operating under the contract. This duty is peculiar to the situation, and is as just as it is severe. It places the responsibility for what happens on such premises on the occupier who is in control of the same, and protects those of the public who, in the use of the highway along such premises, lawfully come within dangers originating thereon. Of such dangers, the casual user of a sidewalk is generally unwarned, and the matters from which they arise are specially within the knowledge, or should be within the knowledge, of the occupier.

What is said by Sir Frederick Pollock in his philosophical work on Torts, in relation to the duties imposed by law on the occupiers of buildings, applies as well to the duty of such occupiers to those who are in lawful use of the adjacent highway, as to the duty to those who resort to the premises in the course of business in which the occupier is concerned or interested:

"The duty is founded not on ownership but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so. To that extent there is a limited duty of insurance, as one may call it, though not a strict duty of insurance such as exists in the classes of cases governed by *Rylands v. Fletcher* [L. R. 3 H. L. 330, 37 L. J. Ex. 161]."

Where the thing committed to an independent contractor to do for the occupier, on or about his premises, is of itself inherently dangerous, such contractor is the mere instrument or agent of the occupier, so far as concerns the responsibility to those lawfully coming within such danger. In the present case, the responsibility of the defendant, as occupier, is the same as if the window cleaner, who fell from the window sill, had been the ordinary servant of the defendant. He was bound in either case to use the care requisite to see that the work of cleaning his windows was not made unreasonably dangerous to one passing on the sidewalk. This, in effect, is the principle announced by the Supreme Court in the case of *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485:

"When a person is engaged in a work, in the ordinary doing of which a nuisance occurs, the person is liable for any injury that may result to third parties from carelessness or negligence, though the work may be done by a contractor."

The duty imposed by law on the occupier is an absolute duty, which he cannot shift. It is by reason of his control thereof, that the occupier of premises on a public street or highway owes, as has been said, a duty of quasi insurance to those using the highway against injury resulting from the condition of the premises, or from what is being done on or about the same for the convenience and benefit of the occupier. So a general contractor having possession and control, for the purpose of erecting buildings for the owner of the premises, cannot relieve himself from liability for a dangerous situation, though created by an independent subcontractor, as recently decided by this court in the case of *Wilson v. Hibbert*, 194 Fed. 838, 114 C. C. A. 542.

There is little or no difference in English or American authorities on this point, and it is unnecessary to cite the long list of such authorities which have been brought to our attention by the ability and industry of the learned counsel of the defendant in error. This principle was given a wider application by the Supreme Court in the case of *Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298. In that case, the defendant, owning a lot in Chicago, contracted in writing with another to erect a building thereon, which included the excavation of an area in the sidewalk next to and adjoining it, so as to furnish light and air to the basement. After the excavation had been made, it was left unguarded by the contractor, and the plaintiff was injured by

falling therein. On the ground that the contractor was doing the thing which he was employed to do, which was inherently dangerous to the users of the sidewalk, the court held the owner who had employed the contractor liable for the injury occasioned by the neglect to surround the excavation with sufficient lights and guards. Speaking of the owner and employer, the court said:

"He cannot escape liability by letting work out like this to a contractor and shift responsibility on him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work, so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city and left without guards and light at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered."

This wider and more inclusive rule is variously stated in a multitude of cases, both English and American, and is very clearly stated by the Supreme Court of Ohio in *Covington & Cincinnati Bridge Co. v. Steinbrock*, 61 Ohio St. 223, 55 N. E. 619, 76 Am. St. Rep. 375:

"The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work he is about to do or have done is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. * * * It is the danger to others, incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

In such cases, the principal makes the contractor an agent or servant, for whose negligence he is responsible. So in the English case of *Bower v. Peate*, 1 Q. B. Div. 321. Here the plaintiff and defendant occupied adjoining houses. Defendant, having decided to rebuild his house and in doing so to carry his foundations lower than the foundations of the plaintiff's adjoining house, entered into a contract with a builder to do all the necessary work. The written contract contained a clause by which the contractor agreed to take upon himself the risk and responsibility of shoring and supporting, as far as necessary, the adjoining building affected by this alteration, during the progress of the work. Cockburn, Chief Justice, delivering the opinion of the Queen's Bench Division of the High Court of Justice, says:

"The answer to defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work, from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

See, also, *Tarry v. Ashton*, 1 Q. B. Div. 314.

If the work to be done by the contractor for the occupier is necessarily attended with some danger, even when performed without negligence by the contractor, such occupier would be responsible for having neglected to guard against such inevitable danger should an inno-

cent third person suffer injury therefrom. Thus, in the case of *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7, where one was building a brick wall abutting on the highway, and plaintiff was injured by a falling brick, though the servant who dropped it was not negligent, the court said:

"It is a matter of common knowledge and experience that when men are breaking and handling bricks in the construction of such a wall, some of the material may fall, although the workmen are in the exercise of ordinary care. The immediate cause of the evil in such case may indeed be accidental, but it is an accident which the builder of the wall, in view of the danger to life and limb, may be bound to contemplate and provide against by safeguards or barriers, so that the traveler may not be exposed to injury."

See, also, *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346.

We have not overlooked the fact that the falling body by which the plaintiff was injured was a living man, capable of exercising his own will and capable, therefore, of causing or contributing to his fall by his own negligence. But we have not been able to discover in these facts a sufficient reason for relieving the occupier of the premises from liability. As we have tried to show, the man whose fall did the harm in question must be regarded as the servant of the occupier, although an independent contractor did intervene, and the occupier cannot escape liability for the negligence of his servant and agent, even under such unusual circumstances as these. On principal, the servant's control over his own will and his own movements does not seem to make any difference. The occupier was the master, and if in that character he had ordered the servant to assume the dangerous position, and the fall had taken place while the servant was obeying the order, the master would have been as completely liable as if the falling body had been an inanimate object carelessly placed on the window ledge. And we think the same result must follow, although the master knowingly permits (but does not directly order) his servant to assume a position so dangerous that the servant's lack of care for his own safety may be followed by injury to an innocent passer-by. This is little more than a restatement of the proposition, that he who, either himself or by an agent, does an act inherently dangerous to the innocent users of a highway—whether the order be given directly or through the mouth of an independent contractor—is charged with a high degree of responsibility, nearly akin to the responsibility of an insurer.

[2] The court, having correctly instructed the jury that the employment by defendant of an independent contractor to clean the windows of his building was not available as a defense, it only remained to submit to the jury, not whether this work was dangerous, but whether defendant had used reasonable care in guarding against the dangers that were naturally incident thereto. It is a matter of common knowledge that work done on the outside of a building, such as in this case, or in the case of work done on scaffolding, is attended with dangers to those using the sidewalk beneath. Such accidents, whether negligent or non-negligent, must be guarded against, either by means calculated to prevent the falling of bodies, or by such bar-

riers or warning notices as would prevent the use of the sidewalk within the area of danger, the only question to be determined being whether defendant has used reasonable care to safeguard the situation.

[3] The charge of the court below was in another respect more favorable to the defendant than it had a right to demand. The jury were repeatedly instructed that the burden rested upon the plaintiff to show, first, that this work was dangerous work, and second, that the defendant was guilty of negligence in not acting as a person of ordinary prudence should act, in order to guard against its dangers. The rule of evidence applicable in such cases is thus stated by Sir Frederick Pollock:

"Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."

In other words, the maxim "*res ipsa loquitur*" is applicable to cases like the present. This rule rests upon both reason and authority. It is the dictate of a wise public policy, that of protecting the right of those lawfully using the public highways, to be unmenaced by dangers resulting from the condition of adjoining premises, or from what is being done for, or by permission of, the occupiers, on or about the same. These things, though known to such occupiers, cannot be known or appreciated by the users of the highways. Bodies are not expected to fall from the windows of buildings, upon the adjoining highways. Such happenings are not consistent with the usual and orderly conduct and ménage of such buildings.

The leading cases of *Byrne v. Boadle*, 2 H. & C. 722, and of *Kearney v. London, Brighton & South Coast Railway Co.*, 6 Q. B. Cas. 759, have been followed by many other cases, both in England and in this country, and the applicability of the rule of evidence embodied in the maxim "*res ipsa loquitur*," to objects falling from buildings into a highway, is well established.

The jury, however, having found both the questions thus submitted, in favor of the plaintiff, the assignments of error, as to the charge of the court in regard to the defense of an independent contractor, are overruled, and the judgment below is hereby affirmed.

WESTERLUND et al. v. BLACK BEAR MINING CO. et al.
(Circuit Court of Appeals, Eighth Circuit. January 13, 1913.)
No. 3,807.

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS—CONTRACTS—VALIDITY.

A mining lease for five years of the mines, plant, and machinery of a mining corporation without the approving vote of its stockholders is an incumbrance and voidable by them under the statutes of Colorado,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which vest the general power to manage the affairs of the corporation in its board of directors, but declare that they shall not have power to incumber its mines, plant, or principal machinery incident to the production, without the approving vote of the holders of a majority of its shares of stock, and that any mortgaging or incumbering thereof without such consent shall be absolutely void. Revised Statutes of Colorado 1908, §§ 865, 977.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

2. MINES AND MINERALS (§ 105*)—MINING COMPANIES—"INCUMBER."

The words "incumber" and "incumbering," when used with reference to property or its title, include within their meaning every right or interest in land or real estate which may subsist in third persons to the diminution of the value of the property or its title, but consistent with the passing of the fee by the conveyance of the owner thereof.

If the right or interest of the third person is such that the owner of the servient estate has not so complete an ownership and property in his land or real estate as he would have had if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3519-3527.]

3. STATUTES (§§ 188, 192, 206*)—CONSTRUCTION—GENERAL RULES—"POPULAR SENSE."

Words and phrases should be given their popular sense and meaning, unless there is a clear indication that they were used in a different sense. The popular sense of a word or phrase is that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it.

When a word which has a known legal meaning is used in a statute, it must be assumed that it was used in its legal sense, in the absence of a clear indication of a contrary intent.

The legal presumption is that words and phrases in a statute are used in their usual or customary sense, unless it clearly appears that the Legislature intended to use them in a more restricted or different sense.

"All the words of a statute must have effect rather than that part should perish by construction."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 270, 276, 283; Dec. Dig. §§ 188, 192, 206.*]

4. COURTS (§ 366*)—FEDERAL COURTS—DECISIONS OF STATE COURTS AS PRECEDENTS.

The federal courts consider themselves bound to adopt and follow the decisions of the highest judicial tribunal of a state interpreting its statutes alone. The decisions of lower courts are argumentative only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.]

5. CONTRACTS (§ 134*)—EVIDENCE (§ 16*)—PRINCIPAL AND AGENT (§ 164*)—JUDICIAL NOTICE—CONSTRUCTION—STATUTORY PROVISIONS—"VOID"—RATIFICATION.

Courts take judicial cognizance of the fact that the word "void" is used in statutes in the sense of utterly void so as to be incapable of ratification, and also in the sense of voidable by those alone whose rights are infringed without expressed discrimination, so that resort must be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had to the rules of construction in many cases to determine in which sense the Legislature intended to use it.

An act or contract declared to be void by statute which is *malum in se*, or against public policy, is generally utterly void and incapable of ratification.

An act or contract which is neither wrong in itself nor against public policy, which has been declared void by statute for the protection or benefit of a certain party, or class of parties, is voidable only, is capable of ratification by the beneficiary or beneficiaries of the statute, and it may be avoided by him or them alone.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 722; Dec. Dig. § 134;* Evidence, Cent. Dig. § 20; Dec. Dig. § 16;* Principal and Agent, Cent. Dig. §§ 622-625; Dec. Dig. § 164.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7332-7339.]

6. CORPORATIONS (§§ 386, 387, 388*)—POWERS AND LIABILITIES—CONTRACTS.

An act or contract of a corporation which is beyond the scope of its corporate powers, which it cannot lawfully do in any way or manner under any circumstances, is void and incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it.

But an act or contract of a corporation which is within its corporate powers, is not wrong in itself, nor against public policy, but is forbidden and declared void by statute for the benefit or protection of a certain party, or class of parties, is voidable only and voidable by the party or parties alone for whose benefit the statute was enacted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548, 1553, 1554-1555, 1556-1567; Dec. Dig. §§ 386, 387, 388.*]

7. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS—AVOIDANCE OF CONTRACT.

Neither the corporation nor its creditors, nor others claiming under it, had the right to avoid the mining lease in question in this case on the ground that it was executed without the approving vote of the stockholders, because the requirement of that assent was not made for their benefit and they were estopped from enforcing it by the execution of the lease by the corporation. The stockholders alone had the right to enforce that requirement because it was enacted for their benefit and protection alone and they alone had any beneficial interest in its observance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

8. CORPORATIONS (§ 189*)—POWERS AND LIABILITIES—RULES IN EQUITY—PLEADING.

It is only when stockholders exhibit a bill against their corporation and others, "founded on rights which may be properly asserted by the corporation," that they are required to comply with rule 94 in equity. The right of these stockholders to avoid the mining lease on the ground that it was made without a compliance with the statutory requirement of an approving vote of the stockholders could not be properly asserted by the corporation, but could be asserted by the stockholders alone, and rule 94 was inapplicable to their bill or suit in this case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

9. QUIETING TITLE (§ 7*)—EQUITABLE JURISDICTION.

There is a legal presumption that a cloud or an unlawful incumbrance upon the title to real property inflicts such an injury upon parties who have a lien upon or interest therein and who have the right to the freedom of the title from such a cloud or incumbrance as will invoke the jurisdiction of a court of equity to remove it.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

*(Additional Syllabus by Editorial Staff.)***10. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS—CONTRACTS—AVOIDANCE.**

Under Rev. St. Colo. 1908, §§ 865, 977, declaring that the board of directors of a mining corporation shall not have power to incur its mines, plant, or principal machinery incident to the production without the approving vote of the holders of a majority of its shares of stock, a bill of the stockholders to avoid a lease entered into without such approval is not objectionable, though it alleges that the lease was executed by the president and secretary of the corporation instead of the board of directors.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

11. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS—CONTRACTS—AVOIDANCE OF STOCKHOLDERS.

That, at the annual meeting of stockholders following the execution of a lease which was executed without the approving vote of the stockholders, they voted to reject the lease, does not affect the right of action of the stockholders to avoid the lease for want of their approval of its execution.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

12. EQUITY (§ 87*)—LACHES—ANALOGY WITH LIMITATIONS.

Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous limitations at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Bill in equity by Lisi Westerlund and others against the Black Bear Mining Company and others. From a decree for defendants, complainants appeal. Reversed and remanded, with instructions.

John S. Macbeth, of Denver, Colo. (Henry F. May, of Denver, Colo., on the brief), for appellants.

L. F. Twitchell, of Denver, Colo. (Allen & Woy, of Telluride, Colo., and Goudy & Twitchell, of Denver, Colo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained the demurrers to a bill and dismissed a suit brought by four of the stockholders of the defendant the Black Bear Mining Company, a corporation organized under the laws of Colorado, to avoid a mining lease of all the property of that corporation which was alleged to be worth \$600,000, and to consist of mining claims and mines in the state of Colorado, on the ground that this lease was made without an approving vote of the holders of a majority of the stock of the corporation, in violation of section 865 of the Revised Statutes of Colorado, 1908. The corporation by the terms of the lease demised and let to the defendant J. B. Bailey all its mines and mining claims, its stamp reduction mill, its tramway, all its buildings, the right to occupy this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property, and the right to remove from it any and all the ore therein or thereon, during the term of five years from October 31, 1910, to October 31, 1915, in consideration of the covenants of the lessee to pay certain royalties named in the lease and to do certain acts therein specified. This lease was subsequently assigned by Bailey to the Black Bear Mining Company, another corporation of the state of Colorado, and the other defendant in the suit; but in the discussion of the questions at issue the lease will be treated as though it was still held by Bailey. The Black Bear Mining Company covenanted in the lease that in case it made a sale of the premises the lessee should receive \$60,000, or 10 per cent. of the selling price if that was more, and that in the event of such a sale the rights of the lessee to the possession and use of the property and to the extraction of ore therefrom should not cease until the expiration of one year from the date of the lease, nor then unless he had received six months' notice of the sale before it should be made.

[1] The statutes of Colorado under which the Black Bear Mining Company exists contain these provisions:

"The stock, property and concerns of any company organized under the provisions of this act shall be managed by not less than three nor more than nine directors, who shall respectively be stockholders in said company." Revised Statutes of Colorado 1908, § 977.

"In all mining companies or corporations hereafter formed, in which the stock is made assessable under the charter or by the laws of this state, the board of directors shall have full and absolute power to levy assessment or assessments, to rescind the same and to declare dividends and to do all other acts which they may deem for the best interest of the stockholders of the company, or corporation, and which they may deem necessary for the proper development of any mine or mines belonging to such company or corporation." Section 978.

"The corporate powers shall be exercised by a board of directors or trustees of not less than three nor more than thirteen, who shall respectively be stockholders in said company. * * * The board of directors or trustees of a mining or manufacturing corporation shall not have power to incumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property without such consent shall be absolutely void, and the vote upon such proposition shall be entered on the minutes of the corporation." Section 865.

It is not denied that the last paragraph of section 865 deprives boards of directors of mining corporations organized under the laws of Colorado, and the corporations themselves, of the power to incumber their property in the absence of approving votes of their stockholders. But counsel for this corporation argue, and the court below held, that this mining lease was not an incumbrance upon the property of this corporation, and hence that it did not fall within the terms of this paragraph of the statute because it was neither a mortgage, nor did it evidence a pledge for the payment of money. This contention presents the first question to be determined in this case.

Before entering upon its discussion, let us examine, for a moment, the statute and the effect of the lease. The law expressly withholds

from the board of directors of a mining company, the power "to incumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant." It is evident that it was the production from such mine or plant by the corporation that the statute was enacted to protect. It was the power to hinder or prevent the production by the corporation from its mine or plant by an incumbrance, either of the mine or of the plant, or of the principal machinery incident to the production, that was clearly and expressly withheld from the board of directors and officers of the corporation in the absence of an approving vote of the stockholders. But this mining lease deprives the corporation of all right and power to produce ore from its mine or plant, or with its machinery, for five years, and perhaps forever, for it grants to the lessee the right within the five years to remove all the ore from the property so that at the end of that time there may be none to produce. An ordinary lease for years grants nothing but the occupancy and use of the premises and requires their return without substantial diminution of the property or its value at the end of the term. But this mining lease is not of that class. It conveys the right to take from the body of the property all its value and to leave it at the end of the term a worthless shell.

"A mining lease is a grant in presenti of all the minerals in the land—these minerals being part of the realty—with the right to enter and search for them and to mine and remove them when found." *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 807, 72 C. C. A. 213, 219.

Nor is this all. This lease pledges the property of the corporation to the payment of \$60,000, or 10 per cent. of the selling price if that be more, as a condition of its release in case of a sale of the property during its term. The question at issue, therefore, really is whether or not a contract by a mining corporation, which for five years deprives it of the power to produce ore from its property, vests the right to extract all the ore from it in a third party and pledges all its property for the payment of \$60,000, or 10 per cent. of its selling price if that be more, as a condition of the release of the contract in case of a sale during the term, constitutes an incumbrance upon the property. At first blush the question seems susceptible of but one answer.

[2] The main argument in support of the proposition that this lease constitutes no incumbrance is the invocation of the rule that words and phrases should be given their familiar and popular sense rather than their forced and subtle or technical significance, and the contention that the popular meaning of incumber and incumbering is mortgage or mortgaging, or pledge or pledging, for the payment of money, and that these words should therefore be limited to that meaning in the interpretation and enforcement of the statute. Baron Pollock said, and his statement will not brook denial, that the term "popular sense," in the rule on which counsel here rely, means "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it." *Grenfell v. Commissioners of Inland Revenue*, 1 Exch. Div. 242, 248. There is no class of persons more familiar with titles to property and incumbrances thereon than

the judges whose duty it is frequently to define, enforce, and remove such incumbrances, and their opinions, some of which will be cited below, clearly indicate that people conversant with the subject of this statute would seldom, if ever, limit the meaning of incumber to mortgage or pledge for the payment of money. Answering a like contention as to the popular sense of the word "incumbrance," the Supreme Court of Wisconsin said:

"Webster defines an 'incumbrance' to be 'a burdensome and troublesome load'; and again, 'a burden or charge upon property; a legal claim or lien upon an estate.' It will hardly be claimed that Webster did not define the word for the use of the populace, or that he only intended such definition to include mortgages. Certainly, judgments duly rendered and docketed must be regarded as incumbrances, as used in popular speech." *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292, 8 N. W. 226, 37 Am. Rep. 830.

[3] A decisive canon of construction here, however, is that when a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. *The Abbotsford*, 98 U. S. 440, 444, 25 L. Ed. 168; *McCool v. Smith*, 1 Black (U. S.) 459, 464, 470, 17 L. Ed. 218; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396. The words "incumber" and "incumbering," when used in reference to property and its title, are words of this character, and the known legal meaning of these words in their popular sense, in the sense that would be attributed to them by conveyancers, lawyers, and judges, the persons most conversant with them, included when this statute was enacted, and still includes, not only mortgages, deeds of trust, and pledges for the payment of money, but every right or interest in the land which may subsist in third persons to the diminution of the value of the land or its title, but consistent with the passing of the fee by the conveyance of the owner. *Prescott v. Trueman*, 4 Mass. 627, 629, 3 Am. Dec. 246; *Fritz v. Pusey*, 31 Minn. 368, 369, 18 N. W. 94; *Batley v. Foerderer*, 162 Pa. 460, 29 Atl. 868, 870. In the case first cited the question arose in the Supreme Judicial Court of Massachusetts in the year 1808, whether or not a paramount right to the title to land which lay dormant in third persons was an incumbrance. Chief Justice Parsons delivered the opinion of the court. He said no authority on either side had been produced, but that upon general principles the court was of opinion that:

"Every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be decreed an incumbrance. * * * Thus a right to an easement of any kind is an incumbrance. So is a mortgage. So also is a claim of dower which may partially defeat the plaintiff's title by taking a freehold in one-third of it."

This declaration of the meaning of these words has been affirmed by the following authorities which illustrate it by the specific decisions attributed to them respectively below: *Bouvier's Law Dictionary*; 4 Words & Phrases, 3519; 16 Amer. & Eng. Encyc. of Law, 158; *Warden v. Sabins*, 36 Kan. 165, 169, 12 Pac. 520. An ordinary lease is an incumbrance. *Clark v. Fisher*, 54 Kan. 403, 406, 38 Pac. 493; *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428; *Grice v. Scarborough*, 2

Speers (S. C.) 649, 42 Am. Dec. 391; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201. An attachment is an incumbrance. *Thatcher v. Valentine*, 22 Colo. 201, 206, 208, 209, 43 Pac. 1031; *Spangler v. Sanborn*, 7 Colo. App. 102, 43 Pac. 905. The lien of a judgment is an incumbrance. *Willsie v. Rapid Valley Horse Ranch Co.*, 7 S. D. 114, 121, 63 N. W. 546. Taxes and municipal claims are incumbrances within the meaning of a court's order of sale subject to incumbrances. *In re Gerry* (D. C.) 112 Fed. 958, 959. An execution sale subject to redemption is an incumbrance. *Post v. Campau*, 42 Mich. 94, 3 N. W. 272. A prohibition of the use of land for a brewery or a blacksmith shop is an incumbrance. *Van Schaick v. Lese*, 31 Misc. Rep. 610, 66 N. Y. Supp. 64, 68; *Batley v. Foerderer*, 162 Pa. 460, 29 Atl. 868, 870. An easement for a party wall is an incumbrance.

"If the right or interest of the third person is such that the owner of the servient estate has not so complete an ownership and property in his land as he would have had if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered." *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702.

An inchoate right of dower is an incumbrance. *Shearer v. Ranger*, 22 Pick. (Mass.) 447, 448, 449; *Bigelow v. Hubbard*, 97 Mass. 195, 198; *Jones v. Gardner*, 10 Johns. (N. Y.) 266; *Porter v. Noyes*, 2 Greenl. (Me.) 22, 26, 27, 11 Am. Dec. 30; *Russ v. Perry*, 49 N. H. 547, 550; *Fitts v. Hoitt*, 17 N. H. 530; *Jenks v. Ward*, 4 Metc. (Mass.) 404. A private right of way is an incumbrance. *Wilson v. Cochran*, 46 Pa. 229, 233; *Harlow v. Thomas*, 15 Pick. (Mass.) 66, 68; *Clark v. Swift*, 3 Metc. (Mass.) 390, 392. A right of way for a railroad is an incumbrance. *Barlow v. McKinley*, 24 Iowa, 69, 70. An attachment is an incumbrance within the meaning of that word in a statute which provides that a certain notice filed with the clerk of the county shall constitute constructive notice to a purchaser or incumbrancer. *Batley v. Foerderer*, 162 Pa. 466, 29 Atl. 870. A conveyance of timber on land and the right to remove it is an incumbrance. *Cathcart v. Bowman*, 5 Pa. 317. A reservation of mineral and the right to prospect for and remove it is an incumbrance. *Adams v. Henderson*, 168 U. S. 573, 574, 580, 18 Sup. Ct. 179, 42 L. Ed. 584; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720, 722. A conveyance of all the iron ore and coal on certain lands and the right to remove it is an incumbrance. *Stambaugh v. Smith*, 23 Ohio St. 584, 591, 592.

Perhaps a sufficient number of authorities has been cited, however, to demonstrate the popular sense and the legal meaning attributed to the words "incumber" and "incumbering" by those conversant with the subjects to which they refer in the statute under consideration. It will be noticed that they are given the same broad and general significance in the construction of an insurance policy (*Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 292, 8 N. W. 226, 37 Am. Rep. 830), an order of court (*In re Gerry* [D. C.] 112 Fed. 958, 959), a statute (*Batley v. Foerderer*, 162 Pa. 466, 29 Atl. 870), and a covenant in a deed (*Prescott v. Trueman*, 4 Mass. 627, 629, 3 Am. Dec. 246). What then do counsel for the appellees present to establish their contention that

the meaning given to these words by the opinions of the authors and judges which have been cited is subtle, forced, and technical, and that their popular sense is limited to mortgages, or to "putting property in pledge for the payment of money"? They cite two decisions, and two only, which discuss, decide, or define the meaning of these words. *Sullivan v. Barry*, 46 N. J. Law, 1, 5, wherein the court held that the provision of a statute that "nothing in this act contained shall enable any married woman to execute any conveyance of her real estate, or any instrument incumbering the same, without the husband joining therein," did not prohibit a married woman from making an ordinary lease of her property because she had the right to use it, and putting it to rent was often the only way in which she could do so, and *Lockwood v. Middlesex Mutual Assur. Co.*, 47 Conn. 553, 560, in which a policy of insurance required the insured to disclose fully in the proposals for insurance and to specify in the policy any incumbrances. He had leased the property. The proposals described the property as "to be used and occupied for the usual purposes of such a building by a tenant," and as "occupied as a boarding house." The policy contained these words, "occupancy—tenant," and the court held that the lease was sufficiently specified in the proposals and the policy; that possession by a tenant under an ordinary lease was not referred to by the clause relative to incumbrances; but that a life lease or a lease for 99 years might present a different question. But neither these two sporadic decisions, inspired by the peculiar facts of the cases they determine, nor the earnest argument of counsel, can be permitted to overcome the reason of this case, the consensus of opinion, and the uniform current of authority upon this subject to which reference has been made, and to substitute in the statute before us, for the broad popular sense of the words "incumber" and "incumbering," which these opinions and authorities portray, the limited technical meaning "mortgage" or "pledge" for the payment of money which the necessities of the appellees' case require. In the light of these opinions and decisions there is no rational way of escape from the conclusion that the popular sense, the ordinary significance, and the well-known legal meaning of the words "incumber" and "incumbering," when used with reference to property and its title, included, when this statute was passed, and still include, every right or interest in land which may subsist in third parties to the diminution of the value of the land or its title, but consistent with the passing of the fee by the conveyance of the owner.

The legal presumption is that the Legislature used, and intended to use, these words in this statute in their usual sense at the time the law was passed, unless it clearly appears that they intended to use it in a more restricted or different sense. *Corning v. Board of Com'rs*, 42 C. C. A. 154, 157, 102 Fed. 57, 60; *St. Louis & S. F. R. Co. v. Furry*, 52 C. C. A. 518, 526, 114 Fed. 898, 906; *In re Gerry* (D. C.) 112 Fed. 958, 959. How then does it clearly appear that the Legislature of Colorado intended to use these words in other than their ordinary significance? Counsel answer: Leasing mining property was a common practice when this statute was enacted and was without in-

jurious effects; mortgaging mining property was a common practice at the same time, and it produced evil results; therefore the Legislature used the word "incumber" in the sense of mortgage and the word "incumbering" in the sense of mortgaging. But this case is here for determination on demurrer, and the facts on which this contention is based are neither within our judicial knowledge nor are they pleaded or proved, so that the legal presumption that the Legislature expressed its intention must still prevail.

Counsel contend that mining leases made by corporations without the consent of their stockholders have been before the Supreme Court of Colorado, that no question of their validity on account of the failure of the stockholders to consent has been raised, and they have been held valid. They say that many mining leases have been made by corporations without the consent of their stockholders, and that lawyers, laymen, and officers of corporations in Colorado have assumed that such leases were valid, and that this lease should be so held on account of this contemporaneous construction of the statute. But the facts upon which this argument is based are not admitted by counsel for the appellants, they are not within our judicial cognizance, and they are neither pleaded nor proved in this case. The contention is therefore without foundation and it falls.

They cite the conceded rule that, where words of general import follow specific designations, the application of the general language is controlled by the specific words. Thus a statute provided that the keeper of any hotel or boarding house, or any other person who rents furnished or unfurnished rooms, shall have a lien, and the court held that the lien was given to persons of the same class as keepers of hotels and boarding houses only. *Hover v. People*, 17 Colo. App. 375, 387, 68 Pac. 679; *Gillette v. Peabody*, 19 Colo. App. 356, 363, 369, 75 Pac. 18; *Cutshaw v. City of Denver*, 19 Colo. App. 341, 350, 351, 75 Pac. 22. And they argue that, because in the last clause of section 865 it is declared that any mortgaging or incumbering shall be void, the word "incumbering" should be construed mortgaging, and the word "incumber" in the earlier part of the statute should be construed mortgage. But the rule is inapplicable in this case because the command of the statute that the board of directors "shall not have power to incumber" without the consent of the stockholders, which, without the last clause of the section, itself makes all mortgages and incumbrances so made voidable as to stockholders, contains the general term "incumber" only, and is without specific designations followed by words of general import, and because the interpretation here sought would deprive the words "incumber" and "incumbering" of all force and effect and fly in the face of the familiar canon that "all the words of a statute must have effect rather than that part should perish by construction." *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 963, 72 C. C. A. 9, 11 (2 L. R. A. [N. S.] 185); *Stevens v. Nave-McCord Merc. Co.*, 150 Fed. 71, 75, 80 C. C. A. 25, 29.

[4] Finally, counsel contend that the courts of the state of Colorado have decided that section 865 does not withhold from boards of directors of mining companies the power to make mining leases, and

they invite this court to follow that decision. In support of this position they cite *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742; *Aliunde Con. Mining Co. v. Arnold*, 16 Colo. App. 542, 67 Pac. 28; and *Conqueror Gold Mining & Mill. Co. v. Ashton*, 39 Colo. 133, 138, 90 Pac. 1124. The case first cited was brought by stockholders of a corporation: (a) To set aside the sales of treasury stock of the corporation by directors to some of their co-directors in payment of debts of the corporation to the latter; and (b) to avoid a mining lease made without the consent of the stockholders. The opinion of the court covers ten printed pages; eight of these are devoted to the sales of the stock and the last two to the lease. The court cites section 585 of *Mills' Ann. Statutes*, which provides that "the stock, property and concerns of any company organized under the provisions of this act shall be managed by not less than three nor more than nine directors," and the articles of incorporation of the company and holds that under these the board of directors of a mining corporation may make mining leases. *Mills' Ann. Stat. of Colorado*, from which the court cited the only portion of the statutes of Colorado mentioned in its opinion, was issued in 1891. The provision of section 865 of the *Revised Statutes of Colorado 1908*, which enacts that boards of directors of mining companies shall have no power to encumber their property without the approving vote of their stockholders, was not enacted until 1895. Hence it was not found in *Mills' Ann. Statutes*. It is neither mentioned nor referred to in the decision of the court in this *Mosher Case*, and this court is confident that it was not called to the attention of, considered, or interpreted by, that court. The question it would have presented was too serious to have been determined without reference to the statute which conditioned its decision. Moreover, if it did decide it, its decision is not an authoritative declaration of the law of the state of Colorado, and, while it is entitled to such respectful consideration as the arguments it presented invoke, it does not control the federal courts in the determination of the question at issue because it is not the decision of the highest judicial tribunal of the state. It is the decision of the highest judicial tribunal of a state interpreting the statutes of that state, and those only, that the federal courts consider themselves bound to adopt and follow. *Freund v. Yaegerman* (C. C.) 27 Fed. 248; *Federal Lead Co. v. Swyers*, 161 Fed. 687, 88 C. C. A. 547. And as the opinion in this *Mosher Case* does not refer to the provisions of the statute under consideration and contains neither argument nor reason for the construction of them which counsel for the appellees contend it sustains, it is not more persuasive than it is binding.

In the other two cases cited no question regarding the power of the boards of directors or officers of a corporation to make mining leases without the approving vote of the stockholders was raised, considered, or decided. In each of them the legal question was the extent of the authority of an agent to make or to modify a lease, and, while in the discussion of that question the general statement that the power to manage the affairs of the corporation and to make leases is lodged in the board of directors may be found in the opinions, that statement

was clearly made without thought of the power of the stockholders over incumbrances, or the restriction upon the power of the board of directors contained in the statute it is our duty to interpret. The result is that there is nothing in those decisions of the courts of Colorado that is either decisive or persuasive that the provisions of this statute do not withhold from boards of directors of mining companies the power to make mining leases without the approving vote of the stockholders, and the sum of the whole matter is here.

The Legislature by section 865 made a law that the board of directors of a mining corporation should not have the power to incumber the mines, plant, or the principal machinery of its corporation incident to the production from such mines, without the approving vote of the holders of a majority of its stock, and that any such mortgaging or incumbering without such approving vote should be void. When this statute was enacted, the popular sense, the ordinary significance, and the known legal meaning of the words "incumber" and "incumbering," when used with reference to property or its title, included every right or interest in land which may subsist in third persons to the diminution of the value of the land, or its title, but consistent with the passing of the fee by the conveyance of the owner. If the right or interest of the third person is such that the owner of the servient estate has not so complete an ownership and property in his land as he would have had if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered. The board of directors of this corporation, without the approving vote of its stockholders, made a mining lease for five years of the mines, plant, and principal machinery of this corporation, whereby, for the promise of certain royalties, they caused the corporation to convey to the lessee the possession and occupation thereof and the right to remove all the ore therefrom, and pledged the property for the payment of \$60,000 or 10 per cent. of the selling price if that was more, for the privilege of selling its property free from the lease during the last four years of its term.

That this lease diminished the value of the land of the corporation is not debatable. It took from the corporation the right of possession and occupation of the property for five years and thereby deprived it of a possession and occupation it would otherwise have had. It took from the corporation the right to produce ore from the property for five years, and, forever, if the lessee extracted all the ore during the term. It subjected the land to a pledge of the payment of \$60,000, or 10 per cent. of the selling price, if that was more, as a condition of passing and conveying a title free from the lease within its term, an incumbrance as effectual within the five years and of the same nature as a mortgage for that amount would have been. For the title could be conveyed subject to either, but it could be conveyed within the five years free from neither without a payment of the \$60,000 or more.

And the conclusion is that this mining lease constituted an incumbrance upon the property of the corporation and that it was voidable at the suit of its stockholders because, as against them, its execution without their approving vote was beyond the powers of the board of directors and of the corporation.

Counsel for the appellees maintain, however, that although the mining lease was voidable by the stockholders, because it was made without their approving vote, they cannot maintain this suit because they have not complied with rule 94 in equity. That rule requires every bill by one or more stockholders in a corporation against the corporation and others "founded on rights which may properly be asserted by the corporation" to contain an averment that the suit is not a collusive one to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have cognizance, and other allegations, none of which are found in the bill in this case. The answer of counsel for appellants is that this bill is not founded on rights which may properly be asserted by the corporation, but upon rights which the stockholders alone can enforce, and hence that it does not fall under the rule. The court below was of that opinion, and the next question is: Is the right of action to avoid a lease or conveyance by a corporation without the indispensable approval of its stockholders in the corporation or in the stockholders?

[5] The statutes of Colorado granted to the board of directors of this corporation the general power to manage its affairs, to incumber its property by mining leases, or otherwise, but provided that it should not have this power to incumber its property unless its exercise was approved by a vote of the stockholders, and declared that any incumbering without such a vote should be absolutely void. Courts take judicial cognizance of the fact that Legislatures use the word "void" in statutes in the sense of utterly void so as to be incapable of ratification, and in the sense of voidable by those alone whose rights are infringed without express discrimination, so that resort must be had to settled rules for the interpretation of statutes in each case to determine in which sense the Legislature intended to use it. One of these rules is that an act declared to be void by statute which is *malum in se* or against public policy is utterly void and incapable of ratification, but an act or contract so declared void, which is neither wrong in itself nor against public policy, but which has been declared void for the protection or benefit of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries. A conveyance in fraud of creditors was declared to be "utterly void, frustrate, and of none effect," by the statute of 13 Eliz. c. 5, and has been uniformly declared to be void by the statutes of the states. But such a conveyance is universally held to be voidable only, to be valid until avoided, to be voidable by the creditors alone, and to be capable of ratification by them. *Bacon's Abridgement*, Title, Void and Voidable; *Anderson v. Roberts*, 18 Johns. (N. Y.) 516, 527, 9 Am. Dec. 235; *Harvey v. Varney*, 98 Mass. 118, 120; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Oriental Bank v. Haskins*, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; *Crowninshield v. Kittridge*, 7 Metc. (Mass.) 520. A gift of goods declared by statute to be void as to creditors is voidable only, may be avoided by them alone, and is susceptible to ratification. *Snow v. Lang*, 2 Allen (Mass.) 18. And a preference of a creditor within 60 days of insolvency declared to be void as to creditors by statute is voidable only,

is capable of ratification by the creditors, is valid until avoided by them, and may be avoided by them alone. *Colt v. Sears Commercial Co.*, 20 R. I. 64, 37 Atl. 311, 314.

[6] Another principle of law so firmly established as to be no longer debatable is that an act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is within its general corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid until avoided, not void until validated, and it is subject to ratification and estoppel. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Campbell v. Argenta Gold & Silver Min. Co. (C. C.)* 51 Fed. 1, 8; *Zabriskie v. Cleveland, C. & C. R. R. Co.*, 64 U. S. (23 How.) 381, 398, 16 L. Ed. 488; *St. Louis, V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 393, 402, 408, 12 Sup. Ct. 953, 36 L. Ed. 748; *Boston & M. Consol. C. & S. Min. Co. v. Montana Ore-Purchasing Co. (C. C.)* 89 Fed. 529, 530; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 99 Am. Dec. 300; *Bishop & Co. v. Kent & Stanley Co.*, 20 R. I. 680, 684, 41 Atl. 255; *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 105, 108, 109, 7 N. W. 695; *Eastman v. Parkinson*, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921, 928, 929, 932; *State v. Richmond*, 26 N. H. 232; *Rochester Savings Bank v. Averell*, 96 N. Y. 467, 471, 475; *Paulding v. Steel Co.*, 94 N. Y. 334, 341; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 85, 16 S. E. 501; *Watts' App.*, 78 Pa. 370, 394; *Manhattan Hardware Co. v. Phalen*, 128 Pa. 110, 118, 18 Atl. 428; *Thomas v. Citizens' Horse Ry. Co.*, 104 Ill. 462, 467.

In *St. Louis, Vandalia & Terre Haute R. R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 393, 403, 12 Sup. Ct. 953, 956 (36 L. Ed. 748), the Supreme Court said, of a statute of Illinois which declared a lease without the consent of the stockholders void:

"Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny."

The mining lease under consideration falls within this principle. It is evident that the incumbering of the property of the corporation was not *malum in se*, that it was not against public policy, and that the provision of the statute which withheld from the board of directors the power to incumber, without the approving vote of the stockholders, was enacted for their sole benefit, for the single purpose of preventing the corporation and the board from depriving them of the

use and production of the property by the corporation itself without their consent. The lease, therefore, is voidable, not void. It is valid until avoided, not void until validated, and it is capable of ratification by estoppel.

[7] But a corporation which has executed and accepted the benefits of a contract within the scope of its powers, that is neither wrong in itself nor against public policy, and that is defective only because in its execution the corporation has failed to comply with some legal requirement enacted for the sole benefit of third persons, is estopped to assail it, and the beneficiaries of the requirement alone may avoid it. Hence the stockholders of this corporation, and they alone, have the right to avoid this lease because they alone had any interest in a compliance with the legal requirement that they should assent to its execution. *Hervey v. Midland Ry. Co.* (C. C.) 28 Fed. 169, 174; *In re New York Economical Printing Co.*, 110 Fed. 514, 519, 49 C. C. A. 133; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 304, 307, 314, 315, 316, 33 C. C. A. 517; *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 108, 109, 7 N. W. 695; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 85, 16 S. E. 501; *Eastman v. Parkinson*, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921, 928, 929, 930; *Campbell v. Argenta Gold & Sil. Min. Co.* (C. C.) 51 Fed. 1, 8; *Wood v. Waterworks Co.* (C. C.) 44 Fed. 146, 150, 12 L. R. A. 168; *St. Louis, etc., R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 393, 402, 408, 12 Sup. Ct. 953, 36 L. Ed. 748; *Antietam Paper Co. v. Chronicle Publishing Co.*, 115 N. C. 143, 145, 20 S. E. 366; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 145, 20 South. 84; *Bishop & Co. v. Kent & Stanley Co.*, 20 R. I. 680, 684, 686, 41 Atl. 255; *McKee v. Title Ins. Co.*, 159 Cal. 206, 113 Pac. 140; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 433, 17 L. R. A. 375; *Bartlett v. Pollak Co.*, 108 Ala. 390, 18 South. 615, 620, 54 Am. St. Rep. 172; *Jones on Real Property*, § 153; 2 *Beach on Private Corporations*, p. 1165, § 744.

In *Hervey v. Illinois Midland Ry. Co.* (C. C.) 28 Fed. 169, 174, Mr. Justice Harlan, in 1884, held that a provision of statute which made the assent of a given number of stockholders essential to the validity of a mortgage was primarily for the benefit of the stockholders of a corporation and that its creditors were estopped from assailing it on the ground that no such assent to its execution had been given.

In *Beecher v. Marquette & Pac. Rolling Mill Co.*, 45 Mich. 103, 109, 7 N. W. 695, 697, a suit was brought to foreclose a mortgage made by the corporation, and Parks, the grantee of the equity of redemption, defended on the ground that the stockholders had not authorized the mortgage as required by a statute of Michigan which declared that no mortgage of any of the mines, works, real estate, or franchises of a corporation should "have any force or effect" unless authorized by the vote of three-fifths in interest of the stock of the company at a meeting called as directed by the statute. Judge Cooley delivered the opinion of the Supreme Court of Michigan to the effect that the mortgagor, the grantee from it, and all others claiming un-

der it, were estopped from avoiding the mortgage upon that ground. He said, among other things:

"In this case the stockholders acted deliberately in sanctioning the giving of the mortgage, and they now make no complaint. The bonds and mortgage were given, and have been acted upon. Complainant has loaned money in reliance upon them. Interest has fallen due and he has filed his bill to foreclose, and neither the corporation nor any of its stockholders has seen fit to make defense. The corporators may possibly have had a right to take advantage of the exact words of the statute, repudiate their action, and treat the mortgage as of no force or effect; but they had an equal right to treat it as effective and valid. They have chosen the latter course, and this is conclusive upon the corporation and upon any one claiming under it. What would have been the result had no corporate meeting ever been held we do not consider."

In *re New York Economical Printing Co.*, 110 Fed. 514, 519, 49 C. C. A. 133, 138, a trustee in bankruptcy of the property of a corporation attempted to defend his title against a mortgage made by the corporation without the consent of the stockholders required by a statute, and the United States Circuit Court of Appeals said:

"We have not overlooked the point made by the trustee that the mortgage was invalid because the consents of the stockholders of the mortgagor had not been filed in the office of the proper official, as required by the provisions of the stock corporation law. These provisions are for the protection of stockholders, and only stockholders can take advantage of any defects in complying with them. *Bank v. Averell*, 96 N. Y. 467, 475; *Paulding v. Steel Co.*, 94 N. Y. 334."

In *Eastman v. Parkinson*, 133 Wis. 375, 381, 113 N. W. 649, 652, 13 L. R. A. (N. S.) 921, 928, a trustee in bankruptcy of the mortgagor, a corporation, attacked a mortgage of its property because it was made by the corporation without the assent of the stockholders which a statute declared requisite to its validity. Judge Marshall, delivering the unanimous opinion of the Supreme Court of Wisconsin, said:

"Such statutes as the one under consideration, by the great weight of authority, are regarded as having been enacted for the protection of stockholders. Neither the corporation nor any one representing it, nor its creditors, can efficiently invoke the statute against an executed contract."

There were early decisions in California which, failing to note the distinction between contracts of corporations beyond the scope of their general powers and contracts within that scope made without compliance with some formality or requisite of their execution, held that deeds of corporations without the indispensable assent of their stockholders were void, and that the corporation itself, its creditors, or any one claiming under it, could be heard to defeat them upon that ground. *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178; *Pekin Mining, etc., Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679. But the error in these decisions was disclosed by the opinion of Judge Knowles to the contrary in *Campbell v. Argenta Gold & Silver Min. Co.* (C. C.) 51 Fed. 1, 8, and was corrected by the Supreme Court of California in the late case of *McKee v. Title Ins. & Trust Co.*, 159 Cal. 206, 222, 223, 113 Pac. 140, 146, 147. In that case an assignee in insolvency brought a suit to avoid bonds to the amount of \$275,000, and to reduce the mortgage securing them by that amount, on the ground, among others,

that the statute declared that one of the conditions on which the corporation could create or increase its indebtedness was that the creation or increase should be assented to by two-thirds of the stockholders, and that the increase of indebtedness evidenced by these bonds had never been assented to or authorized by them. Judge Shaw, delivering the opinion of that court, said:

"The assignee in insolvency represents the interest of the creditors only. He is not suing on behalf of the stockholders, or in their interest, and, there being no fraud, he stands in the shoes of the corporation with regard to the bonds. * * * The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders only."

He then dismissed the contention of the assignee upon that ground and cited some of the authorities mentioned above in support of the decision.

Indeed, so firmly established has this principle become that the authors of text-books declare it to be the law of the land. Jones, in volume 1 of his work on "The Law of Real Property in Conveyancing," says, at section 153:

"A mortgage by a corporation made without the assent or vote of a certain portion of its stockholders, as required by the statute, can be attacked only by the corporators. Objection to its validity cannot be made by the corporation itself in defense of a suit to foreclose the mortgage. Such a provision is for the protection of the stockholders, and they alone are wronged by the execution of a mortgage in violation of the statute, and they alone can raise the question of the validity of the mortgage."

And Beach, in his work on Private Corporations, at section 744, declares that:

"The corporators, and no one else, can raise objections to proceedings under acts restricting the power of the directors to mortgage."

Such is the weight of reason and authority in support of the position that the stockholders alone had the right, and that the corporation was without right, to maintain a suit to avoid this lease on the ground that it was made without the approving vote of its stockholders.

No well reasoned and considered opinion to the contrary comes to our attention. Counsel rely upon *Carlsbad Water Co. v. New*, 33 Colo. 389, 81 Pac. 34; *Southern Building & Loan Ass'n v. Casa Grande Stable Co.*, 128 Ala. 624, 29 South. 654; *Hutton v. Bancroft & Sons Co.* (C. C.) 83 Fed. 17, 18; *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 574, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, 75 Fed. 433, 22 C. C. A. 378. And they cite a number of other cases which in no way involved any limitation of the powers of a corporation for the benefit or protection of stockholders, which have nevertheless been carefully read, but which are too irrelevant for review.

In *Carlsbad Water Co. v. New*, 33 Colo. 389, 81 Pac. 34, a manufacturing corporation had made a mortgage upon its principal machinery without the approving vote of its stockholders, and had been

adjudged a bankrupt. A suit had been brought to foreclose the mortgage, and the trustee in bankruptcy was defending it on the ground that the stockholders never had assented to its execution. All that the Supreme Court of Colorado said upon the question whether the right to attack the mortgage was in the corporation and its assigns, or in the stockholders, was in these words:

"It was competent for appellant trustee to question the validity of the mortgage. In *re Antigo Screen Door Co.*, 123 Fed. 249, 254 [59 C. C. A. 248]; *McShane v. Carter*, 80 Cal. 310, 312 [22 Pac. 178]; *Pekin Mining, etc., Co. v. Kennedy*, 81 Cal. 356 [22 Pac. 679]."

In the case *In re Antigo Screen Door Co.*, the question whether or not a corporation, its creditors or assigns, had the right to question the validity of an incumbrance for its lack of the requisite assent of stockholders, was neither presented nor considered. The question there was whether or not a trustee in bankruptcy could assail a chattel mortgage which was fraudulent as to creditors, and the court held that he could. The two California cases have been overruled, as has been heretofore shown, by the decision of the Supreme Court of that state in *McKee v. Title Ins. Co.*, 159 Cal. 206, 113 Pac. 140, 147, and of the federal court in that circuit in *Campbell v. Argenta Gold & Silver Min. Co.* (C. C.) 51 Fed. 1, 8, for the cogent reason that the court in those cases failed to note and give effect to the decisive difference between a contract beyond the scope of the general powers of a corporation and a contract within that scope made in disregard of a requirement regarding its execution made for the benefit or protection of stockholders, or other third persons. Thus it appears that the opinion in the Colorado case presents neither argument nor authority to sustain the decision of this question which it contains.

In *Southern Building & Loan Ass'n v. Casa Grande Stable Co.*, 128 Ala. 624, 29 South. 654, a mortgagor corporation brought a suit to avoid its mortgage: (a) Because it was usurious; (b) because it was given to secure payment for stock of another corporation for which it had no power to subscribe; and (c) because it was made without the requisite assent of the stockholders. The court held that the corporation was estopped from avoiding the mortgage until it paid the amount owing upon it. The question whether it or its stockholders alone had the right to avoid the mortgage for the lack of the latter's assent was neither presented, considered, nor decided. If it had been, the Supreme Court of Alabama undoubtedly would have decided, as it had repeatedly done before, that the stockholders alone had that right. *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 145, 20 South. 84; *Barrett v. Pollak Co.*, 108 Ala. 390, 18 South. 615, 620.

In *Hutton v. Bancroft & Sons Co.* (C. C.) 83 Fed. 17, 18, a stockholder brought a suit against his corporation and one Bloede to cancel stock issued to the latter on the grounds: (a) That Bloede obtained the stock by fraud; and (b) that its issue was beyond the powers of the corporation, violative of the statutes of Delaware and of the rights of the complainant as a stockholder. The court held that the stockholder could not maintain the suit without first applying to his corporation for a remedy for his wrongs. But it expressly declared

that this conclusion was not based upon the failure to comply with rule 94 in equity, and the report of the case fails to disclose any statutory or other legal restriction upon the powers of the corporation for the protection or benefit of the stockholders upon which the complainant was counting in that case, or any consideration or decision of the question now in hand.

In the suit between the Louisville, New Albany & Chicago Railroad Company and the Louisville Trust Company and others, reported in 75 Fed. 433, 22 C. C. A. 378, and 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, the New Albany Company prayed a cancellation of its guaranty of certain bonds: (a) Because the guaranty was made fraudulently by a minority of its directors; (b) because no quorum of its directors was present at the meeting which directed the guaranty to be executed; and (c) because the guaranty was made without the requisite petition of a majority of its stockholders. It was held that as against innocent purchasers of the bonds the New Albany Company was estopped from avoiding its guaranty, but that as against those who took the bonds with notice of the defect in the execution of the guaranty it should be canceled. But the record of that case has been searched in vain for any objection, or any ruling upon any objection, to the maintenance of the suit by the corporation on the ground that the stockholders had not assented to the guaranty. No claim appears to have been made that the stockholders alone had the right, and the corporation had no right, to maintain the suit upon that ground. The opinions do not mention the question now under consideration, and it is certain that it was not in the minds of the courts in this case and was not determined by them.

The result is that, laying aside the overruled California cases, but one opinion, the opinion in Carlsbad Water Co. v. New, 33 Colo. 389, 81 Pac. 34, in which the question here at issue was presented, considered, and decided, has come to our attention in which it has been held that a corporation has the right to challenge its otherwise valid contract on the ground that it was made without the required assent of its stockholders. That decision is fortified by no argument or reason and by no authorities that have not been overruled. It is the decision of a state court upon a question of practice in a suit in equity, it is not binding upon the federal courts, and in the light of the overwhelming weight of reason, the consensus of opinion, and the current of authority to the contrary, to which attention has been called, it cannot be permitted to prevail.

[8] An act or contract of a corporation otherwise within its powers and valid, but defective on account of the failure of the corporation to comply with some requirement of statute or of law enacted for the sole benefit or protection of third parties, is assailable by the beneficiaries alone. It may not be successfully attacked by the corporation. The Black Bear Mining Company had no right to avoid this mining lease on the ground that it never received the approving vote of its stockholders. That right was in the stockholders alone, and there was no defect in the bill because the complainant failed to insert in it the allegations required by rule 94 in equity.

[10] There are minor objections to the bill. Counsel say that it contains averments that the lease was executed by the president and secretary of the corporation without authority from the board of directors, and that the complaining stockholders cannot maintain their suit because the statute withholds power to make it without their consent from the board of directors alone. This construction of the statute is too narrow and technical to be sound. The statute grants the power to make the lease to the board of directors alone and then conditions their exercise of this power with the approving vote of the stockholders, and its legal effect is to condition the power of the agents of the board in this matter, the president and secretary of the corporation, with the same limitation. They contend that the stockholders cannot maintain this suit to avoid the lease for the lack of their assent because the bill shows that the lease was executed without the assent of the board of directors and that it is for that reason void as to the corporation. But if this view of the averments of the bill were correct, the right to disregard or avoid the lease on this ground would be in the corporation and not in the stockholders, and the fact that the corporation had such a right on another ground would neither diminish nor destroy the right and cause of action of the stockholders to avoid the lease on the ground that it was made in violation of the provision of the statute enacted for their benefit and protection.

[11] Counsel maintain that it appears on the face of the bill that, at the annual meeting of the stockholders succeeding the execution of the lease, they voted to reject and repudiate it, that from this fact the inference may be drawn that the repudiators thereafter controlled the corporation and its officers, and that on this ground the complainants may not maintain their suit. It does not follow, however, from the repudiation of the lease by the stockholders that the complainants control the corporation, and, if they do, that fact neither diminishes nor destroys their cause of action founded on the violation of the statute enacted for their benefit because the corporation cannot sustain that cause of action and the stockholders alone can maintain it.

[9] Counsel argue that the complainants had an adequate remedy at law by a suit in ejectment in the name of the corporation, that there is no equity in the bill because it failed to show that the lease will cause irreparable injury to the stockholders, and that their suit is barred by laches because it was not brought until nine months after the execution of the lease.

But: (1) The corporation has no right to eject the lessee on the ground that the stockholders did not assent to the lease, and, although the corporation may maintain such an action on other grounds, the stockholders still have their right to relief in equity on this ground. (2) The lease is not void on its face. It is voidable by the stockholders by reason of facts it does not disclose, and it is therefore a cloud upon the title of the corporation. It not only clouds that title, but it deprives the corporation of the possession of its property and of the right to produce ore therefrom; it is in violation of a statute enacted to protect the complainants in their right to have the title, possession, and right of production of ore free of incumbrance in their corpora-

tion. And there is a legal presumption that any cloud or unlawful incumbrance upon real property inflicts such an injury upon parties interested therein who have the right to have it free thereof as will give a court of equity jurisdiction to remove it at their suit without proof of other damage. *Schofield v. Ute Coal & Coke Co.*, 92 Fed. 269, 271, 34 C. C. A. 334, 336; *Ormsby v. Ottman*, 85 Fed. 492, 493, 29 C. C. A. 295, 296.

[12] (3) Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law. *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21; *Boynton v. Haggart*, 120 Fed. 819, 830, 57 C. C. A. 301, 312. The bill discloses no unusual facts or circumstances tending to estop the complainants from bringing their suit within the time fixed by such a statute. On the other hand, it negatives the existence of such facts, for it contains averments that the lessee and his grantee, the Black Bear Mining Company, had notice that the stockholders had not assented to this lease before they respectively acquired any interest therein. This suit was brought within the time fixed by the analogous statute of limitations (section 4071, Revised Statutes of Colorado 1908), and the bill does not show that it is barred by laches.

All the objections to the complainants' pleading have now been considered and found to be untenable. In their consideration it has been conceded that the inference might be drawn from the bill that the lease was void as against the corporation because not authorized by the board of directors. This concession has been made to show that the bill states a good cause of action in equity notwithstanding, but it is neither decided nor admitted that this is the true construction or effect of the allegations of the pleading. The decree must be reversed, and the case must be remanded to the court below, with instructions to overrule the demurrer, to permit the defendants to answer, and to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

BEATTY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 11, 1913.)

No. 1,143.

JURY (§ 19*)—CONDEMNATION PROCEEDINGS BY UNITED STATES—RIGHT TO TRIAL BY JURY.

A proceeding by the United States in a federal court to condemn land for a public use is a suit at common law, within the meaning of Const. U. S. Amend. 7, and the landowner cannot be deprived of the right at some stage of the proceeding to have the question of just compensation determined by a jury, whatever may be the state practice, to which the court is required to conform as near as may be by Act Aug. 1, 1888, c. 728, § 2, 25 Stat. 357 (U. S. Comp. St. 1901, p. 2517).

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

Following state practice, see notes to *O'Connell v. Reed*, 5 C. C. A. 603; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 393.]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Condemnation proceedings by the United States against Paul Beatty and others. From a decree confirming the report of commissioners, awarding damages to defendants, they bring error. Reversed.

For opinion below, see 198 Fed. 284.

D. C. O'Flaherty, of Richmond, Va., and E. Hilton Jackson, of Washington, D. C. (O'Flaherty, Fulton & Byrd, of Richmond, Va., on the brief), for plaintiffs in error.

Barnes Gillespie, U. S. Atty., of Tazewell, Va. (T. J. Muncy, Asst. U. S. Atty., of Tazewell, Va., on the brief), for the United States.

Before PRITCHARD, Circuit Judge, and DAYTON and SMITH, District Judges.

SMITH, District Judge. Under the terms of an act of Congress making appropriations for the support of the army for the fiscal year ending June 30, 1912, approved March 3, 1911, an appropriation was provided for the purchase of land accessible to the horse-raising section of Virginia for the assembling, grazing, and training of horses purchased for the mounted service. In pursuance of this statute, a petition was filed on behalf of the United States, in the District Court of the United States for the Western District of Virginia, to condemn certain tracts of land in Front Royal magisterial district, in Warren county, Va. The practice followed on behalf of the United States seems to have been governed by section 2 of the act of August 1, 1888 (25 Stat. 357, c. 728 [U. S. Comp. St. 1901, p. 2517]), which provided that in proceedings to condemn for the United States the practice, pleadings, forms, and modes of proceedings in cases arising under the provisions of that act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record in the state within which the District Court is held. The district attorney therefore proceeded according to the method prescribed for condemnation proceedings by the

*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Virginia statutes as set out in section 1105f of the Code of 1910 and the succeeding sections.

Upon the filing of this petition the plaintiffs in error now before the court filed a demurrer, which was overruled by the court below, and thereupon the court ordered that the causes be docketed and five disinterested freeholders, agreed to by the United States and the present plaintiffs in error, should be appointed for the purpose of ascertaining and reporting a just compensation under the terms of the Virginia statute. The commissioners appointed made a report to the court, to which report the plaintiffs in error excepted, among other grounds on the ground that the amount assessed for just compensation was not a sufficient, just, or adequate allowance. On the coming in of these exceptions the trial judge below took the testimony that was offered by the government and the parties, and after hearing the same on the 9th of August, 1912, made its judgment, adjudging that the reports made in each of the cases made by the commissioners should be confirmed. Before, however, this judgment had been made, the plaintiffs in error in the present case had moved the court to impanel a jury to ascertain a proper and just compensation for their lands and to try the issues of fact made up by their exceptions to the commissioners' reports as to what was a just compensation for the land sought to be taken by the government, which motion was refused by the court in its judgment confirming the report of the commissioners.

It is upon the action of the trial judge below upon this point—as we find no error in his rulings anterior to this motion—that this appeal may be said to turn, viz., whether or not the plaintiffs in error were entitled to have the question of what damages should be paid them assessed for them for the compulsory taking of their lands through the medium of a jury. It would seem a startling proposition in the first instance to say that, although the Constitution of the United States forbids the United States laying a fine of a few dollars on a defendant without a trial by jury, and although it forbids the United States confining him for an offense committed without the verdict of a jury, and although the Constitution in a common-law case prevents the recovery by one individual from another, or by the United States from any citizen of the United States, of even a comparatively small amount of money without the verdict of a jury, yet that, in a proceeding for condemnation for public purposes, property of the value of hundreds of thousands of dollars may be taken without the verdict of a jury.

The question here depends entirely upon the language of the Constitution. There are two statutory provisions of Congress to be found, first in section 566 of the Revised Statutes (U. S. Comp. St. 1901, p. 461), which provides that the trial of issues of fact in the District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by a jury, and in section 648 (U. S. Comp. St. 1901, p. 525), which provides that the trial of issues of fact in Circuit Courts shall be by jury, except in cases in equity or of admiralty and maritime jurisdiction. These two provisions, however, are statutory, and are anterior to the provisions of the act of August 1,

1888, which provides that the practice shall conform to the state practice. By the statutory practice in the state of Virginia trial of the question of damages in condemnation proceedings is not required to be by jury. If, therefore, the right to a trial by a jury in the federal courts depended upon the statutory provisions in the United States Revised Statutes, they would be repealed by the later statute of 1888, which was also a statutory provision changing the practice of trial of issues of fact in condemnation cases from a trial before a jury to a trial in the method described by the state practice, which might be before commissioners or at least not before a jury.

We are thus cast back to the question whether or not the right of trial by jury in such cases in the federal courts is constitutional, in which event it could not be changed or done away with by any statutory provision. The constitutional provision is contained in the seventh amendment, which provides that the right to a trial by a jury shall be preserved in suits at common law where the value exceeds \$20. In *Kohl v. United States*, 91 U. S. 367, 376 (23 L. Ed. 449), where the case arose upon proceedings for condemnation instituted by the United States in a court of the United States, the court held:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not within the meaning of the statute a suit at common law when initiated in a court."

In this case, however, the question arose upon the right of the Circuit Court of the United States to entertain jurisdiction of proceedings for condemnation, and turned upon the point whether such proceedings were suits at law within the meaning of the statute conferring jurisdiction in such suits upon the Circuit Court. The court states the question (91 U. S. 375, 23 L. Ed. 449):

"If, then a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court."

All that the court held upon the case made was that it was a suit at common law. There was no question of the parties' right to a trial by jury upon the quantum of the assessment.

In *Upshur County v. Rich*, 135 U. S. 467, at page 476, 10 Sup. Ct. 651, at page 654 (34 L. Ed. 196) the court cites the case of *Kohl v. United States* as holding that a proceeding for the condemnation of land as a site for a post office is a suit at law, and in *Chappell v. United States*, 160 U. S. 499, on page 513, 16 Sup. Ct. 397, at page 401 (40 L. Ed. 510) both the cases of *Kohl v. United States* and of *Upshur County v. Rich* are cited as deciding the proposition that a proceeding for condemnation "instituted and concluded in a court of the United States was in substance and effect an action at law."

In *United States v. Jones*, 109 U. S. 513, at page 519, 3 Sup. Ct. 346, at page 350 (27 L. Ed. 1015), the court uses this language:

"The proceeding for the ascertainment of the value of the property and consequent compensation to be made is merely an inquisition to establish a

particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners, or special boards, or the courts, with or without the intervention of a jury, as the legislative power may designate."

But the question of the right to a jury was neither before nor argued before the court. The only question before the court was whether the United States could use a state tribunal for the purpose of condemnation proceedings. The court itself (109 U. S. on page 518, 3 Sup. Ct. on page 349, 27 L. Ed. 1015) states:

"The only point presented upon which we can pass relates to the jurisdiction of the court below; if that can be sustained, its judgment must be affirmed."

Indeed, it actually appears in the case that a jury was allowed by the statute, and actually the judgment below was based upon the verdict of a jury. There was no contention but that the party was entitled to a trial before a jury.

In *Chappell v. United States*, 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510, the right to a trial by jury was not contested. It was a proceeding for condemnation filed in the District Court for the District of Maryland under the act of Congress of August 1, 1888, and the question was whether the party was entitled to *two* juries. The trial was regularly had before the District Court itself, and a special jury of 12 impaneled by the court for the purposes of that particular inquiry. The contention of the party was that he was entitled to a hearing before a special jury, and then a trial *de novo* before another and a regular term jury. The Supreme Court held that the defendant had had the benefit of a trial by an ordinary jury at the bar of the District Court, and was not entitled to a second trial by jury, except at the discretion of the trial court, or upon reversal of its judgment for error in law.

In *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, the case came up in the District of Columbia under the act of Congress of March 2, 1893, providing for the acquisition of ways for highways in the District of Columbia, and which provided for an assessment on a trial before a court and a special jury of 7 persons. No question was made or argued in the case that the party was entitled to a jury of 12 men. The argument was principally upon the question of the constitutionality of the act, and the court says (167 U. S. on page 592, 17 Sup. Ct. on page 983, 42 L. Ed. 270):

"It was objected to the validity of section 15 that it commits the assessment of benefits upon lands, whether within or without the particular subdivision benefited by the establishment of a new highway to 'the same jury' which estimates the compensation or damages under the previous sections for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating the tribunal of 7 men which is to estimate the damages and to assess the benefits as 'a jury,' when it is in truth an inquest or commission appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than 12 persons and in not being required to act with unanimity. * * * By the Constitution of the United States the estimate of the just compensation for property taken for the public use under the right of eminent domain is not required to be made by a jury, but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury."

This enunciation, if carried to its apparent logical extent, would appear to mean that Congress could, if it saw fit, devolve upon a single individual appointed by the executive the right and power of depriving an individual of his property, worth say thousands of dollars, at an arbitrary valuation, when it could not impose a fine of a small amount without the verdict of a jury of 12 men. The only question for decision before the court in *Bauman v. Ross*, as appears from the statement in the opinion of the court itself on this point, was whether section 15 of the act was invalid, because it committed two different assessments to the same jury. There was nothing either asserted or argued in the case that called for a ruling that no jury of any kind was requisite. The whole confusion on the subject appears to go back to the statement in *Kohl v. United States* that the right of eminent domain always was a right at common law and was enforced without the agency of a jury. That it was a right of sovereignty, and as such recognized and exercised by the law of England, is unquestioned; but it was not a right at common law, understanding by common law the collection of unwritten principles and precedents administered by the judiciary as forming the law governing the relations between crown and subject and subject and subject. The common law did not include statutes, but only the general customs of the realm contained in the body of its unwritten principles and precedents. 1 Bl. Comm. 62-64. It is hardly correct to term a law or a right created by and depending upon statute as forming a part of the common law. The crown itself in England possessed no power to expropriate the property of an individual. In Article XLVI of Magna Charta it is declared that no freeman shall be disseised or divested of his freehold or of his liberties or free customs, but by the judgment of his peers or by the law of the land, and these rights were made clearer and embodied in the petition of right to Charles I and the Bill of Rights enacted in the first year of William and Mary.

True, it left the "attribute of sovereignty," viz., the right to take private property for public use, the "law of the land," although not the common law. It could be done and be done only by act of Parliament (i. e., with the threefold concurrence of King, Lords, and Commons), and when done was done by virtue of a statute. Not of the common law. By the constitution of England, Parliament was supreme. 1 Black. Comm. 160-162. It could do anything. A trial by jury was secured by Magna Charta and the common law, but Parliament could dispense with it. It could and at times did put a man to death, attain him, and forfeit all his property without any trial whatsoever, but simply by act of Parliament as the law of the land. 4 Black. Comm. 259. It could therefore take private property for public use without compensation; but there had grown up a system of construction in England, so continuous and uniform as to become fundamental law, that Parliament would not take private property for private uses, nor would it take private property for public uses without just compensation. 1 Black. Comm. 138, 139; *Loan Association v. Topeka*, 20 Wall. 662, 22 L. Ed. 455; *Chicago, Burlington R. R. v. Chicago*, 166 U. S. 237, 17 Sup. Ct. 581, 41 L. Ed. 979; *Traction Co. v. Mining Co.*, 196 U. S. 251, 252, 25 Sup. Ct. 251, 49 L. Ed. 462.

These two principles were supposed to be imbedded in the United States Constitution—the one expressly in the fifth amendment; the other as implied therein. *Loan Association v. Topeka*, supra.

As Parliament had the right to take without compensation if it saw fit, and had the right to do away with jury trial also if it saw fit, it was entirely within its power, in statutes providing for the expropriation of private property for public uses, if it directed the compensation it saw fit to pay to be ascertained by assessors other than a jury. A jury was dispensed with in such cases, not because at common law in similar cases a trial by jury could not have been had, but because each statute of Parliament providing for an appropriation of private property to public uses was a law unto itself, made for that special occasion, and being enacted by the supreme power in the land, unhampered by any written constitutional restrictions, it provided in each particular case for the ascertainment of the compensation to be made by such person or persons, commission, or tribunal it saw fit.

A good deal of unconsidered language has been used with regard to the method of ascertaining the compensation in such cases prevailing in England and America prior to the adoption of our Constitutions. In the article on Eminent Domain in volume 7 of the *Ency. of Pl. & Pr.* p. 546, it is stated that "a well-settled practice existed both in England and in America before the adoption of any of our Constitutions of ascertaining the compensation by means of other agencies than a common-law jury," and this language is supported by many of the decisions of state courts cited in the note.

But it is entirely erroneous to speak of "a practice" which depended in each case upon the terms of the particular statute, and it is wholly overlooked that anterior to our American written Constitutions the conditions in the American colonies were the same as those in England; i. e., the colonial assembly, with the concurrence of the King's representative, was supreme, except where controlled by some express statute or law of the mother country. The local Parliaments, including therein the representative of the crown, had the same powers as the Parliament of England in this regard, and could appropriate private property for public use without any compensation, and could therefore allow such compensation as they chose to allow, to be ascertained in any manner they saw fit.

With the advent of written Constitutions came a different power of action by the legislative body. The federal Constitution contains two applicable provisions. The fifth amendment to the United States Constitution prohibits the taking of private property for public uses without just compensation, and the seventh amendment reserves the right to a jury trial in suits at common law where the value exceeds \$20. Under these provisions that "attribute of sovereignty," viz., the right to take private property for public uses, which was unlimited as to its exercise by the supreme lawmaking power, became now limited in express terms.

1. It could be exercised only upon condition that just compensation was paid.

2. If the proceeding to condemn were a suit at common law, the right to a trial by jury was reserved.

As the process of condemnation as practiced since our written Constitutions did not exist at common law, the question is really whether this process as now created was not the equivalent of a suit at common law. The jury at common law was always the tribunal to assess damages. Under the practice in cases of admiralty and equity jurisdiction in England, a man might be judicially divested of his property, but not in the way of assessment of damages in common-law rights of action. Equity and admiralty dealt with questions of existing rights of property, and the relations of litigants to each other; but the assessment of damages for torts committed upon the person or property was at common law the function of a jury. In any case even in equity and admiralty, the adjudication depriving a suitor of his property, or condemning him to pay money to his adversary, was rendered only after a hearing before a proper judicial tribunal, presided over by a duly qualified judge, after testimony taken and argument had with the administration of justice according to settled judicial principles and the right of appeal to a higher court on questions of fact and law—a different case from a hearing before a special commission or a single individual appointed for the occasion by the executive.

The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury. Could it be reasonably argued that, if the government instituted proceedings to condemn a chattel worth \$50 for violation of the custom laws, the owner or claimant is entitled to a trial by jury, or if it seeks to condemn a chattel worth \$25 for violation of the excise or pure food laws, the owner or claimant is entitled to a trial by jury. *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879; *Henderson Distilled Spirits*, 14 Wall. 53, 20 L. Ed. 815; *Garnhart v. United States*, 16 Wall. 165, 21 L. Ed. 275; *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479.

Yet if it proceeds to condemn a piece of land for public purposes worth \$50,000, the owner or claimant is not entitled to a trial by jury! The only difference in the cases is that in the proceedings to condemn for violation of the law the issue for the jury is the fact of violation, while in the proceeding to condemn for public purposes the issue is the value of the property. But that is the issue in this case. The crime of the owner in the last case is his refusal to accept what the government offers to pay, and his insistence upon a higher value, and as it is the case of a suit at common law, he is entitled to have his damages assessed by a jury.

The judgment of the District Court of the United States for the Western District of Virginia is accordingly reversed, and the cause remanded for a new trial before a jury.

Reversed.

DOLESE BROS. CO. v. KAHL†

(Circuit Court of Appeals, Eighth Circuit. January 10, 1913.)

No. 3,688.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DANGEROUS EMPLOYMENT—SAFE PLACE TO WORK—QUESTION FOR JURY.

Where it was part of plaintiff's duty as an employé in defendant's quarry to cut and cap fuses, and he was injured by the explosion of a box of fulminate caps with which he was working; caused by a spark from a blacksmith's anvil located in the same room where plaintiff was required to work, whether defendant provided a reasonably safe place for plaintiff to do such work in requiring that it be done in the same room in which the blacksmith's shop was located was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 229*)—INJURIES TO SERVANT—"CONTRIBUTORY NEGLIGENCE."

"Contributory negligence," as applied to an injury to a servant, is the omission of the servant to use those precautions for his own safety which ordinary prudence requires. It is not synonymous with assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

3. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—DANGEROUS PLACE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a careful workman 25 years of age, at the time of the injury had been employed in defendant's quarry for six months. It was part of his duty to cut and cap fuses for use in defendant's blasting operations, which he was required to do in a shop where blacksmithing operations were also carried on during a part of the day. He first did the work at a bench known as the south bench, but, fearing that the fall of irons hung over this bench might be dangerous, moved his work to the north bench, which was slightly nearer the blacksmith's forge. While at work at this bench, a spark flew from a piece of steel which was being welded into a box of fulminate caps, which immediately exploded, causing the injury. Plaintiff had been working at the north bench for 15 or 16 days prior to the accident with the knowledge and acquiescence of his superior officer, and it appeared that neither knew how far the sparks would fly, or how long they would live. *Held*, that plaintiff was not negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—SAFE PLACE—DUTY OF MASTER—INSTRUCTIONS.

In an action for injuries to a servant, the court charged that the master was required to furnish the servant with a reasonably safe place to work. Other instructions defined the term "safe place to work" as meaning a place so made and surrounded as to be safe when all the safe-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied May 17, 1913.

guards and protection which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employé, while himself exercising reasonable care in the service he undertakes to perform, and that it did not mean a place so made or surrounded as to exclude all possibility of danger, that defendant was required to act as a prudent man, or as one who acts with due care for his own safety and the safety of others under all circumstances within the vicinity, or surrounding the parties as a reasonable man would have acted under like circumstances, and, if defendant so acted, plaintiff could not recover. *Held*, that the charge as a whole was not objectionable as misleading the jury to believe that defendant was bound to furnish a reasonably safe place at all events.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action by Edward Kahl against Dolese Brothers Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John M. Cameron and Ralph F. Potter, both of Chicago, Ill. (Ruel B. Cook, of Davenport, Iowa, Jackson, Hurst & Stafford, of Rock Island, Ill., and Custer & Cameron, of Chicago, Ill., on the brief), for plaintiff in error.

M. J. Wade, of Iowa City, Iowa (Frank A. Cooper and F. Vollmer, both of Davenport, Iowa, and Wade, Dutcher & Davis, of Iowa City, Iowa, on the brief), for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

PER CURIAM. This is a suit for damages for personal injuries in which a judgment was entered in favor of Kahl, the plaintiff below, for \$20,000.

The defendant below, Dolese Bros. Company, owns and operates a stone quarry at Buffalo, Iowa. The plaintiff at the time his injuries were sustained was 25 years of age and had been employed by defendant in its quarry for six months. The fuse used in the work of blasting at the quarry was about a quarter of an inch in diameter, came in long rolls, and was cut in 3½-foot lengths. The caps were of metal, tubular in shape, about one inch long, closed at one end, and of a diameter to fit over the end of the fuse. They contained fulminate of mercury. After the fuse was cut into the proper length, one end of each piece of fuse was inserted into a cap, which was clamped or "crimped" fast to the fuse. The end of the fuse was then in contact with the fulminate.

During the three months before his injuries were sustained the plaintiff, Kahl, had been engaged in cutting and capping fuses. This work was done in a frame building known as the shop. It was 40 feet long east and west by 30 feet wide north and south. A space 10 feet wide by 22 feet long was partitioned off in the northwest corner for an office and storeroom, leaving 20 feet between the south partition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

of the storeroom and the south wall of the building. The caps and fuses were kept in this storeroom. Along the south wall of the building was a work bench about 3 feet wide. On the north side was another bench placed against the partition between the main room and the storeroom and running west 10 or 12 feet from the east end of the storeroom. About six feet south of the east end of this north bench was an anvil, and just south of the anvil a forge, both used in such blacksmithing operations as were required about the quarry. This blacksmithing work usually consisted of sharpening and repairing tools and appliances. At the time of the accident certain construction work was under way at the quarry and the forge and anvil were in use on an average of about one-third of each day. Along the south side of the shop over the bench were rows of iron pins 10 inches long inserted in the studding. The plaintiff and certain of his witnesses testified that pieces of iron of various sizes and character were hung upon these pins.

It had been the custom for four years to cut and cap fuses in this room. There was testimony on the part of the plaintiff to show that this had generally been done at the center of the south bench. From the anvil to the nearest point of the bench the distance was about 8 feet on a diagonal line and the bench was about 12 feet long. The plaintiff had done this work there for more than two months. He had become alarmed because iron fell from the pins onto the south bench while he was working, and he was afraid that thereby the caps might be exploded. For this reason about 16 days before the accident he had commenced doing the work referred to on the north bench. He testified that the superintendent saw him working at the north bench several times and was talking to him on the day before while he was putting on the caps at the same place where he was standing when the accident happened. The plaintiff also testified that he could not work at any point on the north bench except the east end by reason of certain sacks of cement being piled on or against the other parts of the bench.

The accident which injured the plaintiff occurred about 7:30 in the morning. He was working capping fuses about three feet from the east end on the north bench with his back to the anvil. He was preparing the fuses to be used in firing shots that evening, a task which would consume a half hour of time. He had the caps beside him on the bench. These caps were purchased and kept in tin boxes each containing 100. The caps were placed in the box open ends up. The box was $2\frac{1}{8}$ inches wide and $2\frac{5}{8}$ inches long. While Kahl was so engaged, the defendant's blacksmith, with the engineer of a steamer, whose eccentric rod, one inch in diameter, had been broken, came into the shop with the rod. They proceeded to heat the pieces of rod in the forge and weld them upon the anvil. This work had nothing to do with the business of the defendant. They had so heated and pounded the iron alternately for 10 minutes or more when sparks from the iron flew over Kahl's head into the open caps upon the bench and an explosion resulted. Kahl was thereby rendered totally blind, his face and hands were disfigured, and he sustained other serious injuries.

The evidence has been stated in the aspect most favorable to the plaintiff.

At the close of all the evidence the defendant requested the court to direct a verdict in its favor. To the ruling of the court denying this motion the defendant excepted, and that is the principal assignment of error in the case.

It is claimed that a verdict for the defendant should have been directed because: (1) There was no evidence of negligence on the part of the defendant, and (2) the evidence conclusively showed that the plaintiff was guilty of contributory negligence.

[1] Upon the question of the defendant's negligence, it appears that the work of capping fuses had been carried on at the south bench a long time, and that this work had been done by the assistant superintendent himself when the anvil and forge were being used. We are now asked to say that this blacksmith shop was so obviously a reasonably safe place in which to do this work that reasonable men could not differ on the question. This we decline to do. Under the evidence in the case, it was clearly for the jury to say whether or not the defendant had exercised ordinary care to provide a reasonably safe place in which the plaintiff could do the work.

[2] The chief question argued upon this assignment of error is that relating to contributory negligence. There is in the case no defense based upon assumption of risk. Assumption of risk and contributory negligence are not the same thing. *Schlemmer v. Buffalo, etc., Railway Company*, 220 U. S. 590, 596, 31 Sup. Ct. 561, 563 (55 L. Ed. 596). In that case the court said:

"Contributory negligence, on the other hand, is the omission of the employé to use those precautions for his own safety which ordinary prudence requires."

The question therefore is: Was the plaintiff under all the circumstances of the case, guilty of negligence?

[3] The defendant insists that the accident was caused because the plaintiff removed from the south bench to the north bench. The evidence that iron articles fell upon the south bench, and that they might in falling explode the caps, made it a question for the jury as to whether or not that was a dangerous place for him to work. There was also evidence to show that the only place in the shop in which the work could be done was at the place where the plaintiff was working when the explosion occurred. Moreover, the evidence as to distance seems to indicate, or at least the jury might have so found, that the north bench was practically as safe a place as the south bench. There was evidence to show that from the anvil to the nearest point on the south bench the distance was 8 feet; that the work had been done at the center of the south bench which would be about 6 feet farther along on the bench. The distance in a direct line from the anvil would not, therefore, be much more than 5 or 6 feet farther than the distance from the anvil to the point where the plaintiff was standing when he was injured. A blacksmith of 14 years' experience testified that in welding a rod an inch thick sparks would fly about 18 to 22

feet, and that oakum had frequently caught fire from sparks at a distance of from 15 to 20 feet.

Among other circumstances which the jury were entitled to consider, and as to which there was evidence, were these: The plaintiff, according to the defendant's witnesses, was a careful workman. He had been working at the north bench for 15 or 16 days with the knowledge of his superior officer, who had not told him that it was a dangerous place. While he knew that a spark would explode the caps, he did not know how far sparks would fly, or how long they would live. The forge was used principally for sharpening picks and drills. Sparks did not fly when this work was being done. The plaintiff had never seen any sparks fly from that anvil. He had never seen any welding done upon that anvil. When the engineer and the blacksmith came in to weld the broken rod, the plaintiff did not know what they were going to do and did not see what they were doing. While he could do the work at any time he chose, yet the practice had been, according to defendant's testimony, to do this work at the south bench when the anvil and forge were being used. The defendant's superintendent testified that he never paid any attention to sparks, that he did not know how far they would fly, that he did not know whether it was a dangerous place to work or not, that he did not consider it dangerous to work at the south bench, that he never thought there was any danger even when the blacksmith was working, and as a matter of fact he did not know if a spark would fly down there and set the caps off, or not. The assistant superintendent and immediate superior to plaintiff testified that he paid no attention to sparks, that when he was putting on caps he paid no attention to whether the blacksmith was working or not, and that he made no inquiry as to how far sparks would fly.

The blacksmith, a witness for the defendant, testified that he did not pay any attention to the sparks and that he did not realize that there was any danger there. *Chicago & E. Ry. Co. v. Ponn*, 191 Fed. 682, 689, 691, 112 C. C. A. 228.

The box containing the caps was very small, and the plaintiff was standing between it and the anvil.

Under all these circumstances, it was for the jury to say whether or not the plaintiff was guilty of contributory negligence.

[4] In the course of his charge the court said:

"Now the law is that the master must furnish the servant with a reasonably safe place to work."

The defendant excepted to this portion of the charge, and that exception is the basis of another assignment of error.

But immediately following the above-quoted statement is found the following:

"To fully cover that matter to you gentlemen, not educated to the law, is somewhat difficult; particularly it is somewhat difficult to do it with reasonable terseness and clearness, and at the same time avoid prolixity, or many words.

"The term 'safe place to work' means a place so made and so surrounded and with such appliances or machinery as to be safe, when all the safeguards and protection which ordinary experience, prudence, and foresight would suggest, have been taken to prevent injury to the employé, while the em-

ployé himself is exercising reasonable care in the service in which he undertakes to perform.

"The term 'safe place' does not mean a place so made or surrounded, or with such machinery or appliances, as to exclude all possibility of danger, and the mere fact that an accident happens is not in itself evidence or a showing that the place was unsafe within the meaning of the term just given."

The court also said:

"If the use of explosives, such as were being worked with at the time of this accident, would require a higher degree of care and attention both from the defendant as to the place furnished for the work, and a higher degree of care and diligence on the part of the employé, Mr. Kahl, in doing the work, each must have acted as a reasonably prudent man under like circumstances would have acted.

"By the term 'prudent man' is meant one who acts with due care for his own safety and the safety of others, under all circumstances within the vicinity or surrounding the parties, as a reasonable man would have acted under like circumstances.

"If the defendant company did not thus act, and if Mr. Kahl did thus act, the plaintiff will be given a verdict by you gentlemen.

"If each party were negligent, the defendant company in not furnishing a reasonably safe place, and Mr. Kahl in not exercising diligence, there can be no recovery."

When the whole charge is considered, it is apparent that the judge did not say, and the jury could not have understood him as saying, that the defendant was bound in any event to furnish a reasonably safe place to work. The jury must have understood that before a verdict could be returned against the defendant, on that part of the case, it must find that the defendant had not acted as a reasonably prudent man under like circumstances would have acted. The other requests to charge, which are made the bases of assignments of error and the one in regard to the admission of evidence, we have examined; but we find no error in any of the rulings referred to, and none of them merit any special discussion.

The judgment of the court below is affirmed, with costs.

SECURITY INV. CO. OF PITTSBURGH v. FIRST NAT. BANK OF
BEAUMONT, TEX.

McMULLIN v. FIRST NAT. BANK OF BEAUMONT, TEX., et al.

(Circuit Court of Appeals, Third Circuit. February 21, 1913.)

Nos. 1,620, 1,645.

CORPORATIONS (§ 547*)—LEGALITY—PREFERENCE OF CREDITORS.

When the property of a defendant corporation was in the hands of receivers, in order to protect it from sacrifice, a plan was formulated by the creditors to grant extensions. Plaintiff, which was a creditor, obtained an extension note, which matured in about half the time of those of other creditors of the same class under the plan agreed to, and yet the note referred to such plan, and purported to be executed thereunder. Other creditors had no knowledge of such preference. *Held*, that a court would not enforce payment of such note before the time when the other notes of the same class matured, on the ground of public policy, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

would enjoin prosecution of an action thereon until the creditors were on an equality.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178-2181; Dec. Dig. § 547.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the First National Bank of Beaumont, Tex., against the Security Investment Company of Pittsburgh. Judgment for plaintiff, and defendant brings error. Reversed. Also suit in equity by M. K. McMullin, doing business as M. K. McMullin & Co., against the First National Bank of Beaumont, Tex., and the Security Investment Company. Decree for defendants, and complainant appeals. Reversed.

James W. Collins, of Pittsburgh, Pa., and S. O. Levinson and Chester E. Cleveland, both of Chicago, Ill., for Security Investment Co.

W. S. Moorhead and John S. Wendt, both of Pittsburgh, Pa., for First National Bank of Beaumont, Tex.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for M. K. McMullin.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the First National Bank of Beaumont, Tex., brought an action at law against the Security Investment Company of Pittsburgh to recover a balance of \$4,263.98 on a note of the latter for \$10,308.33, payable December 7, 1910. Thereafter M. K. McMullin, a creditor of said Security Company, filed a bill in equity against the Bank and the Security Company, praying the former be enjoined from prosecuting said claim to judgment until May 1, 1913, and that the Security Company be enjoined from paying said note and from giving any preference to said Bank over him and other creditors similarly situate. The Bank's demurrer thereto the court below sustained, and dismissed the bill. Thereupon McMullin took this appeal. Trial by jury having been waived in the law case, the court heard the case, and entered judgment for the claim in suit in favor of the Bank, whereupon the Security Company sued out this writ of error. In this court the cases were heard, and will be disposed of together.

The statement of claim in the law case averred inter alia that the Security Company gave and duly registered its promissory note on May 1, 1908, to the Bank, a copy of which was attached, for \$10,308.34, with interest at 5 per cent., payable December 7, 1910, giving as collateral security therefor 220 shares of the assenting stock of the Westinghouse Electric & Manufacturing Company; that the Bank, in pursuance of the provisions of the note and upon its nonpayment at maturity, had, after notice, sold said stock at public sale, and realized therefrom a net balance of \$7,450.30, after application of which there still remained unpaid the \$4,263.98 for which suit was brought.

Without entering into detail at this point, it suffices to say the Security Company defended on the ground that the plaintiff, having as a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditor surrendered its prior indebtedness and accepted the present note, in pursuance of a plan of composition covering all the indebtedness of said company, should not, on grounds of public policy, be permitted to enforce the same, as thereby the plaintiff would be enabled to obtain a secret preference and an undue advantage over creditors of like order. It also claimed that the Bank, having no right to enforce payment of the note in advance of the claims of other creditors, its sale of the collateral was unwarranted, and for its unlawful sale the Security Company was entitled to recover by way of certified balance, under the Pennsylvania statute, its damages of several thousand dollars.

Turning to the plaintiff's pleadings, we note, first, that what is here sought to be enforced is an executory contract in the shape of a note payable in futuro; and, secondly, that this note is not an original undertaking between the parties, but, as it states, it (together with another of like amount) is a "secured extension note," the payment of interest thereon is conditioned "as defined in the plan dated March 6, 1908," for the extension of its debt and the protection of its interest in the Westinghouse Electric & Manufacturing Company, and "this note is issued under and in pursuance of article 1 of said plan, to which reference is hereby made for a description of the rights of the registered holder hereof and of the company. For the security of this note the company has deposited with the registered holder hereof the following property, 220 shares Westinghouse Electric & Mfg. Co. assenting stock." It therefore appears by the plaintiff's own showing that it is invoking the court's aid to enforce an executory contract, and that such contract, by its own recitals, is created by a plan "for the extension of its debt and the protection of its interest in the Westinghouse Electric & Mfg. Company," and "under and in pursuance of article 1 of said plan." The plaintiff, thus seeking the aid of a court of law to enforce an executory contract which declares it was made pursuant to such extension plan, stands in the position of one affirming the plan, and of its provisions the law will take notice.

Turning, then, to such plan, it appears that on October 23, 1907, the United States Circuit Court for the Western District of Pennsylvania appointed receivers for the Security Investment Company, the defendant, into whose hands the assets of such company passed and were held by the court through such receivers for the benefit of its creditors. This action was necessary to prevent the sacrifice of its resources. Among its creditors at that time in what, under the plan referred to in the note in suit, is known as class B—that is, creditors whose collateral security was less than their indebtedness, were the complainant, McMullin, in the sum of \$130,453.82, and the respondent Bank in \$20,000. The Bank then held as collateral for its indebtedness 440 shares of the capital stock of the Westinghouse Electric & Manufacturing Company. On the same day the court appointed receivers for the latter company, and took over its assets. At that time the face value of the \$22,000 of the Bank's said collateral was of the real value of \$10,000. In order to rehabilitate the Electric Company, it was necessary, among other things, for its stockholders to furnish several mil-

lions of additional capital, and, as the Security Company owned 231,000 shares of the stock, it had to furnish its quota. To do this it was necessary for the Security Company, the bulk of whose resources consisted of said shares, to secure not only an extension of its indebtedness from its creditors, but induce them to loan to it the money necessary to aid in the rehabilitation of the Electric Company. To that end an extension plan was submitted to all its creditors, which, in general, provided for an extension by all creditors belonging to class A—that is, those holding collateral equal to or in excess of their indebtedness, who were to surrender their notes and receive in lieu thereof notes payable in three years—and all in class B were likewise to surrender their notes, and receive in lieu thereof notes payable in five years. It is therefore apparent that the plaintiff, whose indebtedness falls under class B of said plan and for which it was entitled to payment in five years, is by this note seeking to enforce payment in two years, a preference of three years over McMullin, the complainant, and all other creditors of class A, and likewise a preference of one year over all creditors in class B. It is therefore manifest that, unless some valid ground exists justifying this inequality, this action should, as prayed for by McMullin's bill, be enjoined until such time as the plan provides for the payment of all members of class B, and thus enforce that equity of equality which is the due of all creditors of like class. To justify such inequality, the Bank says this preference was given to it by the reorganization committee, that on the strength of that concession and on that alone it surrendered its note, and accepted, *inter alia*, the extension note in suit. To this contention the answer is, first, that such act of the committee, in virtually establishing a third class of creditors, was beyond the powers conferred upon it; and, second, that the preference given plaintiff by the committee, being unknown to McMullin and his fellow creditors, will not be enforced by the law. In the provisions defining the powers of the committee, we find no conferring of such power as was here exercised. Without entering into a discussion of the scope of the discretionary powers vested in such committee, it suffices to say that, if it had a right to exercise such power in behalf of the plaintiff, it had the right to do so for every other creditor; and to give such discretionary scope to the reorganization committee would be to substitute for the proposed plan, which was based on the equity of equality of all creditors of like class, a preferential, individual, and undisclosed inequality, the effect of which might be the premature sweeping away of the assets from all the other creditors. Such agreement for a preference as here given being unauthorized and without notice to other creditors, the law will not enforce it. *McMullen v. Hoffman*, 174 U. S. 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, and cited in 6 Am. & Eng. Ency. Law, p. 395. And this the law does, not in relief of a defendant, but on the higher grounds of public policy. *Pittsburgh v. Monongahela* (C. C.) 139 Fed. 782.

The Bank contends it is not bound by the provisions of the plan because it alleges it never agreed thereto, averring that all it did was to accept the note under its express agreement, to which the Security Company by the plan committee agreed, that its indebtedness "will ma-

ture and be paid with interest as follows: One half thereof in one year from the date the plan goes into operation; the other half within two years from said date. The foregoing is conditioned on the successful consummation of the plans of reorganization, and if such plans do not go into effect, then the foregoing is void." But the manifest purpose of the Bank was to have the plan, as proposed, consummated, for without its consummation its claim was likely to be lost in large part. Indeed, to quote its own words, the stipulation was "conditioned on the successful consummation of the plans of reorganization." But coupled with this approval of a plan based on a continuation amongst all creditors of that equity of equality which the creditors already had on the assets then in the hands of the Circuit Court, this Bank, with a selfishness that was exceptional among the thousands of indulgent creditors, added the inequitable condition that the Security Company was to give it a note which was preferential, which gave it a material advantage over other creditors and which was not warranted by the plan which it desired consummated. But, in exacting such exceptional conditions, the Bank in its inequitable zeal ignored significant facts. These were that its fellow creditors, and not its debtor, were the real parties in interest in the property which was then in the hands of the court, knowledge and implied consent by whom to such a preference were requisite to its validity; and, second, that against the enforcement of such agreements between a debtor and a secretly favored creditor the law sets the stern barrier of a refusal to allow its process and powers to aid in consummating an injustice to that great number of other creditors, to whose consent for an extension on the basis that all creditors of a class should be treated alike is due the fact that to-day this great industry has been saved from disintegration and its indebtedness, including that to the plaintiff, made good.

In accordance with the views expressed, the record in the law case will be remanded, with directions that the judgment in the law case be reversed, and that judgment be entered in favor of the defendant, but without prejudice to the plaintiff, after May 1, 1913, to sue the Security Company for any balance of indebtedness, and without prejudice to the right of the Security Company, in such action or by original action, to enforce any rights or claims it may have against said Bank arising from its alleged premature sale of collateral, or its alleged failure to loan funds. In the equity case, the decree dismissing the bill is reversed and the record remitted, with directions to enter a decree overruling the demurrer, the Bank to pay the costs of both cases in this court.

CLYDE IRON WORKS v. FRERICHS et al.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1913. Rehearing Denied April 8, 1913.)

No. 2,323.

1. SALES (§ 61*)—EXECUTORY CONTRACT—SELECTION OF GOODS.

A contract for the sale of machinery to be shipped from Minnesota to Louisiana was executory until the machinery was selected and separated from the seller's general stock and appropriated to the sale, both under the general law and as provided by Rev. Civ. Code La. art. 2456.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.*]

2. SALES (§ 451*) — CONDITIONAL SALES — STATE LAW — EXTRATERRITORIAL FORCE.

The Louisiana law, holding conditional sales ineffective, has no extra-territorial force to invalidate a conditional sale contract for the sale of machinery before or at the time of the delivery of the machine in Minnesota for transportation to Louisiana, so as to pass the title to the buyer before it had paid the purchase price, since, as the condition was effective in Minnesota, the title did not pass on delivery to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. § 451.*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 80 C. C. A. 448.]

3. SALES (§ 479*)—CONDITIONAL SALES—VALIDITY—LIEN FOR UNPAID PURCHASE PRICE.

A lumber company purchased certain machinery under a conditional contract of sale, reserving title in the seller until the price was paid, the machinery to be shipped from the seller's place of business in Minnesota to the buyer in Louisiana, and to be paid for \$1,000 cash and the remainder in 30-day notes to be executed on arrival of the machine in Louisiana. The reservation of title was valid in Minnesota, but invalid in Louisiana; its place there being taken by Rev. Civ. Code La. art. 3227, giving the seller a lien for the unpaid purchase price. *Held* that, on a sale of the machine by receivers of the buyer before the price was paid the seller was entitled to a lien on the proceeds for the unpaid portion of the price, regardless of whether the contract was enforceable according to the law of Minnesota or Louisiana.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Intervention by the Clyde Iron Works against H. J. Frerichs and another, as receivers of the Greenlaw Lumber Company, Limited. Decree for defendants, and plaintiff appeals. Reversed and remanded.

Edwin T. Merrick, Walter S. Lewis, Philip Gensler, Jr., and Ralph J. Schwarz, all of New Orleans, La., for appellant.

F. L. Richardson and Frank Soule, both of New Orleans, La. (L. A. Morphy, on the brief), for appellees.

Before SHELBY, Circuit Judge, and NEWMAN and GRUBB, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SHELBY, Circuit Judge. A contract was made and signed at Ramsey, La., November 29, 1909, between the appellant, the Clyde Iron Works, and the Greenlaw Lumber Company, for the sale by the former to the latter of a log-handling machine and swinging boom for \$2,900. The machine was to be "delivered f. o. b. cars Duluth, Minn." One thousand dollars of the purchase money was to be paid in cash; the remainder in ten installments of \$190 each, for which notes were to be given on the arrival of the machine in Louisiana. The first note was to be due in 30 days, and one note every 30 days thereafter. The price was to include the costs of "the services of a man to superintend in the erection of the machine" in Louisiana. It was provided that, if the buyer decided that the machine was not suitable for the work, it could return it to the seller at Duluth and pay return charges. The contract contained the following clause:

"It is understood that the legal title to said machine shall remain in you [the seller] until fully paid for, and any note or other bill of exchange given you for any portion of the purchase price of said machine, or any judgment obtained thereon, shall not be deemed a payment hereunder until the same is actually paid in cash."

The machine was shipped and erected, and was accepted by the buyer. The purchase money was all paid, except \$760 and interest, which is still due the seller. Receivers were appointed by the lower court for the buyer, the Greenlaw Lumber Company, and they took possession of the machine. A controversy arose between the receivers and the seller as to whether the latter had a vendor's lien or privilege on the machine for the unpaid purchase money. The machine was sold by order of the court, with other property of the company, and its price brought into court, which is more than the amount due to the seller. The seller, by intervening petition, claimed payment in full as a preferred creditor, and the receivers of the buyer contested the claim, not denying that the seller was entitled to rank as an ordinary creditor for the sum still due on the machine.

The District Court decided, confirming the report of the special master, that the seller was entitled to recover only as an ordinary creditor, and dismissed its intervening petition in all other respects. The seller, the Clyde Iron Works, appealed to this court, and assigns the decree as error.

The ultimate and only practical question is whether or not the seller, out of the fund derived from the sale of the machine, is entitled to payment in full of the purchase money, or is it entitled to share only as an ordinary creditor?

If the contract of sale was made in Louisiana, and is to be governed by the law of that state, the seller would have a lien or privilege for the unpaid purchase money. Civil Code La. art. 3227.

[1] The written contract signed in Louisiana provided for the delivery of the property on board cars in Minnesota. The identical machinery sold had not been selected when the contract was signed. It was subsequently selected and delivered to the carrier. Both under the general law and under the Louisiana Code, the contract was execu-

tory until the machine, the object of the sale, was selected and separated from the seller's general stock, and so appropriated to the sale. Benjamin on Sales (7th Ed.) § 311, and note; Civil Code La. art. 2456. It appears, therefore, that the executory contract was consummated in Louisiana, but the executed contract was consummated by selection, separation, and delivery in Minnesota. The appellant's contention is that, when such is the case, the contract is to be treated as a sale made in Louisiana and to be governed by the laws of that state. *Erman & Cahn v. Lehman*, 47 La. Ann. 1651, 18 South. 650, and *McLane v. His Creditors*, 47 La. Ann. 134, 16 South. 764, are cited as sustaining this view. Later cases, however, modify, if they do not overrule, the doctrine of the two cases last cited, and indicate that an executory contract for the sale of an indeterminate object would not become an executed sale till the object is identified and appropriated to the sale, and that, if such appropriation did not occur in Louisiana, the contract of sale is not a Louisiana contract. *State v. Shields*, 110 La. 547, 555, 34 South. 673; *George D. Witt Shoe Co. v. J. A. Seegars & Co.*, 122 La. 145, 47 South. 444. In the present case, this appropriation occurred, as we have said, in Minnesota. Relying on the cases last cited, and others reaffirming that doctrine, the appellees contend that "title in the machine" passed to the Greenlaw Lumber Company on the delivery of it to the carrier, and that the executory agreement made in Louisiana became an executed sale in Minnesota, and that the Louisiana statute, giving a privilege for the purchase money, is inapplicable. It is true that the contract only became an executed contract of sale on the selection, separation, and delivery of the machine in Minnesota; but it is not true that the title passed from the seller to the buyer on such delivery. The contract, in express terms, retained the title in the seller until all of the purchase money was paid. Such retention of title would not be valid or effective in a contract of sale consummated in Louisiana, where conditional sales are not recognized as valid (*Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 South. 193); but they are recognized as valid in Minnesota (*Minneapolis Harvester Works v. Hally*, 27 Minn. 495, 8 N. W. 597; *Dyer v. Thorstad*, 35 Minn. 534, 29 N. W. 345; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028), and they are also held valid under the general law (*Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285), and are upheld and enforced by this court, unless the local law prevents (*Southern Hardware & Supply Co. v. Clark* [C. C. A.] 201 Fed. 1). Conditional sales are almost universally sustained as entirely lawful, 1 *Mechem on Sales*, § 564. In some states they are construed to be chattel mortgages. They are made in many different forms (1 *Mechem on Sales*, § 561); but in every instance they constitute a security for the purchase money. If valid in Louisiana, they would be of little use, as a lien exists there by statute for the purchase money.

[2] The Louisiana law, holding conditional sales ineffective, has no extraterritorial force to invalidate the condition in the contract before or at the time of the delivery of the machine in Minnesota, so as to make the title pass to the buyer before it had paid the purchase money.

The condition being effective in Minnesota, the title did not pass on the delivery to the carrier.

[3] The appellant contends that the moment the machine reached Louisiana the situation changed, "because the Louisiana law will not recognize a conditional sale of this kind," and consequently title did not pass till the machine came within the state of Louisiana. It is claimed, therefore, that both the executory and executed contracts were consummated in Louisiana, and that it follows that a lien exists for the unpaid purchase money under the Civil Code. That may be true, or it may not be true. A decision of that question does not seem to be necessary.

We repeat that the ultimate and only practical question is whether or not the seller is entitled to payment in full out of the money in court of the remainder due on the purchase, or is it entitled only to share with the other creditors?

The case is certainly governed, as to the disputed question, by either the Minnesota or the Louisiana law; for the completed sale was effected in one of these states or the other. If it is governed by the law of the former state, the contract secured all of the purchase money by retaining title in the seller till the purchase money was all paid, and the fund in court arising from its sale equitably belongs to the appellant to the extent of the amount due on the machine. If the case is governed by the Louisiana law, the statute gives the privilege or lien for the unpaid purchase money. In either view, therefore, the appellant would be entitled to full payment. A contrary conclusion can only be reached by treating the contract as a Louisiana contract to defeat the provision making the sale a conditional one, and by treating it as a Minnesota contract to prevent the application of the Civil Code allowing the privilege for the unpaid purchase money. We do not think the Louisiana jurisprudence can be used to brush the Minnesota law aside and not take its place; it cannot be used to divest the seller's title retained by the contract, and not stand to give the seller the privilege or lien granted by it.

We are of the opinion that the appellant is entitled to payment as a preferred creditor out of the fund produced by the sale of the machine.

The decree is reversed, and the cause remanded, with instructions to enter a decree conforming to the opinion of this court.

In re STAR SPRING BED CO.

(Circuit Court of Appeals, Third Circuit. February 15, 1913.)

No. 1,691.

BANKRUPTCY (§ 136*)—CONTEMPT—DISOBEDIENCE OF ORDER—PUNISHMENT.

The attorney for a bankrupt corporation, on the evening before the filing of the petition, and after the directors had admitted its insolvency, procured a loan at a bank for the corporation secured by a pledge of its accounts receivable, and with the money took up a number of unma-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1107 to date, & Rep'r Indexes.

tured notes of third persons which the corporation had indorsed and discounted. After the appointment of a receiver on the next day by an order directing the officers, agents, and attorneys of the bankrupt to turn over to him all notes, etc., in their possession, which order was made with the knowledge and consent of the attorney and pending the examination of the bankrupt concerning such notes, the attorney turned the notes over to the president, who destroyed or otherwise disposed of them. *Held*, that the respondent was guilty of a flagrant contempt of the court which justified a definite punitive sentence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the Star Spring Bed Company, bankrupt. Mendel Makowsky was adjudged guilty of contempt, and brings error. Affirmed.

A. A. Silberberg, of New York City, for plaintiff in error.
Rosenberg & Levis, of New York City, for trustee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the Star Spring Bed Company was adjudged bankrupt on April 19, 1911, and one Bilder was duly appointed its receiver. On the same day the receiver served on Mendel Makowsky, its president, a copy of the order of court appointing him receiver, which order directed "all attorneys, agents, officers and servants of said alleged bankrupt forthwith deliver to said receiver all * * * notes, * * * securities and all other choses in action * * * in the possession of them or either of them." Such order had been made with the knowledge of Abraham A. Silberberg, who, by indorsement thereon, as attorney for the bankrupt, consented to the making thereof. At the subsequent taking before the referee of the testimony of Makowsky, Harris Gutman, the treasurer, and Silberberg, who was also the personal attorney of Makowsky, it appeared that on the day previous to the filing of the petition, at a meeting held at Silberberg's office, the directors of the bankrupt conceded its insolvency, and in pursuance thereof a formal acknowledgment of that fact was subsequently signed and filed in the case. Later in the day, and after banking hours, Silberberg went to the Union National Bank of Newark, N. J., and after an interview with the president and cashier thereof obtained a loan of \$20,000 on the bankrupt's demand note, securing the same by the assignment of \$29,000 of accounts receivable owned by said bankrupt. With this \$20,000 Silberberg then took up and received from the bank 29 promissory notes of third parties, which had not matured and which the bankrupt had previously indorsed and had the bank discount. The testimony also showed that Makowsky, who had received the notes from Silberberg, refused to surrender them to the receiver. These

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts were brought to the attention of the court by its receiver, who, in a petition, averred that:

"The said notes have not been destroyed and have not been surrendered to the makers, and that the said notes are in the possession, custody, and control of the said bankrupt and its officers, agents, and attorneys."

He further averred that he feared Gutman and Makowsky might flee the jurisdiction of the court and prayed they be attached and adjudged guilty of contempt and punished for violation of said order. Thereupon the court, having before it the testimony taken and the petition of its receiver, issued an order directing Makowsky and Gutman to appear on a day certain "and then and there show cause why they should not be adjudged guilty of contempt as prayed for in said annexed petition, and why they should not be punished, as may then be determined, for such contempt." This order was duly served on both men. Before the hearing Gutman committed suicide, and Makowsky did not appear at the return day, whereupon the court duly noted Makowsky's default and directed an attachment, on which Makowsky was attached by the marshal. Thereafter Makowsky presented a petition praying, for various reasons, given in excuse, that he be relieved of his default in not appearing as above noted and also that he be granted a hearing on the merits. On consideration thereof the court released Makowsky on bail, and, on his application, a reference was made to a special master to take testimony to be adduced by him for the purpose of purging himself of contempt. Full proofs were taken, the same fully argued, and the court filed an exhaustive opinion. Without now referring to the importance and value of the notes in question, and whether they were, as claimed, accommodation notes, it suffices to say that the court found, *inter alia*:

"The substitution of bankrupt's book accounts in place of these notes at the bank was for the purpose of canceling the obligations of such alleged accommodation paper. At the time of the serving of such order upon Makowsky, these notes were still in the possession of Attorney Silberberg. Subsequently they were turned over to Makowsky. * * * The attorney knew of the making of such order. In fact, he was instrumental in the making of it and the appointment of the receiver, and, if these notes are property either owned by the bankrupt or in possession of its officers or agents at the time of making such order, Silberberg as the attorney having had possession of them, and Makowsky, as president of the corporation, admittedly having received such notes after the making of such order, both are accountable for their disposition. * * * The withholding of such notes from the receiver, and their subsequent destruction or surrender to the makers, not only frustrated the nullifying of such intended preference, but actually effected it and made impossible an exchange with the bank, and without which it is extremely doubtful that the preference given to it can be avoided. * * * The failure of Makowsky to turn over these notes after they came into his possession was a disobedience of the court's order. Was it willful and contemptuous? He now pleads ignorance of the contents of that order and couples such exculpation with the statement that if he had known they were wanted by the receiver he would have turned them over.

"But no one impartial to the issue here raised can read the testimony that has been introduced in this case and fail of the conclusion that Makowsky did know that such notes were wanted by the receiver, and that he purposely prevented them from being turned over. On May 11, 1911, he testified before the referee that he did not have the notes, but that Silberberg had them. Subsequently, and before the 16th of May, to which his further examination had been continued, he obtained them from Silberberg, and after

consultation with Gutman, the treasurer of the company, he, on that very day, and but a few hours before he was again to testify, either alone or in conjunction with Gutman, destroyed or otherwise disposed of them. Silberberg denies that he had the notes on May 12th, but says that he had turned them over to Makowsky before that date. Whether they were actually destroyed or sent to the makers thereof is immaterial. The fact that he obtained them from the bankrupt's attorney after the serving of the order upon him to turn over, and when he knew that they were sought on May 12th, taken in conjunction with the preparation for taking them up before the bankruptcy proceedings were instituted, and the intended purpose for procuring them, and his subsequently disposing of them, speak forcibly, not only upon the knowledge of Makowsky as to his duty to turn them over to the receiver, but of the underlying evil motive for their not being turned over. To my mind it is a clear case of willful and evil-minded contempt of the order of this court, and cannot be lightly regarded in view of the injurious consequences directly falling upon the general creditors in this case, and those likely to follow in other cases if but slight punishment is inflicted. Every one conversant with the administration of bankrupt estates has found numerous manifestations of attempts by bankrupts to secrete their properties from their creditors or to turn them over to favored creditors, with the purpose of either repossessing such property themselves or ingratiating themselves with the favored creditors that they may have their subsequent financial assistance."

An examination of the testimony satisfies us that the court was fully justified in its findings and conclusions. The offense was flagrant. The receiver was the hand of the court, its own officer, appointed, as provided by the statute, "for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition." These notes, as clearly appears, were in the hands of either Makowsky or Silberberg, his attorney, at the very time testimony was being taken explaining the transaction concerning them, and there was a clear intent in the minds of both men that these notes should not be delivered to the court's officer. As the court said, "both were accountable for their disposition." Indeed, Silberberg (and he reflected the attitude of Makowsky, as well as his own disregard of his duty as attorney of the bankrupt and as an officer of the court), when asked why he did not permit the court to decide the controverted question of the ownership of these notes, said, "I will take the responsibility for judging that." If answer to such contention, or condemnation of such conduct, were required, it is found in *Gompers v. Buck*, 221 U. S. 450, 31 Sup. Ct. 501, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, where the court say:

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."

The very opposite course to that laid down as above by the Supreme Court was adopted by Makowsky and Silberberg in reference to these notes. As a direct result of their willful acts the notes have either been destroyed or have gone beyond their, or the court's, power to reclaim them. In so doing, all possibility of affording any remedial relief to the parties in interest has passed beyond the court's power, and they (Makowsky and Silberberg) have themselves removed the case from the sphere of remedial contempt where a court might make the contempt commitment conditional on the notes being returned, and where, as said in *Re Nevitt*, 117 Fed. 461, 54 C. C. A. 635, the person

adjudged in contempt "carries the keys of his prison in his own pocket." By their conduct they have gone further and made the case one of punitive contempt where the only thing left is for the court by a definitive sentence to punish for a past disobedience and afford an example to others so minded. Indeed, the disobedient refusal to deliver these notes and their subsequent surrender and destruction has brought about a condition fully described in the words of the Supreme Court in 221 U. S. 442, 31 Sup. Ct. 498, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874:

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience."

The sentence and judgment of the court below is therefore affirmed, and the record remanded, with instructions to carry out such sentence.

LEE v. NEW RIVER & POCAHONTAS CONSOL. COAL CO.

(Circuit Court of Appeals, Fourth Circuit. March 6, 1913.)

No. 1,084.

DEATH (§ 24*)—MINORS—NEGLIGENCE OF BENEFICIARY—IMPUTATION TO ADMINISTRATOR.

Where a father, who, under the West Virginia law, was not only the sole guardian of his minor son, but also entitled to the entire recovery in an action for the son's wrongful death, knowingly permitted the boy to work as a trapper in a coal mine, where he was himself employed, for 26 hours consecutively without sleep, which incapacitated the child from protecting himself from dangers accompanying the work, and by reason of this he was killed by a motor while asleep on the track in the mine, the father's default was a bar to his claim of damages for the child's death, and was also imputable to, and precluded a recovery by, the child's administrator.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by W. L. Lee, as administrator of the estate of Charles Wellman, deceased, against the New River & Pocahontas Consolidated Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry S. Cato and Adam B. Littlepage, both of Charleston, W. Va. (Cato & Bledsoe, of Charleston, W. Va., on the brief), for plaintiff in error.

C. W. Dillon, of Fayetteville, W. Va. (Dillon & Nuckolls, of Fayetteville, W. Va., on the brief), for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD, Circuit Judge, and DAYTON and SMITH, District Judges.

SMITH, District Judge. This case comes up upon a writ of error to a judgment in favor of the defendant in an action at law to recover damages for the defendant's negligently causing the death of a boy. The defendant is a coal mining corporation, and employs among its employes those who are denominated "trappers." The duties of a trapper appear to have been to open and close a trapdoor in the mine, which is closed or kept closed by the air pressure in the mine. The performance of this duty requires no great amount of strength or intelligence, as it means simply the opening and closing of a door whenever it is necessary for the purpose of allowing the passage of cars loaded with coal from the mine, or their return empty to the mine. One Charles Wellman was employed as a trapper for this purpose. He was a youth of about 14, and seems to have been perfectly capable in all respects of performing his duties and understanding them thoroughly. He had acquired the nickname of "Speedy" from his activity and quickness in performing his work. He lived with his father, and his father was also employed in the mine. On the day of the accident which resulted in his death he had gone back to work after having performed his full duty the day before and during the night preceding; that is, the evidence showed that he had worked on the 16th day of March from about 7 o'clock in the morning until about 6 o'clock in the afternoon, with the exception of an hour at dinner; that he had worked from about half past 7 o'clock on the evening of the 16th until nearly 6 o'clock on the morning of the 17th, and had again gone to work at about 7 o'clock on the morning of the 17th, and was killed about half past 9. He was killed by an electric motor bringing cars loaded with coal out of the mine, and when it approached where the boy was he was lying apparently asleep, with his head resting upon one of the rails. When discovered by the brakeman on the motor, it was too late to permit the stopping of the motor, which ran over the boy, crushing his head, and causing almost immediate death.

The evidence shows that the working of the boy for this length of time, say practically the whole time from 7 o'clock in the morning of one day until half past 9 o'clock in the morning of the next day, with comparatively short stops for his meals, was with the knowledge of his father, who worked in the mine, and that when the boy went back to work on the morning of the second day, after having been at work all of the preceding night, it was with the knowledge and assent of his father. There is some contest about what was the age of the boy. The law of West Virginia prohibits the employment in coal mines of any boy under the age of 14 years, and requires that, in cases of doubt, the parents or guardians of such boy shall furnish affidavits of their ages, and that any operator, agent, or mine foreman who shall knowingly violate the law, or if any person shall knowingly make a false statement as to the age of the boy, they shall, upon conviction, be fined or imprisoned as the statute directs. There is some conflict in the testimony as to whether or not the affidavits or statements were

furnished in this case. The evidence for the defendants is to the effect that they did have written statements from his father that the boy was over the age of 14. This is denied by his father, and there is evidence that the boy at the time of his death was under 14 years of age. The testimony of his mother is that he was born on the 19th day of November, 1895, and according to the evidence his death occurred on the 17th day of March, 1909; so that he was under 14 years of age at the time of his death. If it is proved, therefore, that he had been employed by the mining company with the knowledge that he was under the age of 14, the parties responsible for that employment would be liable to the penalty imposed by the statute; and it also may be that the knowingly employing by the mine company of a boy under the age of 14 years would be presumptive negligence on the part of the mining company. This last question, however, does not arise for decision at this time. There was evidence to the fact that his parents had made statements that he was over the age of 14 years.

The defendant interposed the defense that under the laws of West Virginia the father of the deceased was entitled to the benefit of whatever would be recovered under this action for the death of the deceased. The action is brought by a third person as administrator for the estate of the deceased boy; but under the law of West Virginia, while this action is permitted to be brought by the administrator, yet the amount, when recovered, goes to the person who under the law of West Virginia would be entitled to inherit, had the deceased died intestate. In the present case it is admitted that Elisha Wellman, the father of the boy who was killed, is the person who would be sole beneficiary and entitled to the entire benefit of whatever might be recovered by the administrator in this cause. The answer of the defendant is in effect a plea in bar, that as the death of the boy was due to the fact that the said Elisha Wellman, the sole beneficiary, permitted, induced, and compelled his son to enter the mine and work on the day that he was killed, knowing that he was under age, and knowing, further, that he had been already working for such a number of hours as would unfit him to carry on his work without sleep afterwards, to permit a recovery in this case would be to permit the father to recover in a case where the accident resulted from his own wrong, and that under the rule of law he is not under such circumstances entitled to recover, and that his bar in this respect bars also the suit by the administrator.

The evidence disclosed that the boy had been at work consecutively before he was killed for over 26 hours without sleep. It may be that, for one engaged in a hazardous occupation, the working beyond a certain number of hours without rest has the effect of unfitting him to protect himself from the hazards of the occupation; and it may be, further, that the permitting by an employer, such as the defendant coal mining company, any one, and especially a boy, to continue working in its employment, when that employment is a hazardous one, for a number of hours consecutively without sleep, with such result as would physically unfit the employé from protecting himself from the hazards of that occupation, might be construed to be negligence on the part of

the employer. Assuming, for the purposes of the decision in this case, that such is the case, and that the permitting by the coal mining company of this boy to work consecutively for 26 hours without sleep was negligence on the part of the employer, inasmuch as it permitted the employé to work when he was physically incapacitated from protecting himself from the dangers accompanying such work, yet that would still leave open the question, on the plea in bar interposed by the defendant, whether if the coal mining company was negligent in this respect, so as to authorize a recovery by the boy if he was living, or by any one who did not knowingly contribute to his death, can the father recover where he himself did knowingly contribute?

The general rule of law is that where the death of a minor child is due to the negligence or the willful action of his father, and that father is the sole beneficiary, he is not entitled to recover. This rule would appear to be founded upon a very salutary rule of public policy. The minor child is supposed to be under the control and orders of his father. To allow one who has the control over a minor child to knowingly and willfully subject him to a hazard which may result in his death, and then allow the person so acting to recover damages for the death occasioned by his wrongful action in this regard, would be to offer a premium to the misuse by a parent or guardian or other person entitled of his powers over a minor. It is a question of public policy, and it is on this question of public policy, as we understand it, that the general rule of law above referred to has been enforced. It may be that to effect this bar the act of the party permitting or directing the minor's conduct must be one of an active kind by one qualified to know the danger to which the minor would be subjected. If the father were of weak mind, or if he were a person not capable of knowing the danger, or if the child's parent to recover were his mother, who also may not have been capable of estimating the danger, so as to rob the directions given of the element of intention to subject the minor to the risks of a hazardous occupation or act which might redound to the benefit of the person giving such instructions, the rule might well not apply. But where the case presented is that of one who is the party charged by law naturally with the control of and dominion over the minor, and he is a person who knows and can realize the dangers which the minor may be subjected to, or may subject himself to, under the instructions or with the knowledge of such party, and such party is one who will be the beneficiary in the case of the death of the minor, it would seem that the rule does apply, and does apply for the salutary reason that in such case the law will not permit the temptation to be offered to an unnatural parent of subjecting a minor in his control and charge to improper risks for the benefit of the parent.

In the present case, if there were no conflict on that point, it might be a question for the jury; but the evidence is by the father's own admission and testimony that he knew the boy was employed in the mine, that he knew the boy had been worked or overworked the night before, and he knew the boy had gone back to work again that morning. His testimony is that on that very morning he was aware that his son had gone ahead of him in the mine to go to work. His father was a mine

worker, had been engaged in mining for more than 7 years, had been working in the very mine where his son was killed for near 6 years, and therefore must be presumed to have known of all the dangers attending his son's occupation. Knowing all those dangers, and knowing that the boy had been working consecutively for 24 hours, and presumably, therefore, knowing that to work without sleep for that time was calculated to so impair the faculties of a boy of that age that he would not be able to protect himself against the hazards of his occupation, he yet permitted him to go back to work on the morning of the 17th, and in our view, as he is the sole beneficiary who would be entitled to receive whatever would be recovered in this action, to allow him to recover would be to allow him to get the benefit of a recovery despite his own wrong, and would be in violation of the salutary rule of law we have mentioned above. We hold, further, that the bar against the father's recovery in this respect will attach to any recovery by the administrator of the boy, who is practically a trustee for the father, for whose sole benefit he would recover in this action; and it follows from this that the judge below was correct in instructing the jury that if they found under the circumstances of this case that the boy's father, who was the sole beneficiary, was himself guilty of negligence in respect to the boy's employment on the occasion of his death, then the defense interposed operated, and there can be no recovery, and the judgment below is affirmed.

Affirmed.

MILLER v. OWENS.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1913.)

No. 1,115.

1. MORTGAGES (§ 522*)—FORECLOSURE—POWER OF SALE—AUTHORITY OF MASTER.

A foreclosure decree provided that the master should advertise the premises for sale on the first Monday in January next, or on some other convenient sales day thereafter, on the following terms, and, should the purchaser fail within five days to comply with the terms, the master should immediately advertise the premises for resale on the next sales day at the risk of the former purchaser. *Held* that, where the purchaser at the first sale failed to comply with her bid, the master without further authority was authorized to readvertise and resell.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1522; Dec. Dig. § 522.*]

2. JUDGMENT (§ 720*)—DEFENSES—ESTOPPEL.

A mortgagor after purchasing at foreclosure sale, failed to comply with her bid. She procured a temporary restraining order enjoining further proceedings to sell the property, on the ground that she had obtained an extension from the mortgagee; but on return of a rule to show cause the rule was discharged, and the temporary injunction dissolved, from which no appeal was taken, whereupon the property was resold to the mortgagee, and the sale confirmed. *Held*, that the mortgagor was estopped by the order dissolving the injunction to thereafter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claim that the resale was void, because of such alleged agreement with the mortgagee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.*]

In Error to the District Court of the United States for the District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Action by Minnie H. Miller against L. B. Owens to recover certain real property. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action at law, instituted in the District Court of the United States for the District of South Carolina, at Columbia, by the plaintiff in error (hereinafter referred to as plaintiff), Minnie H. Miller, against L. B. Owens, defendant in error (hereinafter referred to as defendant), to recover possession of a tract of land in the possession of the defendant. Both parties claim through a common source. It appears that on the 28th day of February, 1894, the plaintiff, being then the owner, executed a mortgage on the premises involved in this controversy to Harriet Murchison, executrix. This mortgage was foreclosed, and at the sale Mrs. Harriet M. Beckwith, formerly Murchison, became the purchaser, and the master made her a deed on the 11th day of July, 1898. Mrs. Beckwith conveyed these lands to the defendant, L. B. Owens, by deed dated March 12, 1907. The defendant interposed the judgment of foreclosure and the conveyance of the premises to him as a bar to the plaintiff's title and her right to recover. It appears that the plaintiff was made a party to the suit for foreclosure, and appeared and was represented by counsel at different stages of that proceeding. A decree of foreclosure was passed November 10, 1896, and pursuant to this decree the premises were advertised for sale on sales day in January, 1897. At this sale the property was bid in, but the sale was not complied with, and by agreement of the parties the sale of the mortgaged property was then postponed until sales day in January, 1898; but it appears that the premises were not actually readvertised for sale until sales day in February, 1898, at which time the sale was temporarily enjoined on motion of Mrs. Minnie H. Miller, on the ground of an alleged agreement by Mrs. Beckwith to give an extension of five years for the payment of the judgment debt; but upon the hearing the injunction was dissolved on March 5, 1898, and the property was again offered for sale on sales day in April and May, 1898, and at the latter sale the premises in question were purchased by Mrs. Beckwith, to whom the master made deed on the 11th day of July, 1898, as hereinbefore stated. This sale was confirmed by order of the court on July 13, 1898. Later, in 1901, when Mrs. Beckwith was offering the land for sale, Mrs. Miller and her husband, Jasper Miller, forbade the sale and refused to yield possession. Upon rule upon them to show cause why Mrs. Beckwith should not be put in possession under her deed, it was adjudged that she was entitled to a writ of assistance to obtain possession, and the decree, among other things, stated: "Jasper Miller and Minnie H. Miller, their agents and tenants, be enjoined from interfering in any way with the execution of said writ by the sheriff or the possession of said lands by Mrs. Harriet M. Beckwith." From this judgment Mrs. Miller and her husband appealed to the Supreme Court of the state of South Carolina, and, after a hearing by that court, the judgment of the lower court was affirmed. Mrs. Beckwith, being in possession pursuant to her deed and the judgment of the court on March 12, 1907, conveyed the premises to L. B. Owens, the defendant, who has been in possession ever since. The case was tried at the November term, 1911, and at the close of the testimony the court instructed the jury to return a verdict in favor of the defendant. The plaintiff excepted to the ruling of the court in this respect, and sued out a writ of error to this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stanyarne Wilson, of Spartanburg, S. C., for plaintiff in error.
Melton & Belser, of Columbia, S. C., for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). [1]
It is stated in the brief for the defendant that:

"Plaintiff assails in this court title of defendant on the ground that the power of the master to sell under said decree was exhausted by the sale made by him in March, 1898, and that he was without power to resell, as he did, in May, 1898, and that consequently his deed was a void act."

An examination of the record discloses the fact that the sale was advertised for sales day in February, 1898, and that further advertisement of the premises was enjoined by the order of Judge Townsend, dated February 5, 1898, and this injunction was not dissolved until March 5, 1898. Therefore the advertisement of the premises for sale on the March sales day was precluded by the order that had been granted by Judge Townsend. It appears from the master's report that the premises were advertised for sales day in April and May, 1898. It appears from the decree of foreclosure of November 10, 1896, that:

"The master for Richland county do advertise the mortgaged premises, as described in the complaint, for sale at public auction * * * on the first Monday in January next, or some other and convenient sales day thereafter, on the following terms," etc.

And in the fourth paragraph of the provision it is provided:

"* * * Should any purchaser fail within five days to comply with the terms of sale, the said master shall immediately thereupon advertise the said premises for sale on the next sales day at the risk of the former purchaser."

Construing these two clauses together, to wit, "on any convenient sales day," and "should any purchaser fail within five days to comply with the terms of the sale, the said master shall have the right to advertise the sale for the next sales day at the risk of the former purchaser," we find nothing in this provision to limit the number of sales that were to be made in pursuance of the decree.

The second proviso cannot be construed to be a limitation upon the power of the master, but is, in our opinion, an additional authority, which could be exercised in case it was desired to resell at the risk of the former bidder, a right which the holder of the judgment might waive. Under these circumstances, we do not think that there is any ground for the contention that there was a lack of authority to sell these premises at the time they were sold, and upon which the decree of confirmation was based.

[2] At the conclusion of the testimony the learned judge who heard this case in the court below said:

"I rule that the order of Judge Townsend, not appealed from, and the order of confirmation of sale in the case of Murchison, Ex'r, v. Miller et al. and the decree of the Supreme Court affirming the decree below, as reported in *Murchison v. Miller*, 64 S. C. 425 [42 S. E. 177], makes the matter res

adjudicata, that if the plaintiff did not raise, by way of objection to the order of confirmation of the sale, the specific point now raised, that is, that the original decree did not contain power to the master to resell in May, 1898, after Miller's failure to comply in March, 1898, that she could have raised it, and that she is concluded by that decree as to not only what she actually raised, but as to what was within the scope of the proceedings, and which she could have raised in opposition to the confirmation of the sale. So I shall direct a verdict. * * *

In the case of *Murchison v. Miller*, 64 S. C. 429, 42 S. E. 178, to which the lower court referred, the Supreme Court of that state, among other things, said:

"The contention in behalf of Mrs. Miller is that in 1897, after the order of foreclosure herein, and after the said property was bid in by Mrs. Miller at the first sale thereunder, and after she had failed to comply with her bid, Mrs. Beckwith, the mortgagee, agreed that, upon Mrs. Miller's paying up all court costs and attorney's fees and paying \$750, she (Mrs. Beckwith) would take a new mortgage exactly like the old one, providing for the payment of the debt within five years, and that the proceedings instituted under the old mortgage should be ended and taken out of court, and that Mrs. Miller had complied with her part of the agreement. That there was any such agreement was denied by Mrs. Beckwith and her attorney, Mr. Shand, who contended that the agreement was merely to postpone the sale under the decree until the first Monday in January, 1898. It appears that the property was advertised for resale in January, 1898, and was postponed at the request of Mrs. Miller. In February, 1898, on a petition setting up the alleged agreement, Mrs. Miller procured from Judge Townsend a temporary restraining order, enjoining proceedings to sell said property; but, upon return to the rule to show cause issued by him, the rule was discharged, and the temporary injunction was dissolved. No appeal was taken from Judge Townsend's order. The property was advertised and offered for sale in March, 1898, and was bid in by Jasper Miller, who failed to comply with the terms of the sale. The premises were resold in May, 1898, and purchased by Mrs. Beckwith, who received deed of conveyance dated July 11, 1898, recorded August 12, 1898. This sale was confirmed by order of the court on July 12, 1898. If there was any such agreement as set up by Mrs. Miller, the order of confirmation stops her from asserting it (*Le Conte v. Irwin*, 23 S. C. 111), not to mention the unappealed order of Judge Townsend, which refused to restrain said sale upon an application based upon said alleged agreement (*Murchison v. Miller*, 64 S. C. 429, 430 [42 S. E. 177])."

Thus it will be seen that it was determined by the Supreme Court of South Carolina that, inasmuch as these lands were sold under a proceeding to which Mrs. Miller was a party, she was thereby estopped from asserting any agreement that she may have had with Mrs. Beckwith as to a further extension of time, independent of the fact that she failed to take an appeal from the order of Judge Townsend, which refused to restrain the sale of these lands upon an application based upon said alleged agreement.

The Supreme Court of South Carolina in *Le Conte v. Irwin*, 23 S. C. 112, stated the following:

"If a party fails to make his defense or present his claim at the proper time and in the proper mode prescribed by law, he must take the consequences."

Also in the case of *Ruff v. Doty*, 26 S. C. 178, 1 S. E. 710, 4 Am. St. Rep. 709, the Supreme Court said:

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to any matter which the parties might have litigated and had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate province of the original action, both of claim and defense."

Under the circumstances, we are of the opinion that the ruling of the learned judge who heard this case in the court below was eminently proper. For the reasons stated, the judgment of the lower court is affirmed.

Affirmed.

KEYSTONE WAREHOUSE CO. v. BISSELL.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 152.

BANKRUPTCY (§ 165*)—PREFERENCE—CREDITOR.

Bankrupt was a milling company, engaged in blending flour which it purchased from various sellers, who shipped it consigned to themselves in care of defendant, which was a warehouse company. They made drafts on the bankrupt for the price, which they sent, with bills of lading attached, to a bank for collection. Defendant received the flour, stored it in numbered compartments, and held it for the shippers until the drafts were paid, and then for the bankrupt, which withdrew it in quantities as needed in its business. Within four months prior to the bankruptcy, without the knowledge of defendant, bankrupt made various withdrawals of flour from compartments containing shipments for which it had not paid, and on discovery, being unable to replace it, an arrangement was made by which defendant took up the drafts covering such shipments and immediately took indorsements of the bills of lading from the bankrupt, transferring what remained of such shipments as collateral to a note taken from the bankrupt. Some other property was also so transferred as security. *Held*, that at the time of such transaction defendant was not a creditor of the bankrupt, since it held the flour stolen merely as bailee, and that the transfers did not constitute a preference, voidable at suit of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Error to the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Action at law by Frederick O. Bissell, trustee in bankruptcy of the D. I. Marshall Milling Company, against the Keystone Warehouse Company. Judgment for plaintiff, and defendant brings error. Reversed.

This cause comes here upon writ of error to review a judgment entered upon the verdict of a jury in favor of defendant in error who was plaintiff below. The action was brought to recover the value of property transferred by the bankrupt within four months of the filing of the bankruptcy petition, and which transfer it was alleged constituted a preference, under section 60, "a" and "b," of the Bankrupt Act. To sustain recovery in such an action it must be shown: (1) That the bankrupt was insolvent at the time the transfer was made; (2) that the effect of the transfer will be to enable one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class; and (3) that the person benefitting by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such transfer shall have had reasonable cause to believe that it was intended by the transfer to give a preference. The facts sufficiently appear in the opinion.

H. D. Williams, of Buffalo, N. Y., for plaintiff in error.

C. E. Ladd and M. W. Comstock, both of Buffalo, N. Y., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). There was conflicting testimony as to whether or not the Milling Company was insolvent when the transfer was made, and as to whether or not the Warehouse Company had reasonable cause at the time to believe that it was insolvent, and that the transfer was intended to give it a preference over other creditors. The verdict of the jury determined these issues in favor of plaintiff, and these branches of the case need not be discussed here. The relations of the parties at the time of transfer will appear from the following summary of the antecedent facts:

The defendant maintained in the city of Buffalo a warehouse for the warehousing of flour and sugar. Besides the space which it thus occupied itself, there were within the limits of its plant other spaces which it sublet to two or more milling companies, of which the Marshall Company was one. The business of the latter company was the blending of various kinds of flour, which, after blending, were put in sacks and sold as a new and distinct product. The greater part of the flour blended by the Milling Company was delivered to the warehouse company by various railroads. Upon the shipment of the flour (which the Milling Company had bought) bills of lading were issued by the railroad companies to the order of the shipper—"notify D. I. Marshall Milling Company, care of Keystone Warehouse Company." The shipper would send to a Buffalo bank a draft on the Milling Company with the bill of lading attached. Upon payment of the draft at the bank, the bill of lading would be delivered to the Milling Company which would then surrender it to the warehouse and receive warehouse receipt. As the flour was received from the railroads it would be placed by the Warehouse Company in various open compartments on the floor of its premises, each compartment containing a car load lot (or fraction thereof) all marked, numbered, and tagged so as to be readily identified. When the Milling Company had paid a particular draft, it would issue to its employes orders for the amount of flour needed for blending to be taken from the lot upon which it had lifted the bill of lading and to which it was entitled.

It appears that for some time before the transactions complained of—defendant contends it was some 2 or 3 weeks; plaintiff that it was 3 months, or more—the employes of the Milling Company, besides taking from the stored flour in the warehouse such as it had obtained title to by paying the shipper's drafts, also removed flour for which no payment had been made and which was still in the custody of the Warehouse Company as bailee of the shipper. The value of the flour thus improperly removed was about \$8,000 and it was taken by the

Milling Company's employ  s without the knowledge of the defendant. As soon as these thefts of flour, or some of them, were discovered, the defendant stopped the Milling Company from taking any more flour whatever from the warehouse, and called upon it to make good the shortage, which it was unable to do. Thereupon, after some negotiations between the parties, the Warehouse Company paid to the banks which held drafts and bills of lading, in three separate checks, upwards of \$8,000. The Milling Company gave its note to the Warehouse Company for upwards of \$8,000, and turned over to it, as collateral, the property which is the subject of this action. The plaintiff's witness says:

"These bills of lading, which were taken up by the Warehouse Company after the shortage was discovered, covered property that it was claimed was unlawfully withdrawn. Not all of that had been withdrawn which was represented by those bills of lading. There was some portion from all of those cars. I am not sure on that point. There was about \$8,000 in all improperly withdrawn. Our shippers in the case of that particular property had shipped on the stuff, and bills of lading had been sent to the banks. The banks were holding the bills of lading, and the Warehouse Company was holding the property until some one produced bills of lading for it."

When the Warehouse Company paid these drafts after discovery of the thefts, it issued warehouse receipts for the flour thus released to the Milling Company, which at once indorsed these receipts to the Warehouse Company. This effected an actual transfer of so much of the flour covered by the bills of lading as had not been stolen. Besides this, the Milling Company turned over "odds and ends," as the witness calls it, consisting of four cars of bran and low-grade flour, which was the property of the Milling Company, and some sacks of "blended flour" which had not been blended from the stolen flour. It was stipulated on the trial that the value of all the property thus taken by the Warehouse Company was \$4,390.90, about half the amount it paid to the banks. The action was brought to recover this sum, on the theory that the transfer of such property was a preferential transfer under section 60, "a," "b," of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

This section plainly contemplates that the person to whom the transfer is made is one to whom, at the time, the bankrupt is liable. In all the authorities cited on the briefs the court has been able to point out that the relations of the parties were such that the transferee had the right for his own benefit to require the transferor to fulfill an obligation or contract. As the trial judge said:

"The plaintiff's specific claim is that * * * pre-existing liability had its beginning three or four months before the transfer of the warehouse receipts; that it had its beginning in fact at the time that the flour was irregularly withdrawn."

Plaintiff relies upon a decision of the Court of Appeals in the Seventh Circuit. In that case defendants sent a note to a banker for collection and remission of proceeds. He collected, but failed to remit, and subsequently, shortly before bankruptcy, conveyed to defendants some real estate which they accepted. The court held that, although the conversion of the proceeds gave the banker no title, de-

defendants being free to follow and recover the same so far as traceable, their acceptance of the conveyance with knowledge of the conversion and insolvency was an election to treat the misappropriation as creating an indebtedness, and that they stood in no better position than general creditors, and that the conveyance constituted a voidable preference. *Atherton v. Green*, 179 Fed. 806, 103 C. C. A. 298, 30 L. R. A. (N. S.) 1053.

The trial judge in the case at bar instructed the jury as follows:

"Whether there was an antecedent liability is a question of fact under the proofs. It is a question for you to decide, and the decision of the question depends upon your belief as to whether defendant exercised the proper degree of care as of the property irregularly withdrawn by the bankrupt."

The defendant excepted to the court's leaving the question of antecedent liability as a question of fact to the jury. It also requested a charge that:

"No obligation as between the Warehouse Company and the Milling Company arose from time to time as the flour was unlawfully withdrawn unless the defendant had notice of such withdrawals."

This was refused, and exception reserved. Defendant is therefore in a position to contend here, as it does, that at the time of the transfer defendant was not a creditor of the Milling Company and therefore not within the provisions of section 60.

We are unable to see how the repeated thefts of flour from the compartments of the defendant's warehouse, without any knowledge on its part of the thefts, made it a creditor of the Milling Company. There is a vital distinction between this case and that of *Atherton v. Green* and similar cases. In the *Atherton Case*, the note which Green sent to the banker, who converted its proceeds, was the property of Green; the stolen flour was not the property of the Warehouse Company. The shipper (or the bank) owned the flour, and the Warehouse Company was merely a custodian or bailee, to keep it safe for the owner until the purchaser paid for it. It is true that the Warehouse Company could have sued for the stolen flour—its possessory title as bailee gave it the right to do so; but in such action it would sue merely as the trustee for the owner and was bound to turn over the proceeds of such suit, less its own charges against the owner, to such owner. Suppose the bailee had brought suit to recover the value of the stolen flour, and on the trial it were shown that, since the theft, the Milling Company had settled with the shipper (or bank), fully discharging the latter's claim for 50 cents on the dollar, could the bailee recover?

The bank, as holder of the bill of lading, could have sued the Milling Company directly. It could also have brought an independent suit against the Warehouse Company for negligent care of the flour, in which suit it could recover only upon proof of negligence, and might have been defeated by some proof of acquiescence on its part in the Warehouse Company's methods of protecting the stored goods. But that is an independent action, the issues of which are not properly presented in the suit at bar, to which the bank is not a party, and by the decision of which it will not be bound. The circumstances that

the bank might maintain an independent suit against its bailee does not alter the legal relations of the Milling Company and the Warehouse Company. The Milling Company bought the flour from the shipper, and whether it got possession of the flour with the latter's consent, or against it, by stealing it from the latter's custodian, it was the *debtor* solely of the *shipper* (or the bank) until the flour was paid for. This action is not brought against the creditor, shipper, or bank, to set aside a transfer of property to him or it. On the contrary, the trustee is seeking to recover the value of the property transferred to the Warehouse Company as collateral to the Milling Company's note to it, as if the Warehouse Company had been a creditor of the Milling Company before this note was made. We think it was not such creditor, and that, there being no antecedent liability, the trustee was not entitled to recover.

The judgment is reversed.

MARYLAND CASUALTY CO. v. EDGAR.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1913.)

No. 1,113.

INSURANCE (§ 527*)—ACCIDENT POLICY—DOUBLE LIABILITY—BURNING BUILDING.

A cellar having become flooded and the odor of gasoline having been perceived, decedent went to investigate. Not being able to detect the odor of gasoline, he lighted a match to ascertain the conditions. After the match had burned out, he threw down the glowing stick, and as it reached the water there was an explosion of gasoline, by which he was so badly burned that he subsequently died. The explosion also burned off the insulation of certain electric wiring in the cellar, slightly charred a wooden lattice door, blackened some of the joists, and blistered the paint on some of the woodwork, when it was extinguished. The building was fired, but was promptly extinguished. *Held*, that decedent's burns preceded the burning of the building, and hence defendant casualty company was not subject to a double indemnity under a clause in its policy providing for double indemnity in case the assured sustains injury in consequence of the burning of a building while he is therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by Hilda Norvell Edgar against the Maryland Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed.

Malcolm Jackson, of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for plaintiff in error.

J. M. Payne and W. E. R. Byrne, both of Charleston, W. Va. (Payne, Minor & Bouchelle, of Charleston, W. Va., on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The defendant in error was the plaintiff below. This action was brought to recover \$5,000 under the double indemnity clause of an accident insurance policy insuring one J. B. Edgar for the benefit of his wife, the plaintiff below. By agreement the defendant paid the plaintiff \$2,000, leaving unpaid an admitted liability of \$500. In September, 1909, Edgar was so severely burned that he died. It appears that he and his wife were living in Charleston, W. Va., at the home of Mrs. Edgar's mother, Mrs. Norvell. As the result of a sudden and heavy rainstorm, the cellar of the house became flooded. Upon some examination being made by a member of the family, the fact that the cellar was flooded was discovered, and an odor of gasoline was perceived. Edgar, in order to investigate further, went down the cellar steps and stood on a chair in the water on the cellar floor at the foot of the steps. Not being himself able to detect the odor of gasoline, he lighted a match to ascertain the conditions in the cellar. After the match had burned out, he threw down or dropped the still glowing match stick. As it reached the water there was an explosion of gasoline, which badly burned Mrs. Norvell and her son, George Norvell, who were standing on the cellar steps behind Edgar. For a very brief space of time thereafter, apparently a few seconds only, Edgar appears to have been in the cellar; but he quickly made his way out, by another exit, badly burned, and hurriedly sought a physician. It developed that he was externally and badly burned about the head, chest, and legs, and, as was believed by the physician most familiar with the case, his fatal injury was due to internal burns from inhaled flame. His death occurred some few days later. The explosion was evidently due to the fact that a can of gasoline left in the cellar had been overturned by the inrush of water, and the gasoline had spread over the water. Aside from the injuries to Edgar, Mrs. Norvell, and George Norvell, the result of the explosion was to burn off in places the insulation of an electric wire in the cellar, to slightly char a wooden lattice door, to burn some paper, to blacken some of the joists in the cellar, and to blister the paint on some of the woodwork near the cellar door. The fire was very speedily extinguished; but for a brief time, as a result of the gasoline explosion, the building was on fire, and, had the fire not been quickly extinguished, the building would have been seriously injured by fire.

The policy insured against bodily injuries through external, violent, and accidental means, and provided for double indemnity, inter alia, "if the assured shall sustain such injuries * * * *in consequence of the burning of a building while the assured is therein.*" We quote here from the transcript:

"Be it further remembered that at the conclusion of the evidence aforesaid the defendant asked the court to give the following instruction to the jury as embodying a correct proposition of law applicable to this case, to wit: 'The court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover under the double indemnity clause of the policy

of insurance; and the jury are therefore instructed to render a verdict for the plaintiff for the sum of \$500.' Which instruction the court, on objection of the plaintiff, refused to give, to which ruling of the court the defendant then and there objected and excepted.

"And thereupon the defendant asked the court to give the following instruction to the jury as embodying a correct proposition of law applicable to this case: 'The court instructs the jury that the plaintiff cannot recover under the double indemnity clause of the policy of insurance, unless the plaintiff proves by a fair preponderance of the evidence that the death of her husband was caused by the burning of some part of the building in which he was injured.' Which instruction the court, on the objection of the plaintiff, refused to give, to which ruling of the court the defendant then and there objected and excepted.

"And thereupon the defendant asked the court to give the following instruction to the jury as embodying a correct proposition of law applicable to this case: 'The court instructs the jury that if the death of the plaintiff's husband was due to burns caused directly and immediately by the gasoline flames, and was not affected in any manner by the burning of any part of the building in which he was injured, then the plaintiff is not entitled to recover under the double indemnity clause of the policy of insurance.' Which instruction the court, on the objection of the plaintiff, refused to give, to which ruling of the court the defendant then and there objected and excepted."

The instruction given, in so far as is now material, is as follows:

"I consider the policy as requiring, as a condition to enable the double indemnity clause to be operative, that proof shall be made that the building was in the condition of burning by this fire. If the jury find that as a fact, I then instruct them, if in that accident the assured received injuries, whether from the burning of the structure or from that that was within it, a condition arises that allows recovery under the policy. If the jury, therefore, finds that this fire in the building caused the structure to ignite—no matter how much was burned—so that the structure did burn, that the condition then arose under which the maximum of this policy is recoverable.

"Now, evidence has been introduced tending to show that a portion of the structure did take fire. However, that is a question for the jury that I will not withdraw from it; and if it is desired by counsel that the jury deliberate upon that question, they can do so. If the jury find that to be a fact, your verdict will then be in favor of the plaintiff for the sum of \$3,000, with interest on \$2,500, part thereof, from the 6th day of September, 1909. If you find that the evidence does not show that the building took fire, then your verdict should be for the sum of \$500.

"To the giving of which instructions the defendant then and there excepted and objected as follows: Because said instructions make the defendant liable under the double indemnity clause of the policy of insurance if the building in which the insured was injured merely took fire in any part, without regard to the question whether or not his injuries were caused in any degree by the burning of the building or any part thereof."

In *Insurance Co. v. County of Coos*, 151 U. S. 452, 463, 14 Sup. Ct. 379, 381 (38 L. Ed. 231), it is said:

"* * * Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

We are unable to perceive that Edgar sustained the injury of which he died *in consequence* of the burning of a building. Continued study of the language of the witnesses but strengthens the conviction that he was burned by the explosion of the gasoline and before the building commenced burning. Undoubtedly there was in a somewhat techni-

cal sense a burning of the building; but this was started by the same flame which burned Edgar, and was, at the time he was injured, either not yet started or was entirely too slight to have caused his injury. The language of the policy is entirely unambiguous. By its terms the burning of a building must have had a causal connection with the injury. There clearly was no such connection here. In fact, the burning of the building was not even contemporaneous with the injury to Edgar, but followed it. Beyond question his injury was caused by the burning of gasoline within a building. In *Wilkenson v. Insurance Co.*, 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, it is held that the language used in the policy at bar covers an injury received from the burning of the *contents* of a building, but we are unable to so construe the language. On the other hand, we concur in the reasoning of the majority of the court in *Houlihan v. Insurance Co.*, 196 N. Y. 337, 89 N. E. 927, 25 L. R. A. (N. S.) 1261. If the parties here intended double indemnity for an injury received in consequence of the burning of the contents of a building, they assuredly have not so expressed their agreement, and we must interpret their perfectly unambiguous contract according to the plain, ordinary meaning of the words used by them. Beyond all cavil gasoline is not a part of a building. And, although the burning of the building may result from an explosion of gasoline in the building, it cannot be said that one burned solely by such explosion has been injured in consequence of the (subsequent) burning of the building.

Our conclusion is that the judgment below must be reversed at the cost of the defendant in error, and the cause remanded for a new trial.

Reversed.

GRANITE BRICK CO. v. TITUS.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1913.)

No. 1,116.

CORPORATIONS (§ 189*)—ACTION BY STOCKHOLDER—PRELIMINARY INJUNCTION—DISCRETION.

Defendant corporation, being in need of funds, procured the same from T. under an agreement, ratified by the stockholders, that he was to be paid his advancements in cash or given the right to take payment in stock at the rate of two for one. Stock was issued in consideration of such advancements, and at the annual meeting of the company in September, 1911, such stock was permitted to vote. Complainant, having advanced some \$70,000, refused to advance more, except on the acceptance of certain propositions, which at a stockholders' meeting were refused, and a resolution passed directing the issuance of bonds to evidence a new loan for \$50,000 to be secured by a mortgage on all of the company's property, on which question complainant's stock was not allowed to vote. In a suit to restrain the issuance of the bonds, the corporation answered that complainant's stock was a fictitious issue, in violation of the statutes of the state, and, being ultra vires, was properly refused the right to vote. *Held* that, under such showing, it was not an abuse of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1937 to date, & Rep'r Indexes

trial court's discretion to issue a preliminary injunction restraining the issuance of the bonds *pendente lite*.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

Appeal from the District Court of the United States for the District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Suit by Edward H. Titus against the Granite Brick Company. From a decree granting a preliminary injunction, defendant appeals. Affirmed.

J. B. S. Lyles, of Columbia, S. C. (D. W. Robinson and Lyles & Lyles, all of Columbia, S. C., on the brief), for appellant.

Robert W. Shand and B. L. Abney, both of Columbia, S. C. (Shand & Shand, of Columbia, S. C., on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. This is an appeal from an interlocutory order of injunction of the United States District Court for the Eastern District of South Carolina, in equity, whereby it is ordered that:

"The Granite Brick Company, its attorneys, agents, servants, and employes, be and they are hereby restrained and enjoined from executing any mortgage on its property to secure the bonds referred to in the bill of complaint herein, or any other indebtedness."

The action in which the order was issued was commenced against the Granite Brick Company and the Columbia Savings Bank & Trust Company as defendants. F. H. Hyatt was not made a party defendant. The learned judge who heard this case in the court below, among other things, made the following statement of facts:

"From the written documents produced in the case it appears that the Granite Brick Company, of which F. H. Hyatt was president, had been carrying on business, but had not been operated at a profit, but, on the contrary, had been operated at a considerable loss. In this condition, Frederick H. Hyatt, the president, made certain representations to the complainant, Edward H. Titus, respecting the business, upon the strength of which the said Titus agreed to subscribe and pay for enough of the preferred stock unissued to make the total amount of such stock issued 1,000 shares. As to these representations, there is a conflict of testimony between Titus and Hyatt; but it is not necessary to pass upon the correctness at this time of the respective statements of either on this point. Titus did, in pursuance of his agreement, subscribe for 200 shares, of the par value of \$100 per share, which amount was paid up in cash. It is claimed by Titus that although this was a written agreement, yet the understanding was that he was simply to loan this money, and to be entitled to take stock in payment for it if he desired to do so. The written document, however, is for a simple subscription, and the matter would be controlled by the written document, except for the fact that subsequently, on July 20, 1911, and September 20, 1911, the stockholders of the company did by resolutions duly passed accept the view of Titus, and agree that as to the amount advanced under this subscription agreement he was entitled to stand as a creditor, or at his option to take payment in stock at the rate of two for one. Titus went on and advanced a good deal of money, and in March, 1911, the directors of the company passed resolutions reciting that at the time Titus agreed to make

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his advances the company was not making and had not made any profit, but had been operated, when at all, at considerable loss, and the stock of the company theretofore issued and outstanding was of the value of much less than its face or par value, and that the company, in recognition of the valuable assistance so rendered by Titus, and in justice to him, and in order to start the company free of debt, offered him stock of the company for the money furnished by him, whether advanced or to be advanced, on the basis of two shares, of the par value of \$200, for every \$100 so furnished by said Titus, provided said Titus was willing to take payment on such basis.

"Titus continued to advance; but, there being some doubt in his mind as to whether these resolutions were explicit enough, he desired them made so, and at a stockholders' meeting held on the 20th of July, 1911, it was unanimously resolved by the stockholders that it was the sense of the stockholders that the right and privilege given to Titus of taking stock in lieu of money advanced by him as adopted at the directors' meeting of March 27, 1911, should be ratified, and that it was the *understanding* and meaning of that resolution and of the stockholders that the said Titus was to have the option of taking for all moneys advanced or paid or liabilities incurred for the corporation payment either in money or in stock, and if taken in stock that he should have the right to two shares of stock, of the par value of \$200, for every \$100 of money so paid, and that that agreement should apply to all moneys paid or advanced, or liabilities incurred by said Titus, whether theretofore marked subscription to stock or not, and that the stock should be issued to him forthwith on that basis, with the privilege to said Titus of holding said stock as collateral security to such indebtedness, and with the power to vote said stock during the time he holds it. No stock held by Titus issued under the resolutions passed by the directors in March, 1911, appears to have been voted at this meeting of stockholders. In accordance with this action stock to the amount of 1,179 shares was issued to him. At a succeeding stockholders' meeting (the regular annual meeting) held September 20, 1911, the resolutions of the directors passed 27th of March, 1911, and of the stockholders passed July 20, 1911, were again ratified and approved. At the annual meeting held 20th of September, 1911, the stock issued to Titus under these resolutions was recognized and allowed to vote. The total advances made by Titus to the company to the 10th of November, 1911, was some \$70,042.95. On the 20th of September, 1911, Titus stated at both the meeting of the stockholders and the meeting of the directors held that day that it would require \$6,000 to pay the company's then outstanding obligations, and that if he indorsed for that sum additional to what he had already advanced he would not be willing to indorse for any other sums, and notified the company that if the company did not show a definite prosperity by November 10th next he would wish his money repaid. On November 10, 1911, a stockholders' meeting was held, followed by other meetings of the stockholders, culminating in a refusal of the company (the stock held by Titus not voting) to accept any propositions submitted by Titus for the adjustment and payment of the debt to him, and on December 27, 1911, resolutions were passed directing a mortgage to be issued and bonds sold for a new loan of \$50,000. These resolutions were not voted on by the stock held by Titus as collateral security. At a subsequent meeting of the stockholders of the company held in February, 1912, the board of directors was enlarged, and new members giving control to the stock outside of Titus elected, and although the stock held as collateral by Titus was present and desired to vote, it was at the meeting excluded from voting by the vote of a minority of the whole stock issued (the stock held by Titus not being allowed to vote).

"The practical recapitulation of the facts shows that the complainant, Titus, having been approached by the president of the Granite Brick Company, when it had been operating at a loss, agreed, under representations made by its president, to subscribe or advance certain money under an agreement thereafter construed by the company simply to be an agreement to advance money with the option of taking payment if he saw fit in stock at the rate of two for one; that stock at this rate was issued to him as collateral security for his advances, and that when he had advanced about \$70,000, and stated that

under the company's prospects he was not willing to advance more, the company concluded to and did pass resolutions to mortgage its property and issue bonds to the extent of \$50,000, and arbitrarily excluded him or his representative from voting the stock held by him as collateral security at the stockholders' meeting (notwithstanding that the stock had been issued and the express agreement of the other stockholders on the 20th of July, 1911, and 20th of September, 1911, to permit him to vote it), at which meeting he could have prevented the issue of the bonds and mortgage by voting the stock held by him against it. In other words, the vote to issue the bond and mortgage, if this stock held as collateral security was entitled to vote, was determined by a minority of the stockholders. Titus therefore stands in the position of having advanced his money, and of now being not only by the company's determination about to have \$50,000 of debt on the company's property put ahead of his, but with the company's notification that the stock issued to him, and held by him as collateral security, is absolutely null and void, and that he can only stand as an open account creditor of the company, with this large bonded indebtedness ahead of him. Titus does not seem to have taken advice of counsel in this matter. The secretary of the company and its apparent legal adviser was Mr. D. W. Robinson of Columbia, a lawyer of excellent standing and large practice. He was present at the meetings held 20th of July, 1911, and 20th of September, 1911, and himself proposed the resolutions passed on the 20th of July and ratified September 20, 1911. He as secretary put his name to the stock issued to Titus, and Titus, therefore, acting, if he did, on the assumption that Mr. Robinson was a lawyer who knew his business, might well have presumed that the stock was regularly issued, and issued by a company who had a right to issue it, and he was justified in accepting it as such.

"The position of the defendant company is that the stock was issued in contravention of the statute of South Carolina, which forbids the fictitious issue of stock, or the issue of stock except for value, and that the entire issue of stock held by Titus is null and void. The company claims that, this stock issue being ultra vires and void, the company is in the control of the other stockholders (who would be in the minority if the stock held by Titus could be voted), and has the same right as any other corporation or individual would have to mortgage its property to raise money. The defendant company further claims that the resolutions passed by the company at the stockholders' meeting held 15th of December, 1910, amounted to a contract on the part of Titus to furnish enough money to properly finish and complete the plant and equipment of the company, and that the present condition of the company is due to the mismanagement of Titus; he having been placed in practical charge and control of the construction work and operation of the company."

There are several assignments of error, but the main question to be determined is as to whether the court below was justified under the circumstances in issuing a temporary restraining order. The evidence was submitted, and after a careful consideration the court said:

"The only question presented at this preliminary hearing is whether a sufficient case has been made under the principles governing the issue of temporary injunctions by courts of equity to call for the maintenance of an injunction so as to maintain the status quo until a final decree can be had. It is the opinion of the court under the facts and issues found that such sufficient case has been made, and a formal order for a temporary injunction will accordingly be made, but wholly without prejudice to or indication of any conclusion of law or fact the court may reach upon the hearing upon the merits."

It was incumbent upon the judge in the court below to consider the allegations of the bill, together with the return, and then, in the light of the facts before him, determine whether, under the law, it was his duty to grant a temporary injunction. From the statement

of the learned judge who tried this case below (which we quote), it appears that he gave this matter a patient hearing, and after a careful consideration of the facts and the pleadings was of the opinion that a temporary injunction should be granted. It should be remembered, however, that the decision of the court below was without prejudice to the rights of the defendant, and was not intended to have any bearing whatever upon the questions of law or fact in so far as the merits of this case are concerned.

The Circuit Court of Appeals for the Sixth Circuit in the case of *Bissel v. Goshen*, 72 Fed. 549, 19 C. C. A. 29, in referring to this question, said:

"Where a preliminary injunction is allowed upon a *prima facie* showing and without the determination of the merits, this court will ordinarily on an appeal consider only the question as to whether, on the *prima facie* case made, there has been an abuse of discretion. Such preliminary injunctions are intended only to operate *pendente lite* or until a hearing on the merits can be had. They are granted by a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge."

Also in the case of *Mayor v. Africa*, 77 Fed. 501, 23 C. C. A. 252, Judge Lurton, again speaking for the Circuit Court of Appeals for the Sixth Circuit, adopts the rule announced in that case and quotes with approval the foregoing statement.

It is insisted that the court below erred in failing to accept the allegations of the return as true, notwithstanding the fact that they were opposed to those of the bill on the same subject. It should be remembered that the court was required to pass upon the averments of the return as well as those of the bill, and after a careful consideration reached a conclusion as to the same which we are not prepared to say was erroneous. We have carefully considered the bill, the return, and the evidence bearing upon the same, and, in view of the decisions just quoted, as well as the general rule bearing upon this subject, are of the opinion that there was no abuse of discretion by the court below. Under the circumstances, we think the action of the court in granting the temporary restraining order was eminently proper.

There were questions raised by the complaint and answer that were not passed upon or even considered by the court below; nor do we think that, for the purposes of determining the merits of the motion, it was necessary for the court to have passed upon these questions.

For the reasons stated, we are of the opinion that the decree of the lower court should be affirmed.

Affirmed.

In re MONARCH CORPORATION.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 122.

1. CORPORATIONS (§ 230*)—ISSUANCE OF STOCK FOR PROPERTY—FAILURE TO TRANSFER PROPERTY.

Stock issued by a corporation, in consideration of the transfer to it of certain patents having nine years to run, where the patents were not assigned, cannot be considered fully paid by the assignment of an option to purchase one of such patents for a price named, and also an exclusive license thereunder for two years.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 877; Dec. Dig. § 230.*]

2. CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—UNPAID SUBSCRIPTIONS—STOCK ISSUED FOR PROPERTY.

Under the Connecticut Corporation Act of 1903 (Pub. Acts 1903, c. 194), which makes every stockholder of a corporation liable for any "balance due" on the stock held by him, and further provides that, if stock shall be issued in payment for property, the directors shall make and sign a statement showing specifically of what the property consists, and that it has an actual value equal to the amount for which it is received, a stockholder, who has received and retained certificates representing full-paid stock in exchange for property, which he has failed to transfer, is liable for the par value of his stock in cash as on an unpaid cash subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

Appeal from the District Court of the United States for the District of Connecticut; James P. Platt, Judge.

In the matter of the Monarch Corporation, bankrupt. Norman Leeds, trustee, appeals from an order of the District Court dismissing the petition of the trustee of the bankrupt, a Connecticut corporation, for an assessment on unpaid capital stock of the corporation issued to and standing in the names of the several stockholders named in the petition. Reversed.

For opinion below, see 196 Fed. 252.

D. S. Day, of Bridgeport, Conn. (R. S. Nichols, of New York City, of counsel), for appellant.

Martin Conboy, of New York City, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The Connecticut Corporation Act (Pub. Acts 1903, c. 194, § 16) provides that:

"Every stockholder, whether an original subscriber or not shall be liable for any balance due on the stock held by him. If a corporation be placed in the hands of a receiver or a trustee in bankruptcy, such receiver or trustee shall have the powers of the board of directors in calling for installments on stock," etc.

This proceeding is brought under this section; the only question to be decided by it is whether an installment shall be called. Whatever defenses individual stockholders may have against the claims for pay-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment of installments called for on their individual shares will come up for consideration when future proceedings may be instituted to recover such installments from them. That a statute like the one above quoted gives a bankruptcy court jurisdiction to decide the questions presented on this proceeding was held by this court in *Matter of Remington Automobile Company*, 153 Fed. 345, 82 C. C. A. 421.

The trustee contends that it will be necessary to provide nearly \$80,000 to pay debts and expenses, and that an installment of \$20 on each unpaid share of stock should be called for. The special master so found, but the District Court having decided to reject the report for reasons which had nothing to do with the amount to be raised, nor the extent of the installment, it did not consider that branch of the case. Since these questions have not been considered by the District Court in the first instance, we shall not discuss them here.

The total amount of authorized capital stock was \$500,000. Of this \$25,000 was subscribed and paid for in cash. The remaining \$475,000 was subscribed for, to be paid by the delivery of property other than cash. This property consisted of two certain patents of the United States relating to the use of carbonic acid gas. At the first meeting of stockholders (January 13, 1906) a resolution was adopted declaring that these patents were in their judgment of the reasonable value of \$475,000. At the directors' meeting a similar resolution was adopted.

Neither of these patents was ever assigned to the corporation, indeed neither of them was ever assigned by their owners to the persons who had subscribed for the \$475,000 shares of stock. These persons, however, did transfer to the corporation an option which they held from the owner to purchase one of these patents for \$20,000, on which option \$2,000 had been paid. The option included a license to manufacture and sell under the patent for two years.

It is contended by respondents that these 4,750 shares were never issued. The record does not sustain this contention. Certificates of stock (common and preferred) in the usual form of such certificates covering the entire 5,000 shares (including those paid for in cash) were executed, removed from the stockbook, and handed over to five different individuals, or their representatives. One of the subscribers received certificates which stood in the names of two of the others, under an agreement that he would hold their shares with which to raise the \$18,000 necessary to pay the balance due under the option. But these certificates were actually issued by the corporation, were issued as full-paid nonassessable stock, so that they or part of them could be sold to raise that money.

[1] The District Judge held that the property actually turned over was the full equivalent of that agreed to be turned over, and that therefore the 4,750 shares of stock were in fact full-paid. We are unable to concur in this conclusion. The full ownership of two patents is something materially different from the ownership of a contract which gave the holder the right to buy one of the patents for \$18,000, with an exclusive license to manufacture, sell, and use under that patent only during the continuance of the option, *two years*; the patent not expiring until 1915. Moreover, there is nothing to show that under section 12 of the Connecticut statute the board of directors ever signed

a statement, or ever even voted, that "the option" had an actual value equal to \$475,000.

[2] The main contention of the respondents is that, where the specific property which has been valued and is to be transferred for stock has not been in fact turned over, there can be no cash installment called for. They insist that the "balance due" from the stockholder necessarily depends upon the terms of the subscription contract. This last proposition may be conceded. The argument, briefly stated, is as follows:

Subscriptions to pay in cash are payable only in cash; subscriptions to pay in property generally—in coal or flour, etc.—are payable in property primarily, but on default are payable in cash. In such cases, the agreement is to pay in money or in money's worth. But it is contended that if a subscription is payable in some specific property, such as a parcel of land, a patent, or what not, it does not, upon default, become payable in money; that the subscribers cannot say, in this case:

"It is inconvenient for us to give you the patents; but here is \$475,000, their value in money. Take it, and give us the stock."

Under this theory they say that the "unpaid balance" is not a sum of money, but the specific property which was not turned over. We do not need to discuss the authorities cited in support of this proposition generally, nor to express our opinion upon it, because the state of Connecticut has legislated upon this subject, and the nature of the contract of subscription, or of the contract entered into by purchase and holding of stock, is to be determined in the light of that legislation.

The statute provides that the certificate of incorporation must state the par value of a share. Section 63. Section 12 provides for the issue of certificates of stock, but no stock certificate—technically so called—shall be issued until the stock covered by such certificate has been subscribed *and paid in full*. In cases of part payment, receipts (the holding of which receipts makes the holders stockholders) are to be issued, which must state the amount paid and the number of full-paid shares of the receipt holder will be entitled to upon payment of the balance stated to be due. Section 69 provides that the certificate of organization shall state—

"the amount of each class of stock; the amount paid thereon in cash; the amount paid thereon in property other than cash; the amount paid on each share of its stock which is not paid in full."

While the statute contemplates that some shares may be paid for in stock and some shares paid for in property, the peremptory opening sentence of section 12:

"No corporation shall issue any certificates for stock until the stock has been * * * paid for in full"

—seems to us the full equivalent of section 55 in the Stock Corporation Law of New York (Consol. Laws 1909, c. 59), which provides:

"No corporation shall issue * * * stock * * * except for money, labor done, or property actually received," etc.

Respondents concede that the New York courts construe its statute as requiring a default in the transfer of specific valued property to be made good in money.

The provisions as to valuation of property transferred for stock are found in the latter part of section 12 of the Connecticut statute, as follows:

"If any stock shall be paid for otherwise than in cash, a majority of the directors shall make and sign upon the record book of the corporation a statement showing particularly of what *the property* received in payment for stock subscriptions consists, and that it has an actual value equal *to the amount for which it is so received*. The judgment of the directors as to the value of property accepted in payment of stock shall be final; but the directors concurring in the judgment of such value, in case of fraud in the overvaluation of such property, shall be jointly and severally liable to the corporation for the amount of the difference between the actual value of any property so accepted in payment at the time of such acceptance, and the amount for which it is received in payment. The secretary shall keep a record of the names of the directors concurring in such judgment of value."

We construe this Connecticut statute as providing that if a prospective stockholder wishes to pay in property, instead of cash, and the corporation assents to such method of payment, he may do so by having his property valued at some specific sum by the directors, and using such valued property, instead of cash, to pay the full value of the stock which is issued to him. But if, after thus getting his property made a legal tender for the stock, he does not use that legal tender to pay for it—either because he changes his mind about parting with the property, or because he cannot get the legal title to it—and does not repudiate his proposed arrangement, saying, "I cannot give the property and therefore will not take the stock," but on the contrary does take stock certificates to all appearances representing full-paid stock, he must make good what he has not paid in the only available legal tender.

We are referred to no Connecticut decisions which would require a different construction of the statute.

The conclusion we have reached on this fundamental question makes it unnecessary to discuss propositions as to the liability of the directors and other matters which are presented on the briefs.

The order is reversed, and cause remanded, with instructions to proceed in accordance with the views expressed in this opinion.

HOLLY v. McDOWELL COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. March 10, 1913.)

No. 1,145.

1. EVIDENCE (§§ 29, 43*)—JUDICIAL NOTICE—STATUTES AND DECISIONS OF STATE COURTS.

In determining a demurrer to a declaration, a federal court will take judicial notice of the statutes and decisions of the Supreme Court of the state construing them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43-46, 48, 62-65; Dec. Dig. §§ 29, 43.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES AND DECISIONS—FOLLOWING DECISIONS OF STATE COURTS.

In general, the courts of the United States will adopt and follow the decisions of the state courts in questions which concern merely the Constitution and laws of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.]

3. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—COAL MINES—REGULATION—STATUTES—EFFECT.

Code Supp. 1909 W. Va. c. 15H (sections 400-454), regulating the operation of coal mines within the state, and providing for the appointment of inspectors, foremen, etc., to be employed by the operator, but responsible to the state for the performance of their duties, superseded the common-law rules governing master and servant with reference to negligence in the operation of such mines, and define specifically the duties of the one to the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

4. MASTER AND SERVANT (§ 199*)—INJURIES TO SERVANT—COAL MINES—REGULATION—STATUTES.

Under Code Supp. 1909 W. Va. c. 15H (sections 400-454), regulating the operation of coal mines, and requiring the operators to place the entire internal management of the mine in control of an inside foreman and fire boss, whom he is required to select according to certain statutory qualifications, but who are not responsible for their acts to the operator, such foreman and fire boss are fellow servants of the miners so far as the performance of their duties is concerned; the operators' liability lying only in their original selection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 491; Dec. Dig. § 199.*]

5. MASTER AND SERVANT (§ 190*)—DEATH OF SERVANT—COAL MINES—OPERATION—NEGLIGENCE OF FOREMAN—STATUTES.

Under Code Supp. 1909 W. Va. c. 15H (sections 400-454), regulating the operation of coal mines, and providing that the inside workings should be under the exclusive control of a mine foreman having specified qualifications and a fire boss, who are not responsible for their acts to the operator, there being no claim, in an action for death of a miner due to the fall of material from the roof of an entry, that the mine foreman had not the qualifications specified by the statute, the operator was not liable for intestate's death, because it was due to the foreman's negligence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs 1907 to date, & Rep'r Indexes

in failing to discover the dangerous portion of the roof of the entry and repair the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

6. CONSTITUTIONAL LAW (§ 238*)—EQUAL PROTECTION OF LAWS—COAL MINING—REGULATION.

Code Supp. 1909 W. Va. c. 15H (sections 400-454), regulating the operation of all coal mines, and placing the entire internal control in a mine foreman employed by the operator having specified qualifications and a fire boss, who are responsible for their acts, not to the operator, but to the state, is not unconstitutional, as depriving miners injured or killed by the negligence of the mine foreman of equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-699, 706-708; Dec. Dig. § 238.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Bluefield; Benjamin F. Keller, Judge.

Action by Lee Holly, as administrator of Oscar Holly, deceased, against the McDowell Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William H. Werth, of Tazewell, Va., for plaintiff in error.

Z. W. Crockett and Joseph M. Sanders, both of Bluefield, W. Va. (Sanders & Crockett, of Bluefield, W. Va., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge. Oscar Holly, a coal miner, employed by the defendant, was killed by falling slate near the mouth of what is called the "Kentucky entry" to defendant's mine. The plaintiff, as his administrator, instituted this action in the court below. A demurrer to his declaration and each count thereof was sustained, and this writ of error thereupon sued out.

The declaration originally contained four counts. By amendment two additional ones were added. The general allegations of fact as set forth in the first count are that on January 2, 1912, decedent was assigned to a working place in the mine near a mile inside from the drift mouth, and worked there on the 2d, 3d, and until the evening of the 4th, when, going along this entryway with the purpose of leaving the mine, within about 100 yards of its mouth, he was instantly killed, without fault on his part, by this loose slate falling upon him; that he had no knowledge or notice as to the unsafe condition of this roof, nor was there any obvious or open indication of danger therefrom. It is further alleged in this connection that this Kentucky entry was not only used, at the place where intestate was killed, as a regular passway by all miners in going to and from work, but that it was also used for the operation of an electric railway by means of which coal was hauled out of the mine, by reason whereof employes passed back and forth under the roof of the entry at regular intervals all day

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

long. Further, it is charged that a statute of the state, enacted for the better securing the safety of persons employed in coal mines, required of the defendant, among other things, the employment of a competent and practical mine foreman, whose duty it should be to watch over these traveling ways, and see that all loose coal, slate, and rock in the roof be removed or secured. It is thereupon charged that defendant did not have and had not employed, at the time in question, a competent and practical overseer to perform such duties; "that defendant did have an employé selected and designated by it as its mine foreman," but he "was neither competent nor practical," by reason whereof "he ignored facts and conditions which had, long prior to the killing of the intestate, given ample warning that the roof over the entry in question at the point in question, was in a dangerous condition and liable to fall upon employés passing along under it"; that "repeated incidents had occurred from time to time, covering a period sufficiently long prior to the death of intestate to have given ample knowledge and notice to said mine foreman of the dangerous condition of the roof of said entry at and along near the point where intestate was killed, had he been a competent and practical inside overseer"; and it is thereupon charged that intestate's death was due to the negligence of defendant in failing "to employ and have a competent and practical inside overseer, as was its duty to do under and by force of the statute aforesaid."

[1, 2] It is not necessary at this point to consider the allegations of the four other counts. They will be referred to hereafter. In considering this demurrer, we must take judicial knowledge of the statute and the decisions of the Supreme Court of Appeals of the state construing it. The courts of the United States, as a general rule, adopt and follow the decisions of the state courts in questions which concern merely the Constitution and laws of the state. *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

Turning to this statute (chapter 15H, W. Va. Code, Supplement 1909, p. 44), it is apparent that, recognizing the hazardous conditions attending the coal mining business, the state has undertaken in a measure the control of it, and prescribed the conditions under which such operations may be conducted. It has established an executive department for the purpose, requires the chief thereof to be a citizen of the state, competent, having had at least eight years' experience in the working, ventilation, and drainage of coal mines in the state, with practical and scientific knowledge of dangerous gases found in mines, and with full power to examine any and all mines. It divides the state into twelve mining districts, and directs the appointment of a mine inspector for each of these districts, who shall be a citizen of the state, a miner of at least six years' experience, having practical knowledge of mining, ventilation, and gases. These officers are paid salaries by the state. Inspection of each mine is required to be made by them once every three months, and oftener, if called upon in writing by ten men working in the mine. Monthly reports of these inspections are required. The law further sets forth minute provisions as to the furnishing of plans of the mine and of new openings,

for the installation of speaking tubes, signaling apparatus, safety gates, traveling ways, and hoists in shaft mines; also for the employment of competent engineers for hoisting machinery and regulating how many at a time and under what conditions men shall be lowered into such mines, the use of slopes, engine planes, motor roads, refuge holes, appliances to be furnished for ventilation, the transportation and use of powder in the mine, the control of gases, and many other things too numerous to set forth. Failure to comply with each and all the things required of the operator involves severe criminal penalties and subjects his mine to be closed by the chief of the mine department.

One of the requirements of him is material here. He must "employ a competent and practical inside overseer, to be called mine foreman, who shall be a citizen of this state, and an experienced coal miner, or any person having five years' experience in a coal mine," whose duties in detail are set out in the statute, among which are to remove all loose coal, slate, and rock from the roof in the working places and along the haulways, and furnish necessary props, caps, and timbers. He must see to it that every person employed to work in the mine shall, before beginning to work therein, be instructed as to the particular danger incident to his work in such mine, and be furnished a copy of the mining law of the state and of the rules of such mine. He is subject to fine and imprisonment if he fails to perform these duties. Still another provision requires the operator, in case gases appear in his mine, to employ a fire boss, who, too, must be a citizen, an experienced miner, whose duties are defined, and who is subject to criminal liability if he neglects to perform them. Neither of these men, the foreman and the mine boss, are subject to orders from the operator as to their duties. The operator, no matter how competent, cannot himself perform these duties. He must employ experienced miners to do so. Thus it will be perceived that the state has assumed, to a considerable extent, the control and management of the coal operator's business and has placed its conduct in the hands of the miners themselves. The twelve mine inspectors and the mine foreman and fire boss in each mine, by this law, must come direct from the miner class, and are answerable, not to the operator, but to the state, for neglect of duty.

[3] It is further apparent that it is the design and purpose of this statute that it shall be a code of law itself, providing what shall and what shall not be done to insure the health and safety of those engaged in this hazardous business of mining coal. It has set aside the common-law rules governing master and servant as regards negligence in this particular industry, and has undertaken to define specifically the duties of the one to the other.

[4] As we have hereinbefore set forth, it requires of the master the equipment and material necessary to ventilate the mine, render it as near as possible free from noxious gases, provide for the safe transportation of the workmen in the mine, and facilities for the frequent examinations to ascertain whether such and other requirements are complied with. It then requires the master substantially to turn over

the internal management of the mine to these two men, the foreman and the fire boss, who, under penalties prescribed, must see that the equipment and material so furnished by the master is installed and properly operated. While the master is permitted to employ these men, yet their required qualifications are distinctly set forth, and the Supreme Court of Appeals of the state has very properly held, construing the statutes, that inasmuch as their acts are not under the control of the master, and because they must be selected from the miner class, they must be held coservants of the miners, and the extent of the master's liability lies in their original selection; that is, that he must see to it that their qualifications are such as are required by the statute, and that, so far as their control of the internal workings of the mine is concerned, the state, by inspection, by defining their duties and subjecting them to penalties, has undertaken to compel the careful performance of their trust.

The decisions of the state are uniform as to these rulings. *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812; *McMillan v. Coal Co.*, 61 W. Va. 531, 57 S. E. 129, 11 L. R. A. (N. S.) 840; *Squillache v. Tidewater Coal & Coke Co.*, 64 W. Va. 337, 62 S. E. 446; *Bralley, Adm'r, v. Tidewater Coal & Coke Co.*, 66 W. Va. 278, 66 S. E. 684; *Helliel v. Piney Coal & Coke Co.*, 70 W. Va. 45, 73 S. E. 289; *May v. Davis Coal & Coke Co.* (W. Va.) 76 S. E. 342. To the same effect are the Pennsylvania decisions, from the laws of which state this statute was largely adopted. *Dela-ware Canal Co. v. Carroll*, 89 Pa. 374; *Red Stone Coke Co. v. Roby*, 115 Pa. 364, 8 Atl. 593.

[5] From an examination of the first count in the declaration here, it is apparent that negligence is sought to be imputed to the defendant by reason of the character of its mine foreman. It alleges that it did not have and had not employed at the time of the accident a competent and practical inside foreman; that it did have an employé selected and designated by it as its foreman, but charges that he was not competent or practical. It bases this opinion or conclusion of the pleader upon the charge that:

"He ignored facts and conditions which had *long prior* to the killing of intestate, given ample warning that the roof was in a dangerous condition and liable to fall upon employés passing along under it; that repeated incidents had occurred from time to time, covering a period sufficiently long prior to the death of intestate, to have given ample knowledge and notice to said mine foreman of the dangerous condition of the roof of said entry."

There is no charge here that he was not a citizen of the state, was not an experienced coal miner, or a person having five years' experience in a coal mine, or that he was physically, mentally, or by reason of his habits disqualified to discharge the duties of this position. The sum total of the allegation is that the slate had been loose for a period long enough for him to have discovered it, and, because he did not, he was necessarily incompetent and impractical. This is a non sequitur. The most careful and competent men are frequently guilty of oversight. The "repeated incidents," too, charged to have given ample notice of the condition of this roof, are not set forth; but,

per contra, it is alleged that this loose slate was in a main entry, used constantly by experienced miners in going to and from their work, no one of whom is charged with having discovered it. We cannot, therefore, disagree with the learned judge below, who sustained the demurrer to this count.

The second count charges negligence to the defendant because of its "omission of general supervision over the condition of the roof." As we have indicated, the statute expressly required this supervision on the part of the foreman, and the operator is not liable for his failure to exercise it. The third, fourth, and fifth counts are based upon similar erroneous assumptions of duty and obligations due from the master to his servant, which, by common law, might be relied on, but under the provisions of this statute are wholly inapplicable.

[6] The sixth count assails the constitutionality of the statute, as depriving the plaintiff and his intestate of "the equal protection of the laws" under the fourteenth amendment of the federal Constitution. The right of the states to pass laws of this character has been so well settled by the Supreme Court that further discussion on our part is unnecessary. *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91; *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987; *Consolidated Coal Co. v. People of Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872; *Wilmington Star M. Co. v. Fulton*, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708.

We find no error in the judgment rendered by the court below, and it is therefore affirmed.

CAROZZA v. BOXLEY.

(Circuit Court of Appeals, Fourth Circuit. February 28, 1913.)

No. 1,138.

1. ASSIGNMENTS (§ 23*)—CHOSE IN ACTION—COMMON LAW.

A chose in action for money due or to become due a subcontractor for performance of his contract was not assignable at common law.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 40, 41; Dec. Dig. § 23.*]

2. ASSIGNMENTS (§ 117*)—CHOSE IN ACTION—RIGHT TO SUE—STATUTES.

Code Va. 1904, § 2860, provides that the assignee of a chose in action may maintain any action thereon in his own name which the original obligee, payee, or contracting party might have brought subject to discounts against the obligee, payee, or contracting party before the defendant had notice of the assignment, etc. *Held* that, where money due a subcontractor was assigned by him to creditors pursuant to an order to pay which was accepted by the contractors, the only effect of such statute was to enable the assignee to sue in the name of the assignor taking the assigned claim subject to all equities of the assignor in whom the legal title still remained, and it was therefore error to refuse to permit the assignor to sue thereon for his own benefit and for the use of his assignees to the extent of their interest.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 341, 342; Dec. Dig. § 117.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. ASSIGNMENTS (§ 121*)—CHOSE IN ACTION—FORM OF ACTION.

Under Code Va. 1904, § 2860, authorizing an assignee of a nonnegotiable chose in action to sue thereon in his own name, suit may be brought on an assigned chose in action either in the name of the original obligee or payee, in his name for the use of the assignee, or in the name of the assignee alone.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.*]

4. ASSIGNMENTS (§ 94*)—ORDER TO PAY—EFFECT—NEW DEBT.

Where a subcontractor executed an order on his contractor to pay the amount due or to become due on the subcontract to certain others, the contractor's acceptance of the order did not create a new debt between the original contractor and the assignees for the whole amount of the assignor's claim, nor bar all the assignor's rights therein.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 303-305; Dec. Dig. § 94.*]

5. ASSIGNMENTS (§ 88*)—ABSOLUTE IN FORM—SECURITY FOR DEBT.

An assignment absolute in form of all moneys due a subcontractor for work under his contract could be shown, in an action by the assignor thereon, to have been to secure a debt due to the assignees in an amount less than that due from the debtor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 299-302; Dec. Dig. § 88.*]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by A. T. Carozza, surviving partner of the firm of Carozza, Grassy & Co., against W. W. Boxley. Judgment for defendant, and plaintiff brings error. Reversed.

Carpenter and Boxley had a contract for certain construction work with the Norfolk & Western Railway Company. They sublet part of the work to Carozza, Grassy & Co. During the progress of the work Carozza, Grassy & Co., having become indebted to the Ben Williamson Company and the Field Grocery Company, assigned to these companies and directed to be paid to them all money then due or that thereafter might become due to them from Carpenter & Boxley for work done under the contract. They further secured them by deed of trust on certain personal property.

Carozza, as surviving partner, after this assignment, instituted suit in assumpsit in the court below against Carpenter and Boxley, seeking a recovery of something over \$30,000 claimed to be due by reason of this contract. It seems Boxley alone was served with process. Pleas of the statute of limitation, payment, set-off, nonassumpsit, and assignment were filed. Upon trial, after the plaintiff had introduced a part of his testimony, an objection was interposed to the introduction of certain other on the ground that plaintiff was not entitled to recover by reason of the assignment and order to pay given to the Ben Williamson Company and the Field Grocery Company. Upon this motion the court after reviewing the evidence showing the assignment and order to pay, and that tending to show that Carpenter and Boxley had accepted "the order to pay" incorporated in the assignment, and after counsel for defendant had avowed that they expected to prove unqualifiedly that such order to pay had been accepted, said: "Under such circumstances, it seems to the court a gross waste of time to continue to hear evidence in this case unless plaintiff's counsel can avow that they will be able to produce evidence contradictory to the claim of the defendant that the order was accepted. In using the word 'accepted' I mean, of course, accepted according to the terms of the order. The court now, therefore, calls upon counsel for plaintiff to state whether or not they can make the avowal. If they can, the case will be proceeded with in order that any conflicting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

testimony on this question of fact may be submitted to the jury, but, if they cannot so avow, it seems to the court that it is its duty to instruct a verdict for the defendant." Thereupon, counsel for plaintiff, before answering, submitted three motions. First, to amend the declaration by adding the clause thereto that "this action is brought by the plaintiff for the benefit of the pledgee of the claims asserted for work done, to wit, Ben Williamson Hardware Company and Field Grocery Company"; second, to enter of record that "this action is brought by the plaintiff for the benefit of the pledgee and (of) the claims asserted for work done, to wit, Ben Williamson Hardware Company and Field Grocery Company, and this plaintiff, and that an order may be entered that in event of a verdict for plaintiff for work done that this judgment thereon by the court shall be entered in such form as to protect the rights of the defendants, the pledgee, the plaintiff, and all parties interested in the subject-matter of this action"; and, third, to enter upon record that "this action is brought by the plaintiff for the benefit of the pledgee of the claim asserted for work done, to wit, Ben Williamson Hardware Company, and Field Grocery Company, and that an order may be entered protecting the right of the plaintiff, defendant, pledgee, and all parties interested in this action." These motions the court overruled. Counsel for plaintiff then announced himself "not prepared to deny that the defendant accepted the order," and counsel for defendant announced in reply to the court's question, "what about your counterclaim," that, "if the court instructs a verdict at this point, we will waive our counterclaim, but shall not waive our right to reinstate it in case the verdict of the jury should be set aside." Thereupon the court directed and the jury found a general verdict for the defendant. It is undisputed that this action was taken alone at the instance of the defendant; that the assignees, Ben Williamson Company and Field Grocery Company, had knowledge of the pendency of the suit; that the plaintiff had taken, to be read in support of his action on trial, the deposition of the attorney for both of the assignees and that of a member of one of these firms. Further, it cannot be questioned from the testimony that, while the assignment was a general one, it was in fact given solely to secure to these assignee firms the indebtedness due them aggregating at the time less than \$6,000, and this had been considerably reduced by payment. Exceptions to the ruling of the court were taken, motion to set aside the verdict and award new trial was overruled, and this writ of error sued out.

Allen G. Collins, of Richmond, Va. (Julius H. Wyman, of Baltimore, Md., on the brief), for plaintiff in error.

J. T. Coleman and G. E. Caskie, both of Lynchburg, Va. (Caskie & Caskie and Coleman, Easley & Coleman, all of Lynchburg, Va., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge (after stating the facts as above). We do not deem it necessary to consider the assignments of error in detail.

[1] The vital question is whether this assignment with "the order to pay" incorporated in it barred the plaintiff's right to maintain this action. Under the common law there could be no question about the matter. These choses in action were not assignable. *Tolson v. Elwes*, 28 Va. 436.

[2] Therefore the whole question turns upon the construction of and limitation to be imposed upon section 2860, Va. Code 1904, touching the right of assignees to sue. Decisions from other states construing other and different statutes are calculated to mislead. The Virginia statute in its present form is as follows:

"The assignee or beneficial owner of any bond, note, writing or other chose in action, not negotiable, may maintain thereon in his own name any action which the original obligee, payee or contracting party might have brought, but shall allow all just discounts, not only against himself, but against such obligee, payee or contracting party, before the defendant had notice of the assignment or transfer by such obligee, payee, or contracting party, and shall also allow all such discounts against any intermediate assignor or transferer, the right to which was acquired on the faith of the assignment or transfer to him, and before the defendant had notice of the assignment or transfer by such assignor or transferer to another."

This statute in Virginia is very old. It is first found in the Acts of the Assembly of 1705 (3 Hen. St. at Large, p. 378). As found in the Code of 1819 (1 Rev. Code, c. 125, § 5, p. 484), it reads:

"Assignment of all bonds, bills and promissory notes, and other writings obligatory, whatsoever, shall be valid; and an assignee of any such may thereupon maintain any action, in his own name, which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

In the Code of 1849 (chapter 144, § 14, p. 583) it is found with the change in words that:

"The assignee of any bond, note or writing not obligatory may maintain," etc.

Without further change it was incorporated in the Code of 1860 (chapter 144, § 14, p. 630). With some changes, not affecting its material purpose, it was adopted in West Virginia, and will be found in its Code 1906, as section 3452.

In construing this statute the courts of both states have uniformly held that its only effect is to enable the assignee to sue in his own name, taking the paper subject to all the equities of the maker or obligor. The legal title still remains in the assignor. It did not intend to abridge his rights nor to enlarge those of the assignee beyond that of suing in his own name. *Mackie v. Davis*, 2 Va. 219, 1 Am. Dec. 482; *Norton v. Rose*, 2 Va. 233; *Garland v. Richeson*, 4 Rand. (Va.) 266; *Caton v. Lenox*, 26 Va. 31, 42; *Feazle v. Dillard*, 32 Va. 30, 34; *Davis v. Miller*, 55 Va. 1, 13; *Clarksons v. Doddridge*, 55 Va. 42, 44; *Jaeger v. Bossieux*, 56 Va. 83, 98, 76 Am. Dec. 189; *Gordon v. Rixey*, 76 Va. 694, 704; *Stebbins v. Bruce*, 80 Va. 389, 400; *Tyler v. Ricamore*, 87 Va. 466, 12 S. E. 799; *Bantz v. Basnett*, 12 W. Va. 772, 779; *Clarke v. Hogeman*, 13 W. Va. 718; *Whitaker v. Gas Co.*, 16 W. Va. 717; *Scraggs v. Hill*, 37 W. Va. 706, 712, 17 S. E. 185; *Bentley v. Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Cochrane v. Hyre*, 49 W. Va. 315, 319, 38 S. E. 554.

In *Dunn v. Price*, 38 Va. 203, at page 209, Judge Tucker, discussing this statute, says:

"It does not follow because he (assignee) is entitled to recover in his own name under this statute that he can no longer sue in the name of his assignor for his own benefit. The case of *Garland v. Richeson*, 25 Va. 266, is pregnant with proof that a party may proceed under the statute or as at common law."

In *Davis v. Miller*, 55 Va. at page 13, Moncure, J., says:

"The legal title still remains in the assignor in whose name the suit may be brought."

And in *Clarksons v. Doddridge*, 55 Va. at page 44, he says:

"The assignee may, at his election, sue at law in his own name or in that of the obligee or payee for his benefit."

[3] It is therefore clear that under this statute and these decisions suit may be brought in one of three ways—in the name of the original obligee or payee, in his name for the use of the assignee, or in the name of the assignee alone. And in cases, where complete protection and relief cannot be obtained at law, equity may be appealed to. Code Va. 1904, § 2862; 2 Va. Law Reg. 384, Barton, L. Pr. (2d Ed.) 235, 236; Code W. Va. 1906, § 3454.

[4, 5] But it seems to have been the opinion of the learned judge below that because this assignment contained an order to pay and proof would be forthcoming that such order had been accepted that it created a new debt between the original debtor and these assignees for the whole amount of the assignor's claim, and barred any and all right on the part of the assignor to sue. We cannot concur in this view:

First, because the "order to pay" incorporated in the assignment, as it is, should be considered in connection with the assignment, as a part of it, and incident and subordinate to it.

Second, because, while the paper purports to be an assignment of all moneys due and to become due under the contract and a direction to pay the same to these assignees, the evidence was undisputed that it was in fact only executed to secure the debt due such assignees, much less in amount than that asserted by plaintiff to be due from the defendant. An assignment absolute upon its face may be held to be in trust only to pay certain debts. *Protzman's Ex'r v. Joseph*, 65 W. Va. 788, 65 S. E. 461. The rights of these assignees, as we have shown, were only equitable ones allowed by statute to be asserted at law, and the obligation of such law court becomes apparent, therefore, to protect both the rights of the assignor, still retaining legal title, and the assignee having the equitable one.

Third, because as distinctly held in *Tyler v. Ricamore*, 87 Va. 466, at page 469, 12 S. E. 799, at page 800, a case very similar, "it being admitted and clear that the cause of action is assignable, the defendant cannot object to the several assignments because a determination under the issues joined in this suit will finally settle and conclude claims as to him if there be a complete or a partial assignment." This would be true in this action for the further reason that, while these assignees were not formal parties to it, they had full knowledge of it and entered no objection to its prosecution, but were furnishing evidence to maintain it on trial. Under such circumstances a general verdict directed for the defendant, as was done here, upon issues denying all obligation to pay anything might be held to preclude them from recovery in any subsequent action on their part. As to this, however, we are not called upon to decide. We are of the opinion

that the plaintiff had the right to maintain this action; that his motion to amend his declaration so as to show that it was for the use and benefit of his assignees should have been sustained and not overruled; and that the court erred in stopping the course of the trial and directing the general verdict for the defendant.

The judgment of the court below will be reversed and the case remanded, with directions to set aside the verdict and grant a new trial. Reversed.

GREENBERG v. LESAMIS et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1913.)

No. 2,126.

MINES AND MINERALS (§ 100*)—MINING PARTNERSHIP—APPOINTMENT OF RECEIVER—DISCRETION OF COURT.

In a suit by a member of a mining partnership for dissolution and accounting, he alleged that the partnership owned certain placer claims described, some of which they had leased on royalties; that two of the partners had fraudulently sold their interests to their codefendants, who were insolvent, and who threatened to collect the royalties. *Held*, that the refusal of the court to grant a preliminary injunction or to appoint a receiver was within its discretion; it not appearing from the record whether the lessees were working the property, or what, if any, royalties were, or would become, due.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 225; Dec. Dig. § 100.*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murnane, Judge.

Suit in equity by H. Greenberg against Jack Lesamis, John Tyapay, Andy Garbin, George Stanley, and Sam Sallo. From an interlocutory order denying a motion for a preliminary injunction and the appointment of a receiver, complainant appeals. Affirmed.

J. F. Hobbes and William A. Gilmore, both of Nome, Alaska (Albert H. Elliott and Clarence E. Todd, both of San Francisco, Cal., of counsel), for appellants.

Albert Fink and Thomas R. White, both of San Francisco, Cal., and O. D. Cochran and G. J. Lomen, both of Nome, Alaska, for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. Plaintiff brings this suit for the dissolution of an alleged copartnership and for an accounting. The bill prays also for a restraining order pendente lite and for the appointment of a receiver to take charge of certain alleged rents and profits. The District Court refused to grant the injunction or to appoint a receiver, and from the interlocutory order thus made and entered the plaintiff appeals.

The complaint shows in brief that on March 19, 1910, the defendants Jack Lesamis, John Tyapay, and Andy Garbin were the owners

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and in the rightful possession of certain placer mining claims situated in Noatak-Kobuk mining and recording district, Alaska, the claims being particularly described; that on said date the plaintiff and defendants Lesamis, Tyapay, and Garbin entered on certain contracts in writing whereby it was agreed that plaintiff and said defendants should form a copartnership for working said mining claims and, further, that said defendants would convey to plaintiff an undivided one-fourth interest in and to all of said claims, water rights, etc., then owned or to be acquired by said defendants, in consideration that plaintiff should furnish them with provisions from time to time up to and until July, 1910, and pay to said defendants \$6,000 in cash, and the additional sum of \$24,000 from the profits of the mining operations; that plaintiff paid to said defendants the sum of \$6,000 and otherwise kept and performed his agreement, and in pursuance of said contract the parties entered into a mining copartnership under the firm name of Klery Creek Mining Company and entered upon the mining operations; that about August 10, 1911, the Klery Creek Mining Company executed several written leases upon several of the mining claims, at certain stipulated royalties to be paid the mining company; that thereafter, about August 13, 1911, Garbin and Lesamis collusively and fraudulently, and without consideration, transferred all their right, title, and interest in the Klery Creek Mining Company property to defendants George Stanley and Sam Sallo, both of whom are insolvent and took with full notice and knowledge of said copartnership and of its rights, and that it was indebted at the time in the sum of approximately \$18,000; that the defendants Stanley and Sallo now claim that, under the original copartnership agreement, they are entitled to the sum of \$24,000 from the first and gross output of the mining claims, without deducting the mining expenses or the said indebtedness of \$18,000, and that they claim to be the lessors of the lessees from the Klery Creek Mining Company, and are threatening to and will collect, unless restrained, the royalties of the entire output of said mining claims belonging to the mining company under the alleged claim for payment of the said \$24,000; that on October 24, 1911, one Philip Murphy, as the assignee of Robinson, Magids & Co., a creditor of the Klery Creek Mining Company, began an action at law against the mining company to recover the sum of \$17,124, and caused a writ of attachment to issue against the mining property of the company, which said sum is due from the mining company, and should be paid from the first output of the mines in preference to the \$24,000; that all the defendants are insolvent, and that, by reason of the facts as above set forth, plaintiff is unable to prosecute further the mining operations; that, unless a receiver is appointed to take possession of the copartnership property, the same will be dissipated, and the plaintiff will be compelled to pay the indebtedness of said mining operations; and that said defendants Stanley and Sallo threaten to assume the management and control of the copartnership assets, and to appropriate the rents, royalties, and profits to their own use, and thus ignore the debts and liabilities of the Klery Creek Mining Company.

The defendants by their answer admit substantially all that is alleged in the complaint; but they put a different construction upon the

copartnership agreement, and claim that the \$24,000 balance which Greenberg agreed to pay for an undivided one-fourth interest in the mines is payable out of the gross products of the mines, without deduction for operating expenses. They deny that the deeds given by Lesamis and Garbin to Stanley and Sallo were fraudulently given, and claim that the copartnership was dissolved by mutual agreement about September 9, 1910, and that thereafter Greenberg operated the mines upon his individual account, and whatever indebtedness accrued was his individual indebtedness, and not that of the firm. They also allege matters relevant to an accounting between the parties.

Affidavits have been filed, and some depositions adduced, in support of the opposing contentions. From these, read in connection with the pleadings, it appears *prima facie* that a copartnership was entered into as alleged by the plaintiff; that said copartnership was not dissolved September 9, 1910, as claimed by the defendants, but continued in force and effect at least until Garbin and Lesamis sold, conveyed, and assigned to Stanley and Sallo their several interests in the mining claims, and in all rights and privileges in and concerning the mining and copartnership property, which took place September 2, 1911. The evidence would seem to indicate, further, *prima facie* at least, that these deeds were not executed in entire good faith, as no consideration was paid by the grantees. It further appears that Greenberg has a good cause of suit for dissolution of the copartnership and for an accounting.

Upon the showing made, the question here presented is whether plaintiff is entitled to injunctive relief and the appointment of a receiver. The mining claims are made a subject of the litigation, being specifically described in the complaint. Whoever deals with such claims must deal with them with notice and knowledge of the suit pending concerning them, and it is not apparent how plaintiff's rights as to these can be affected to his detriment. So it would seem that there is no need of an injunction or of a receiver for the protection of plaintiff's rights therein.

This leaves for consideration the feature of the dispute relating to the leases given to persons by the Klery Creek Mining Company for mining upon a royalty. The royalty is payable to the mining company, and it is alleged that the defendants Stanley and Sallo are collecting and threatening to collect such royalty and convert it to their own use, to the exclusion of the mining company; such company being legally entitled thereto.

As to the royalty, it appears that the Klery Creek Mining Company executed and delivered to divers persons leases on the mining claims of the company, reserving to the company 20 and 30 per cent. royalties on the gross output, and in a general way that Stanley and Sallo are receiving and threaten to receive, and to continue to receive, the royalties upon said leases to their own use, without regard to the indebtedness of said copartnership. It further appears that gold had been discovered upon only one of these mining claims, namely, the one known as "No. 1 Above." Greenberg's operations were upon this mine, but whether the leases cover it or not we are not definitely informed. However, we are not informed as to the probable amount of the roy-

alties that have or may become due to the mining company, and the matter is left so indefinite as to these leases that we cannot say whether they are worth much or little.

Under such a state of the record, we are not inclined to interfere with the discretion of the lower court in refusing the injunction or the appointment of a receiver. The interlocutory order will therefore be affirmed, with costs of the appeal to appellees.

PENNELL v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Third Circuit. January 25, 1913.)

No. 1,646.

RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—AUTOMATIC COUPLERS—"CARS."

Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requiring all "cars" used in moving interstate traffic to be equipped with automatic couplers, does not apply to the coupling between a locomotive proper and its tender.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*

For other definitions, see Words and Phrases, vol. 1, pp. 969, 970; vol. 8, p. 7596.

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action at law by Mary Genevieve Pennell, administratrix of the estate of Jay Allen Pennell, deceased, against the Philadelphia & Reading Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

George Demming and Charles H. Burr, both of Philadelphia, Pa., for plaintiff in error.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below, the plaintiff, Mary G. Pennell, brought suit under the provisions of the acts of April 22, 1908, and April 5, 1910, relating to the liability of interstate common carriers by railroads to their employes in certain cases, against the Philadelphia & Reading Railway Company, to recover damages for its alleged negligence, causing the death of Jay Allen Pennell, her husband and its employé. While working as a fireman on a locomotive of the defendant company, hauling a freight train in interstate commerce, the forward part of the engine broke loose from the tender, and Pennell, who at the time was standing above the coupling, fell on the track, was run over, and killed. The negligence charged was an alleged violation by the railroad of the act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), which,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff contended, required it to place automatic couplers between the forward end of a locomotive and its tender. The act provides:

"It shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars."

In *Johnson v. Southern Pacific Company*, 196 U. S. 16, 25 Sup. Ct. 158, 49 L. Ed. 363, the word "car" was held to include a locomotive, and that a railroad was bound to equip engines with automatic couplers, "since engines have occasion to make couplings more frequently" than cars. On the theory that the effect of that decision is to hold "that the engine is a car, and that the tender is a car, each separate and apart from the other," it is now contended that, when these parts are coupled together to form a locomotive, it must be by an automatic coupler.

We cannot agree to such a construction. To do so would be to lose sight of the real purpose of the act. The law was not passed to secure stronger car couplings, for the old-fashioned link and pin were, when once made, and considered solely as couplings, possibly stronger and more reliable connections than automatic ones. It was the constant killing and maiming of men incident to going between the bumpers to couple and uncouple cars that the law sought to avoid, and not to insure the stability of the coupling after it was made, much less the stability between the parts of a locomotive itself. If the instability or insecurity of couplings after they were made had also been a recognized evil, and if Congress had meant to remedy such evil, the requirements of the act would have extended, not merely to the automatic character of the couplings, but also to their strength and durability. The union of engine and tender is in large measure a permanent one, and the act of joining the two is of such rare occurrence, and is so alien to transportation, and an accident resulting from the joining of such parts so unheard of, that Congress could not have had it in view to require an automatic coupler at that point.

Agreeing, as we do, with the conclusion reached by the court below, that "no decision has been cited that requires an automatic coupler between the engine proper and the tender, and there seems to be no reason for requiring it at that point," the judgment is affirmed.

CAREY v. JOHNSON.

(Circuit Court of Appeals, Third Circuit. March 17, 1913.)

No. 1,642.

BROKERS (§ 46*)—CONTRACT OF EMPLOYMENT—PERFORMANCE—RIGHT TO COMMISSIONS.

Where defendant agreed to pay plaintiff a commission of 5 per cent. of the purchase price of certain corporate stocks in case plaintiff found a purchaser at a price satisfactory to defendant, and after plaintiff had obtained a prospective purchaser, who had submitted offers that had been declined, a third person, with whom plaintiff had no relations,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

offered a substantially higher price, to whom defendant sold the stock in good faith, they were not liable to plaintiff for commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. § 46.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Action by Francis King Carey against Alba B. Johnson. Judgment for defendant, and plaintiff brings error. Affirmed.

Hampton L. Carson, of Philadelphia, Pa., for plaintiff in error.

John G. Johnson, of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and RELSTAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Carey, the plaintiff, sued Johnson and others to recover commissions alleged to have been earned by Carey in the sale by defendants of their stock in the Baldwin Locomotive Works. The claim was for 5 per cent. of the purchase price and was based on an express verbal contract. While the record is large, the questions involved fall within narrow limits, and the facts pertinent to those questions are substantially undisputed. Without entering, therefore, into a statement of all the proofs, it suffices to say there was evidence tending to show that Carey called on defendants and requested them to name a price at which they would sell their shares. This they refused to do, and they did not employ Carey as their agent to sell such shares. What they did in substance was to agree with Carey, who had told them the name of his possible purchaser, that in case he found a purchaser at a price satisfactory to them, and they sold to such purchaser, they would pay Carey a commission of 5 per cent. of the purchase money. In that regard Carey testified:

"I could not get my compensation until I had brought them a purchaser at a price which was satisfactory to them."

In pursuance of this arrangement Carey procured and communicated to defendants two successive offers from his purchaser. These the defendants refused for inadequacy of price. The plaintiff then had the same person offer a higher price. About the same time the defendants received, without action or solicitation on their part, an offer, from a third party with whom Carey had no relations, of a substantially larger price. This offer defendants accepted. On the trial the court instructed the jury that the agreement between Carey and defendants did not preclude the latter from accepting an independent offer for their stock, and if they received an independent offer, for a substantially larger price than Carey's offer, and accepted it in good faith, because the price was substantially higher, and without any fraudulent or unworthy purpose of avoiding payment of commissions to Carey, the latter could not recover commissions on such sale. The jury having found for defendants, this writ was sued out by plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The questions of the defendants' good faith and of the substantially inferior, and therefore unsatisfactory, amount to the defendants of Carey's last offer, being established by the verdict, the case resolves itself into the narrow question whether the agreement between these parties thereafter imposed on the owners of the stock, in accepting in good faith a more advantageous offer which came to them unsolicited and from an independent buyer, who bore no relation to Carey, a liability to pay a 5 per cent. commission on such offer. Without discussing the numerous cases bearing upon agents' commissions, it suffices to say we find no case whose facts or principles warrant the recovery of such unearned commissions. The agreement between these parties was simple and clear. It was singularly free from the stipulations as to price, time, and other provisions usually found in the reported cases involving commissions, which restrict the owners', and create the agents', respective fields of operation. In substance, the agreement here was that if Carey brought a satisfactory offer, and it was accepted, he was to have a stipulated commission; and the corollary followed that, unless the defendants did receive and accept an offer brought by Carey that was satisfactory, no commissions were to be paid. Beyond these two limits of contract fulfillment, which entitled Carey to commissions, and nonfulfillment, the agreement did not extend. The defendants certainly made no express contract that, while Carey was seeking a purchaser, they were powerless to accept the offer of a third person. There is no reason or judicial principle on which to bottom and impose on the defendants an implied contract. If the possibility or expectation of a larger offer would of itself justify their rejection of any offer Carey brought to them—and of this there can be no doubt—how can it be contended that, when that justifying possibility or expectation had merged into an actual and better offer, the realization of the fact should be less potent than its expectation. The value of commercial property rests on the owners' power to sell, and the only limitation on that power the owners here imposed on themselves by the agreement was by a sale through Carey at a price satisfactory to themselves. When, then, the price offered by Carey was exceeded by a bona fide, unsought, and independent offer, made to the defendants by other persons, there existed no basis for the defendants and Carey to apply the agreement to pay commissions. In the face of a higher and better one, Carey's offer was not, and could not be, satisfactory to the defendants.

Waiving the question whether under the proofs there was really anything to submit to the jury, certain it is that, fortified as the defendants are by its finding that the offer they accepted was substantially better than Carey's, that it was accepted in good faith, and not for the purpose of avoiding paying Carey commissions, it follows that no error was committed by the court in subsequently entering, and in this court now affirming, the judgment based on such verdict.

IOWA CENT. RY. CO. et al. v. WALKER.†

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,838.

1. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.

Where the plaintiff in an action for a personal injury was chargeable with contributory negligence, and it is sought to recover on the ground of the subsequent negligence of defendant, it must be shown that defendant, after actual discovery of plaintiff's peril, failed to exercise ordinary care to prevent the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

2. RAILROADS (§ 274*)—INJURY TO PERSON AT STATION—NEGLIGENCE.

A locomotive engineer, entering a station with a train and seeing plaintiff, a station employé, wheeling a truck near the edge of the platform, where he might be struck by the engine, had a right to suppose that he would step further away, and was not chargeable with negligence for not acting to prevent plaintiff's injury until he discovered that plaintiff probably would not do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by Allen H. Walker against the Iowa Central Railway Company, Clarence Helm, and J. W. Shreve. Judgment for plaintiff, and defendants bring error. Reversed.

George W. Seevers and W. H. Bremner, both of Minneapolis, Minn., and McNett & McNett, of Ottumwa, Iowa, for plaintiffs in error.

S. V. Reynolds and John N. McCoy, both of Oskaloosa, Iowa, for defendant in error.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. This action was brought by the defendant in error, who will be designated as plaintiff, against plaintiff in error, who will be designated as defendant, to recover for an injury sustained by being struck by the engine of defendant's train. It appears that plaintiff was in the employ of defendant as telegraph operator at New Sharon, Iowa, and also assisted the station agent in and about handling the baggage, receiving the same from trains, and delivering the same to trains. The defendant's railroad track ran practically north and south on the east side of the depot; there being a platform between the depot and the tracks. A freight train from the north was about two hours late. Plaintiff inquired of the dispatcher where the train was, and was informed it had not yet reached Searsboro, a station about eight miles north of New Sharon. Plaintiff then went out to a baggage truck standing close to the edge of the platform next to the track to the northeast of the depot, took a hand grip off, handed it to a lady, had a little conversation with a gentleman, returned to the truck, pushed it along on the platform to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 15, 1913.

south, with a view of taking the truck to the west side of the depot, where the train of another road was soon expected. There was snow on the platform, varying in depth, according to the evidence, from three to eight inches, the snow had been tramped down some, and a path had been shoveled down to the edge of the platform. Plaintiff, to avoid the snow, wheeled the truck close to the east edge of this platform. Just about as he reached the southeast corner, and while turning or about to turn the truck to the west, he was struck by this freight train coming on the defendant's track from the north, and sustained the injuries complained of. He alleged in his petition negligence of the defendant in permitting the accumulation of snow upon the platform, the running of the train at a negligent rate of speed, failing to give any signal by blowing the whistle or ringing the bell, and further alleged negligence upon the part of the defendant, in that, after the engineer discovered him in a place of peril, by the exercise of ordinary care, he could have avoided the injury.

[1] The trial court, in its charge to the jury, eliminated all questions of negligence excepting the latter, saying to the jury:

"But, as I have already said to you, down to the time he was within the danger limit, in my judgment, there is nothing to be considered by you. Now, after he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff."

This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was excepted to by defendant.

In *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:

"The exception does not apply where the plaintiff's negligence or position of danger is not discovered by the defendant in time to avoid the injury."

In *Hart v. Northern Pac. Ry. Co.*, 196 Fed. 180, 116 C. C. A. 12, this court said:

"It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant had actual knowledge of that peril, and after that knowledge was acquired failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril."

Numerous other authorities might be cited to the same effect, to wit, that the defendant's liability under what is known as the last chance doctrine is only where, after actual discovery of the plaintiff's perilous position the injury could be avoided by the exercise of ordinary care and diligence.

[2] There was a conflict in the evidence as to whether the plaintiff, while he was wheeling the truck on the platform to the south, was so near the track that he would be struck by the overhang of the engine, or whether the first time that he placed himself in position to be struck by the overhang of the engine was as he swung the truck to turn to the west. That, however, was a proper question for the jury. Assuming, however, that the engineer saw the plaintiff moving so near the edge of the platform that he might be struck by the overhang of the engine, he had a right to assume that the plaintiff would step to one side out of the danger line, and the engineer was not called upon to act until he discovered that the plaintiff probably would not step to one side. *Little Rock Ry. & Elec. Co. v. Billings*, 173 Fed. 903, 98 C. C. A. 467, 31 L. R. A. (N. S.) 1031, 19 Ann. Cas. 1173; *St. Louis & S. F. R. Co. v. Summers*, 173 Fed. 358, 97 C. C. A. 328; *Ill. Cent. Ry. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Lake Shore & Michigan Southern Ry. Co. v. Miller*, 25 Mich. 274; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; *Beem, Adm'r, v. Tama & Toledo Elec. & Ry. Co.*, 104 Iowa, 563, 73 N. W. 1045.

The evidence, however, is undisputed that, as soon as the engineer operating the engine discovered that plaintiff was in a position of danger he applied the emergency brake, and stopped the train as soon as possible, the train coming to a stop within about 100 feet.

At the close of all of the evidence, defendant requested the court to instruct a verdict for the defendant, which was overruled, to which an exception was taken. As the evidence was indisputable and conclusive that, as soon as the engineer knew that the plaintiff was in a situation of danger, he immediately did all that could be done to avoid the accident by applying the emergency brake, the requested instruction should have been given.

The judgment is reversed, with directions to grant a new trial.

BROWN v. GREENFIELD CONGREGATIONAL SOCIETY et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

1. DEDICATION (§ 18*)—ACTS CONSTITUTING—DESCRIPTION IN CONVEYANCE.

The question of dedication of land to public use is one of intention, and it is not an inflexible rule that designating in a deed certain bounding premises as public grounds amounts to a dedication of them.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

2. DEDICATION (§ 57*)—PURPOSES—PUBLIC COMMONS—USER AND CUSTOM OF TIMES—"PLACE OF PARADE"—"PUBLIC GREEN."

Under the user and custom in Connecticut in 1750, the dedication of ground in a town as a "place of parade" or a "public green" was not inconsistent with the use of a part of it as the site for a meeting house; and where such a practical construction was placed on a dedication by the erection of a church thereon 12 years later, which has been twice rebuilt and enlarged, the building of an addition to the present building will not be enjoined at suit of an adjoining property owner.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 100; Dec. Dig. § 57.*]

Appeal from the District Court of the United States for the District of Connecticut; James P. Platt, Judge.

Suit in equity by Alfred S. Brown, executor and trustee, against the Greenfield Congregational Society and others. From an order denying a preliminary injunction, complainant appeals. Affirmed.

For opinion below, see 197 Fed. 238.

The complainant filed a bill against the Greenfield Congregational Society, an ecclesiastical corporation in the town of Fairfield, Conn., and the individual defendants, to restrain them from erecting an addition to the meeting-house upon the public green or town common in Fairfield in front of the complainant's premises. The bill alleged that the public green had been created and established by the proprietors of the town of Fairfield prior to 1750 and that in that year they conveyed the lots now owned by the complainant to Rev. John Goodsell, bounding them upon the green, described as the "place of parade." The bill further averred, in substance, that the erection of the proposed building was not a use of the public green for the purposes for which it was dedicated and would cause special damage to the complainant.

The cause came up in the District Court upon an application for a preliminary injunction and affidavits were filed showing that the proprietors of Fairfield owned all the lands and that the Goodsell deed was in the terms stated in the bill but did not show any express dedication of the green by the proprietors.¹ The affidavits also showed that in 1762 a church was erected upon the green which stood there until 1845 when it was removed and another building erected which stood until 1853, when it was destroyed by fire and the present church built; the sites of these buildings not being precisely the same. Affidavits were also presented showing the need of the Congregational Society for the proposed addition.

The District Court denied the application for a preliminary injunction and the complainant has appealed to this court.

A. S. Brown, of New York City, and Marsh, Stoddard & Day, of Bridgeport, Conn., for appellant.

E. S. Banks, of Fairfield, Conn., and D. Davenport and W. A. Redden, both of Bridgeport, Conn., for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The most the complainant can claim is that there was an implied dedication of the land in question to public uses by bounding the two parcels conveyed to Rev. John Goodsell by the "place of parade," upon the principle that where the owner of a parcel of land sells a portion of it with reference to a map or plan showing another portion designated as a public square or street, he thereby designates the latter portion to public uses. It may be doubted, however, whether this principle is applicable to this case and whether the reference to the "place of parade" was more than for purposes of description. The question of dedication is one of intention and it is not an inflexible rule that designating in a deed certain bounding premises as public grounds amounts to a dedication of them.

¹ The statement in the affidavit of Lacey that the proprietors sequestered and set aside the public green prior to 1750 seems merely to have been his conclusion drawn from the fact that the "place of parade" was referred to in the Goodsell deed.

[2] We will assume, however, that there was a dedication. The words "parade" and "place of parade" are common designations of public squares and greens in New England. Undoubtedly the term "place of parade" means primarily a training ground but practically it is synonymous with "public green." Therefore it must be determined whether at the time of the dedication the use of a portion of this public green as a site for a meeting house was an appropriate public use consistent with the dedication.

"When land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated for such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication." 13 Cyc. 448.

We may take judicial notice that in Connecticut in 1750 no more appropriate use of a portion of a public green in a country town could have been found than to build the meeting house upon it. The public green was the customary place for the meeting house. The church was supported by public taxation. Use for church purposes was essentially a public use. And this was the practical construction placed upon the dedication in the time of it. The meeting house was built upon the green and a succeeding meeting house stands there now.²

It is thus entirely clear that the erection of the meeting house upon the green was, under user and custom existing at the time of the dedication, an appropriate use. And it necessarily follows that the erection of an addition to the meeting house required by the growth of the church is also an appropriate use. It cannot be said that the proprietors of Fairfield contemplated a use of the green for church purposes but not enough use to permit the church to grow; and this especially in view of the fact that there is nothing to show that the proposed addition will, or that any addition could ever have been expected to, interfere with any other public use of the green.

The order of the District Court is affirmed with costs.

² The fact that the first meeting house was not erected until 12 years after the deed to Rev. Mr. Goodsell in no way affects the statement in the text. The members may at all times have intended to build the church on the green but have been delayed by want of funds. Indeed if, as is suggested, Mr. Goodsell were the minister of the Society the deed to him of the lots facing the green would itself indicate an intention to build the church on it.

THE GLADIATOR.

THE TRANSFER NO. 10.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

Nos. 69, 70.

COLLISION (§ 95*)—TUGS WITH TOWS MEETING—PASSING SIGNALS.

A collision between car floats in tow of two transfer tugs in East River at night *held* due solely to the fault of one of the tugs, which, when they were nearing each other substantially head on, gave a signal for passing starboard to starboard and kept on without assent to it.

[Ed. Note.—For other cases, see Collision; Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Engils, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suit for collision by the New York, New Haven & Hartford Railroad Company, owner of steam tug Transfer No. 10, against the steam tug Gladiator, the River & Harbor Transportation Company, claimant; and cross-libel against the Transfer No. 10. Decree for respondent on the cross-libel, and libellant appeals. Affirmed.

The following is the opinion of Hand, District Judge, in the court below:

This is a libel in rem on behalf of the New York, New Haven & Hartford Railroad Company against the steam tug Gladiator for collision in the East River at 1 a. m. on May 11, 1908, upon a flood tide and some 700 or 800 feet off 25th or 26th street. The libellant's tug Transfer 10 was going up the East River with a car float on either hand extending some 100 feet beyond her bow. She had laid a course from the buoy off Tenth street to Thirty-Fourth street, so as to get well over on the Manhattan side and to go up the west channel of Blackwell's Island.

The tug Gladiator, belonging to the claimant, also with a car float on her starboard hand, had left the Long Island ferry slip and had come down the East River. The tows came into collision by the starboard bow of the Gladiator's float striking the starboard float of No. 10 about amidships. The angle of the collision was approximately 45 degrees. Each tug says that he did not change his course from the time of seeing the other tug. There is no evidence to contradict that testimony. Transfer 10 when she got near to Twenty-Third street had to stop so as to allow a Twenty-Third Street ferryboat to come into her slip. She exchanged single blasts with that ferryboat and let her pass, then resumed her speed. Up to that time she had not seen the Gladiator. The Gladiator, on the other hand, as she came out of her slip, found a Greenpoint ferryboat going to the eastward and into her own slip, and she also had to wait until that boat had passed. In doing so she went further out into the stream, so that, when she was headed down and straightened out on her course, she was somewhat on the New York side of mid-channel.

The stories of the two crews as to the signals are quite divergent. Transfer No. 10 says that when she first sighted the Gladiator she was about three points on his starboard bow. Thinking that he could safely pass starboard to starboard, he blew two whistles, to which he got no answer. This

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signal he repeated, and he was at once answered by a single whistle from the *Gladiator*. At that time he could see both the red and green lights of the *Gladiator*, and he thinks he was about 1,200 feet off the New York shore. Seeing that the crossing of signals would result in a collision, he blew his alarm signal at once, and almost simultaneously stopped and began backing. He had got no sternway at the time of the collision, but had substantially checked his speed.

The story of the *Gladiator's* master is that he also saw the two side lights of the *Transfer* as soon as the Twenty-Third Street ferryboat uncovered her. As she then bore on his port hand, he gave her one whistle, to which she responded. He continued on his course until some time afterwards he says he got a signal of two whistles, indicating that the *Transfer* was about to cross his bow. Shortly after the red light was shut out, and he blew an alarm and stopped and backed. At that time it was too late to avoid collision. The inference of the *Gladiator* is that the *Transfer* tried to cross her bows at the last minute. This I do not believe, and it seems to me a wholly unreasonable supposition to make. If the *Gladiator*, on the other hand, changed her course to starboard, she certainly was in fault, because there would be every reason in that case to suppose that the estimate of the *Transfer* was correct, that the boats otherwise would have passed safely starboard to starboard. But, as I have said, I cannot see any just reason to disregard the testimony of the crew of the *Gladiator* that they kept their course. If so, the case is one in which vessels about to pass head on do not pass port to port, but one of them selects a course starboard to starboard. It is quite clear that in such a case the vessel so selecting deviates from the normal navigation and does so at her risk, and that if collision ensues she is responsible for it, unless, of course, her change of purpose is clear enough in season for the other to accommodate herself to her obvious intention. Some of the distances given by the *Gladiator* do not altogether reconcile this interpretation of the testimony. It is hard to see how they got so far inshore as they think they did, unless there was a change of course. This undoubtedly made the question as to whether or not there was a change of course somewhat uncertain; but that doubt is allayed, I think, by two facts: First, because of the testimony of the crew of the *Gladiator*, which is not contradicted by anything that was seen by the *Transfer*; and, second, because of the fact that both crews say that from the outset they saw both side lights of the other tug. This could not have been so if there had been, after the time when they came in sight of each other, any substantial change in their course.

The result is that I shall hold the *Transfer* in fault, and the libel will be dismissed in accordance with that finding, and a decree go upon the cross-libel.

J. T. Kilbreth, of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Roderick Terry, Jr., both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We concur in Judge Hand's finding and conclusion that this was a head-on situation, where the *Transfer* initiated a starboard to starboard course and kept on without assent to it, and that the *Gladiator*, having kept her course, was free from fault.

It may be noted that, if the situation were as stated in appellant's brief—i. e., the *Transfer* showing a starboard light only to both lights of the *Gladiator*—then the vessels would be on crossing courses, and the *Gladiator* the privileged vessel, in which case the conclusion reached as to fault would be the same. We do not think the *Gladiator*

was far enough west of the center of the river to constitute a violation of the East River statute. Section 757 of the Consolidation Act; chapter 410, Laws N. Y. 1882.

Decree affirmed, with costs.

TRECHMANN S. S. CO., Limited, v. MUNSON S. S. LINE.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 133.

SHIPPING (§ 49*)—TIME CHARTER CONSTRUED—CHARTER FOR "ABOUT 12 MONTHS."

Under a charter of a vessel for "about 12 months" at a monthly hire, where a voyage terminated 29 days before the expiration of that time and another could have been made in 43 days, average time, the charterer was not entitled to redeliver the vessel; but where he refused to make another voyage, but rechartered her for a longer voyage at a smaller hire, the owner is entitled to recover under the first charter only the difference between the amount she would have earned thereunder to the expiration of the 12 months and the amount she did earn to that time under the new charter.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187-200, 202; Dec. Dig. § 49.*

For other definitions, see Words and Phrases, vol. 1, p. 24.]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit in admiralty by the Trechmann Steamship Company, Limited, against the Munson Steamship Line. Decree for libellant, and respondent appeals. Modified.

Haight, Sandford & Smith, of New York City (C. B. Smith and C. S. Haight, both of New York City, of counsel), for appellant.

Wallace, Butler & Brown, of New York City (F. M. Brown, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libellant chartered its steamer Kiora to the respondent for about 12 months in "any safe trade, excluding British North America, Baltic, China Sea and White Sea and south of River Plate, as charterers * * * shall direct." The charter party contained the following clauses:

"4. That the charterers shall pay for the use and hire of the said vessel six hundred and thirty pounds (£630) British sterling per calendar month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at a United States port north of Hatteras.

"5. That should the steamer be on her voyage towards the port of return delivery at the time a payment for hire becomes due, said payment shall be made for such a length of time as the owners or their agents and charterers or their agents may agree upon as the estimated time necessary to complete

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the voyage and when the steamer is delivered to owners' agents, any difference shall be refunded by steamer or paid by charterers, as the case may require."

January 13, 1908, the steamship was delivered to the charterer, which redelivered her to the owners December 15, 1908, 29 days prior to the expiration of the 12-months period. The owners insisted that there was a reasonable time left in which to make a commercially practicable voyage, which the charterer denied. To reduce the loss which would fall on one of the parties, according as this question should be ultimately determined, they agreed to a recharter of the steamship for a voyage to Port of Spain and return at the then market rate of £500 a month, which voyage occupied 59 days.

The District Judge correctly held that the charterer had no right to redeliver December 15th, because a voyage to Cuba and back, the usual time for which would be 43 days, would have been reasonable. This was in accordance with our decision in *The Rygja*, 161 Fed. 106, 88 C. C. A. 270. He allowed the libellant the difference between the charter rate of £630 and the market rate of £500 for this period. The owner insists that it should have been allowed this difference for the period of the voyage actually made under the new charter, viz., 59 days. We approve of neither measure. Each proceeds upon the theory that, because the charterer was not in a position to redeliver December 15th, it was bound to make a commercially practicable voyage. We think, on the contrary, that it would perform its full duty by paying the charter hire to the end of the stated term of 12 months, viz., January 13, 1909. The actual employment of a chartered vessel is under the sole control of the charterer. He may employ her as much or as little as he chooses. In the case of a charter for "about" a stated term, the owner will be sufficiently compensated if he gets the charter hire for the stated term, subject, however, to his right to withdraw the vessel before the expiration of the stated term, if there is not reasonable time enough left for a commercially practicable voyage. We said in *The Rygja*:

"Still we think the word 'about' applicable to the term, whether it be over or under six calendar months, and that, if the last voyage terminate so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver and the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight. This leaves room for dispute in the case of an underlap as to what voyage is reasonable, but that is a difficulty which cannot be avoided where a fixed term is not agreed upon."

The libellant erroneously infers from this that we meant, not only that the charterer might insist in such case on another voyage, but that the owner could require him to make it. The only option the owner has is to withdraw the vessel if a reasonable time is not left to make a voyage commercially practicable under the charter. He will be sufficiently compensated if at that time no such voyage is practicable by getting his vessel back, or if such a voyage is practicable and not ordered by the charterer by getting the charter hire to the end of the stated term. Because the charterer cannot generally make voyages end at a precise date, it is equitable to construe the word "about" so that he may get the benefit of the vessel so long as he can

reasonably use her under the charter and yet not be obliged to pay hire for time in which he cannot use her at all.

The decree must be modified, and the court below is instructed to enter a decree for the libelant for the difference between the hire unpaid at the end of the stated period of 12 months and the hire it has received under the new charter, without interest pending appeal, and with costs of this court to the appellant.

THE HENDRICK HUDSON.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 135.

1. WHARVES (§ 20*)—INJURIES TO VESSELS—LIABILITY OF OWNER OF ABANDONED PIER.

The owner of a pier, which has been out of use for 50 years and is in such a state of dilapidation and decay as to indicate to all navigators that it is an unsafe place to moor a vessel, cannot be held liable for an injury to a vessel so moored from a sunken spile.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 35-43; Dec. Dig. § 20.*]

2. SHIPPING (§ 81*)—LIABILITY OF VESSELS—INJURY TO OTHER VESSEL BY SWELL.

A steamer, navigating the Hudson river at ordinary speed, is not liable for an injury caused by her displacement waves to a derrick scow, which was moored in a dangerous place above a sunken spile.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347; Dec. Dig. § 81.*]

Liability of vessel for injuries caused by creation of swell, see note to *The Ashbury Park*, 78 C. C. A. 3.]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suit in admiralty by the Merritt & Chapman Derrick & Wrecking Company against the steamer Hendrick Hudson (the Hudson River Day Line, claimant) and the Erie Railroad Company. Decree for both respondents, and libelant appeals. Affirmed.

Foley & Martin, of New York City (William J. Martin and Frank A. Spencer, Jr., both of New York City, of counsel), for appellant.

Wilcox & Green, of New York City (Herbert Green, of New York City, of counsel), for appellee Erie Railroad Company.

Olcott, Gruber, Bonyng & McManus, of New York City (William M. K. Olcott and T. B. Chancellor, both of New York City, of counsel), for appellee Hudson River Day Line.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. This action was brought to recover damages sustained by the libelant's derrick scow *Alfred* on or about September 23, 1907. The charge of negligence against the Erie Railroad Company is that it provided a dangerous and unsafe berth for the *Alfred*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

while at work in the Hudson river at Piermont, about opposite Irvington, N. Y. The charge against the Hendrick Hudson is that by proceeding at a reckless rate of speed she caused displacement waves, one of which lifted the Alfred and carried her forward so that when the wave receded she was impaled on a sunken pile.

The Alfred was not a trespasser; she was lawfully at Piermont to assist in raising a number of sunken barges which had been sold by the railroad company to one Briggs and had been left at the inshore, southerly, end of the pier, which extends practically at right angles from the western bank nearly a mile into the river. On the day of the accident the Alfred had made fast to the pier near its eastern end and was in this position when she was injured.

The pier at Piermont was once a busy trade center. When first constructed, the Erie Railroad, or its predecessor, landed passengers to and from New York at this point. Afterwards it was used for freight and its last use by the company was as a storage place for coal. It was built in 1841 and has not been used as a pier since 1862. It had been openly and notoriously out of commission as a pier for half a century. The railroad company was not called upon to advertise a fact which every riverman knew, or should have known. The condition of the pier was visible to all. The photographs introduced in evidence show such a condition of dangerous dilapidation that no prudent navigator would think of tying up there. The condition above the water indicated the probable condition below the water in the immediate vicinity of the pier. No signs or notices placed on the pier could add to the information which the pier itself imparted. If a pinnacle rock rises ten feet above the surface of the water in a navigable river, a notice placed thereon saying "This rock is dangerous" would seem to be superfluous. So a similar notice on the pier would only have stated less emphatically what was made manifest by a mile of ruin and decay.

The Hudson was going at ordinary speed and her waves were no larger than ordinary and would not have injured the Alfred if she had been lying in a proper place. Vessels navigating the river are not obliged to look out for a barge that is anchored over a sunken pile.

The decree is affirmed with costs in favor of both appellees.

AIELLO v. CRAMPTON.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,774.

BANKRUPTCY (§ 479*)—COSTS—APPEAL—TRANSFER OF CAUSE—OBTAINING AND PRINTING RECORD.

Claimant in bankruptcy appealed from an order of the District Court reversing a referee's order allowing the claim to the Supreme Court of the territory of New Mexico, where the case was pending when the territory became a state, when it was transferred to the Circuit Court of Appeals. Claimant paid for printing the transcript in the Supreme Court of the territory, also for a copy of the transcript of the stenographer's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

notes and docket fee in that court, and, after the transfer, it appearing that the printed record in the court of the territory did not conform to the rules of the Circuit Court of Appeals, he was compelled to pay for reprinting the same. *Held* that, the order appealed from having been reversed, claimant was entitled to recover the costs made in the Supreme Court of the territory, in addition to those taxed in the Circuit Court of Appeals in his favor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 901; Dec. Dig. § 479.*]

On Transfer from the Supreme Court of the State of New Mexico, under Act Cong. June 20, 1910.

On motion for allowance of costs on appeal. Granted.

For former opinion, see 201 Fed. 891.

Jesse G. Northcutt and A. Watson McHendrie, both of Trinidad, Colo., for the motion.

J. Leahy, H. L. Bickley, and L. S. Wilson, all of Raton, N. M., opposed.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

PER CURIAM. This case has heretofore been reversed, and a motion has been made to tax costs in favor of appellant for the expense incurred by him in obtaining a transcript of the record which he filed in the Supreme Court of the territory of New Mexico in the sum of \$170.60, and also printing a transcript of the record in the Supreme Court of the territory of New Mexico, in the sum of \$172.20, for a copy of the transcript of the stenographer's notes, \$34.11, and also docket fee in that court.

It appears from the record that the case was taken from the District Court to the Supreme Court of New Mexico while New Mexico was a territory. The case was pending in the Supreme Court of the territory upon its admission as a state, and by virtue of its enabling act the case was transferred from the Supreme Court to this court. The printed record in the Supreme Court of the territory not being in conformity with the rules of this court, and the number of copies of the records not equaling those required by this court, the record was reprinted here. We think it just and proper that appellant recover the costs thus made in the Supreme Court of the territory, and the amount so paid by him will be charged in addition to the costs of this court in favor of the appellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VITELLI et al. v. CUNARD S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 156.

SHIPPING (§ 126*)—INJURY TO CARGO—LIABILITY OF CARRIER AS WAREHOUSE-MAN.

A steamship company, which, on discharging goods of libellant which were subject to injury by water, left them in an exposed position without proper covering, so that they were subjected to a 36-hour rain and seriously damaged, *held* liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 461-464; Dec. Dig. § 126.*]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit in admiralty by Francis Vitelli and another against the Cunard Steamship Company, Limited. Decree for libellants, and respondent appeals. Affirmed.

Lord, Day & Lord, of New York City (H. B. Potter and L. H. Beers, both of New York City, of counsel), for appellant.

Ullo, Ruebsamen & Yuzzolino, of New York City (A. M. Yuzzolino, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The ship arrived April 9, 1909, and began to discharge on Saturday, April 10th, at 7:30 a. m. She discharged defendant's goods on that day, and on April 12th and 13th. The shedded pier at which she lay was congested with freight, so libellant's goods were placed on what is called the "Farm," an open place adjoining the street and running between piers. The weather continued clear until about 3 p. m. on the 13th, when it began to rain lightly, at intervals until about 9 p. m., when a steady rain set in which continued for 36 hours. In consequence the goods in question were badly damaged by water.

The argument was mainly concerned with the obligation of the steamship as a common carrier, and the respective rights and duties of ship and consignee. In the view we take of the facts, it seems unnecessary to go into this branch of the cause, inasmuch as respondent concedes that it at least was under the obligation of a warehouseman to exercise reasonable care in protecting the goods. Knowing the goods were in an exposed position, it was manifestly the duty of the respondent as soon as the weather became threatening, or at least as soon as rain began to fall, to protect them with such waterproof covers as would shield them from damage. Witnesses called by respondent testified that they were so protected by waterproof tarpaulins, securely battened down. The carman of libellants testified that they were covered, not by tarpaulins, but by several pieces of canvas, pervious to water if exposed for a sufficient length of time, overlapping each other, but disarranged, presumably by the wind, so that a portion of the pile of goods was entirely uncovered. We are satisfied

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that his story is the correct one, because, if they had been covered by waterproof tarpaulins properly battened down, we cannot see how the goods could have been so thoroughly water-soaked as these undoubtedly were.

The decree is affirmed, with interest and costs.

BOYCE et al. v. SOUTHERN NAT. BANK OF WILMINGTON, N. C., et al.
(Circuit Court of Appeals, Fourth Circuit. February 20, 1913.)

No. 1,109.

RECEIVERS (§ 128*)—RECEIVER'S CERTIFICATES—CORPORATIONS.

On a distribution of the proceeds of a sale of the assets of an insolvent corporation, receiver's certificates are entitled to priority of payment over debts due to stockholders.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 205, 210, 219-222; Dec. Dig. § 128.*

Receivers' certificates, see notes to *Postal Telegraph Cable Co. v. Vane*, 26 C. C. A. 350; *Nowell v. International Trust Co.*, 94 C. C. A. 601.]

Appeal from the District Court of the United States for the District of South Carolina; Jeter C. Pritchard and Henry A. M. Smith, Judges.

Action between D. C. Boyce and others and Southern National Bank of Wilmington, N. C., and others. From a decree for the latter, the former appeal. Affirmed.

Iredell Meares, of Wilmington, N. C. (George F. Meares, of Wilmington, N. C., Adam B. Littlepage, of Charleston, W. Va., Herbert McClammy, of Wilmington, N. C., and Robert B. Scarborough, of Conway, S. C., on the brief), for appellants.

Benjamin H. Rutledge, of Charleston, S. C. (Mordecai & Gadsden and Rutledge & Hagood, both of Charleston, S. C., on the brief), for appellees.

Before GOFF, Circuit Judge, and BOYD and DAYTON, District Judges.

PER CURIAM. The assignments of error are many; those requiring consideration are few. The jurisdiction of the court below was questioned, but in effect was conceded during the argument. The decree appealed from properly disposed of the funds arising from the sale of the assets of the insolvent corporation, and under the circumstances plainly set forth by the pleadings and testimony, it justly directed the payment of the receiver's certificates. To have directed the payment of debts due the stockholders in preference to said certificates would have been inequitable, would virtually have been borrowing from innocent parties, and applying the money so obtained for the reimbursement of stockholders, who to say the least participated in all the transactions from which came the loss and insolvency referred to in the proceedings in this case. We find no error.

Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RITER-CONLEY MFG. CO. v. AIKEN et al.

(Circuit Court of Appeals, Third Circuit. January 28, 1913.)

No. 1,648.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ROOF STRUCTURE.

The Aiken patent, No. 718,044, for a roof structure designed for use on large manufacturing buildings or sheds, by which light and ventilation are secured without building cabins or other structures above the roof, by dropping every alternate transverse section of the roof to the lower chord of the trusses and placing windows in the vertical sides of the higher sections, discloses a device which was novel, useful, and inventive in character; also *held* infringed.

2. PATENTS (§ 13*)—SUBJECTS OF PATENTS—MANUFACTURES—BUILDING STRUCTURES—"USEFUL ART"—"MANUFACTURE."

Building is a "useful art," within the meaning of article 1, § 8, of the Constitution, authorizing Congress to provide for the granting of patents to "promote the progress of * * * useful arts"; and a building, or a structure which forms part of a building, if it involves novelty and invention, is patentable as a "manufacture," under Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382.)

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4344-4346; vol. 8, pp. 7716, 7238.]

3. PATENTS (§ 13*)—CONSTRUCTION OF STATUTE—CONSTRUCTION BY PATENT OFFICE.

The uniform practice of the Patent Office in granting patents for building structures, and their recognition by the courts, are entitled to weight on the question whether such structures are "manufactures" within the meaning of the statute.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*]

4 PATENTS (§ 13*)—CONSTRUCTION OF STATUTE—"MANUFACTURE."

The term "manufacture," as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. § 13.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Nellie C. Aiken and Nellie C. Aiken, Jr., against the Riter-Conley Manufacturing Company. Decree for complainants, and defendant appeals. Affirmed.

John H. Roney, of Pittsburgh, Pa., for appellant.

Kay & Totten and W. W. Wishart, all of Pittsburgh, Pa., for appellees.

Before GRAY BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Nellie C. Aiken et al., plaintiffs, by their bill charged the Riter-Conley Manufacturing Company with infringing patent No. 718,044, granted January 6, 1903,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to Henry Aiken for a roof structure. That court on final hearing held the patent valid and infringed. From a decree accordingly, the defendant appealed.

[1] The questions involved are, first, whether the device is novel and involves invention; and, secondly, if so, is a roof structure patentable? This patent is especially adapted for use in the construction of large manufacturing sheds or factories, the parts of which are initially constructed in structural steel works and subsequently removed to and erected on the factory site. Prior to the device in suit it was usual to build on the roofs of such structures cabins with two glass sides, or in the case of saw-tooth ones, with a single glass side, to secure light and ventilation. As such buildings increased in size, and especially in width, it was found such superimposed cabins not only caused additional expense, but their weight and exposure to wind strains by reason of their height necessitated very considerable additional strength and material in the frames of the buildings. Henry Aiken, the grantee of this patent, was a structural and mechanical engineer of large experience and practice. He conceived the idea that he could not only wholly eliminate these super-roof structures, but could also so sectionally utilize the roof area itself as to obtain all the advantages and incur none of the disadvantages incident to the use of such cabins. This device, which was exceedingly simple, he disclosed in the patent in suit. Instead of following the universal practice of seating the entire roof on the upper chords of the roof trusses, he dropped every alternate, transverse cross-section of the roof to the height of the lower chord of the roof trusses and seated such section on the lower chords. He thereby secured alternate high and low transverse roof sections, with windows placed vertically the entire width of the building in the plane of the truss sides. In this construction the light supply was brought nearer the floor, with a consequent better diffusion.

The practical advantages of the Aiken system are shown by the proofs. Emil Swenson, who was closely connected with the development of steel building construction by the Carnegie Steel Company, testified:

" * * * Up to this time the methods for providing light had necessitated the superimposed addition of ventilators, dormers, monitors, cabins, and the like, that the main roof structure had to carry, not only by their own weight, but by their added load through increased cross-section area of the structure. These loads had to be carried by the main structure, requiring additional constructive strength in the roof structure of the building itself. The desire for concentration of processes and departments of an industry under one continuous roof, to save the cost of walls necessary if the buildings were separated, and also economizing in the required acreage for a certain given plant, especially for some new industries that had sprung up in the '90's, such as the steel car industry, reached such proportions that roof structures several hundred feet wide were demanded. The problem of lighting thus reached its maximum and it was necessary to get the windows as close to the work as possible. It was then that the happy thought must have occurred to Mr. Aiken to depress alternate bays and utilize the web system for the roof trusses themselves to support the windows; in other words, to make a depressed cabin, instead of a raised cabin, thus saving entirely the cost of the superimposed or false cabin frame. Thus a lighting method had been found

that well diffused the light, came closer to the floor, and remained constant to the floor unit, and that was quite a substantial saving in the cost of the roof structure."

Speaking of wind strains he says:

"The highest point reached by the wind in the case of the monitor construction is always above the like point in the Aiken structure by the distance measured by the height of the monitor itself; the wind blowing on such a point, having a greater momentum, would produce a greater result in wind stresses, because of its greater distance from the base of the columns, which is usually at the ground level."

The device at once found favor. When the proofs were taken more than 2,000,000 square feet of such roof structure were in use, and the validity of the patent and the substantial benefit of the device were impliedly recognized to the extent of \$45,000 paid in royalty.

It will be noted that the device is a roof section of several parts structurally combined and co-operating in a particular way, and at the same time, to effect diffusion of both air and light, and is not for an architectural design or an economic or desirable plan of utilizing house space. Its purpose is the diffusion of light and the movement of air in a combination of structural elements, to wit, series of parallel trusses and roof section at different truss chord levels, whereby intermediate truss and subroof light and ventilation were obtained.

Referring, then, to the first question involved, it is clear to us that, as also found by the court below, the device was novel, useful, and inventive in character, in that several elements conjointly co-operate to secure a unitary result.

[2] This brings us to the second question—whether a roof structure is patentable. In that regard it will be noted that, to carry out its expressed purpose, "to promote the progress of * * * useful arts," the Constitution empowered Congress to secure "for limited times to * * * inventors the exclusive rights to their respective * * * discoveries." There can be no doubt that building is one of the useful arts, and therefore one whose progress was embraced in the comprehensive term of the Constitution. Any discovery that promoted progress in that art, therefore, fell within the power delegated to Congress. In pursuance of that power Congress enacted in 1790 and 1793, in terms ever since substantially followed, that:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition," etc.

That this patent is not for an art, a machine, or a composition of matter is, as it could not be otherwise, conceded; so that the question is: Is it covered by the term "manufacture"? To us it is clear that as building is embraced in the inclusive scope of "useful arts," and as buildings, both as a whole and in their constituent parts of wood, brick, glass, iron, etc., are manufactured products, and not natural objects, they fall within the broad terms "manufacture" of the act of Congress and "useful arts" of the Constitution. From its original derivation of *facere manu*, or handworked products, the word has broadened into all means of treating raw materials, and in modern times its dictionary definition is "anything made from raw materials

by hand, by machinery, or by art." Such being the fact, it would seem to follow that the burden of proof is on him who contends that buildings and parts thereof are not embraced by the statute in question.

[3] Moreover, it is a well-settled principle of federal statutory interpretation that the construction given a statute by those charged with its execution has weight with courts, and will not be overruled without cogent reasons. *U. S. v. Moore*, 95 U. S. 763, 24 L. Ed. 588, and cases cited. Applying this principle to the present case, it seems the Patent Office has construed the word "manufacture" to cover buildings, and has issued large numbers of patents accordingly. Thus, class 20 of the Patent Office covers wooden buildings, and under modern development has been extended to include steel-framed structures, and includes 97 different subclasses, under which patents are issued for doors, windows, floors, supporting columns, wall construction, and other parts of buildings. Roofs form a separate class, No. 108, and under this head we find numerous subclasses of roofs, under the various subheads of adjustable, fabric-lined, metal-lined, composite, fire-proof, lap-joints, shingle, observatory domes, portable, skylight, slate, trusses, etc. Not only has such been the practice of the Patent Office, but the fact that, in the many cases where courts have adjudicated patents issued under such assumed power, none has ever seemed called upon to question it, affords strong support to a construction so long and widely followed. In *U. S. v. Commonwealth*, 186 Fed. 291, 108 C. C. A. 337, this court referred to a construction of law thus adopted upon by boards of Pennsylvania county commissioners and said:

"Such has been the view on which the affairs of Pennsylvania counties as poor districts have been administered for years, and, as our holding of the bonded liability of county commissioners acting with reference to the poor district is in accord with that firmly established practice, our decision is in line with that salutary principle of interpretation which makes fixed practice its own interpreter, and which is referred to in *Stuart v. Laird*, 1 Cranch, 308, 2 L. Ed. 115. There it was sought to raise the question that the justices of the Supreme Court had no right to sit as Circuit Judges; but the court said: 'To this objection, which is of recent date, it is sufficient to observe that practice, and acquiescence under it, for a period of several years, commencing with the organization of a judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most formidable nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not to be disturbed.'"

But, considering the question as unaffected by this long course of practice, we are clear that the term "manufacture" in the patent law embraces buildings. To say that a roof falls within the domain of architecture is not to decide the question; for the question is not whether a roof construction is included in architecture, which, of course, it is, but whether the roof section here in question is, in view of its several constituent and co-operating elements, a manufacture. We must not be misled by the factors of size and immobility. The pyramids, by reason of their bulk and solidity, are none the less a manufacture, as distinguished from a natural object.

[4] The ideas of operative motion and mobility are so intimately associated with the word "machine," and machines are so frequently the

subjects of patents, that we naturally disassociate the idea of a patent with a building. But the fact that the terms "machine" and "manufacture" are both used in the statute shows the latter was meant to include subjects the former did not. Thus, whether required in that case or not, the statement of Judge Acheson in *Johnson v. Johnston* (C. C.) 60 Fed. 618, that "the term 'manufacture,' as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art or industry of man, not being a machine, a composition of matter, or a design," is in our judgment sound. It has stood unchallenged by judicial decision and has the support of standard authors. Thus 1 *Robinson on Patents*, § 183, under the heading "Manufactures, a Comprehensive Class of Inventions," says:

"The species of inventions belonging to this class are very numerous, comprehending every article devised by man, except machinery, on the one side, and compositions and designs, upon the other."

Walker on Patents, page 12, says:

"Whatever is made by the hand of man, and is neither of these [machine, composition of matter, design] is a manufacture in the sense in which that word is used in the American patent law."

And Curtis on Patents, § 5, cites *Hornblower v. Boulton*, 8 Durnford & East, 98, where Lord Kenyon said:

"I have no doubt this patent is for a manufacture, which *I understand to be something made by the hands of man.*"

In tariff taxation, as well as commercial and bankruptcy cases, the word "manufacture" has been accorded the same meaning. Thus in *Kidd v. Pearson*, 128 U. S. 20, 9 Sup. Ct. 10, 32 L. Ed. 346, it is said:

"Manufacture is transformation—the fashioning of raw materials into a change of form for use."

In *Tide Co. v. U. S.*, 171 U. S. 216, 18 Sup. Ct. 839, 43 L. Ed. 139, it is said:

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."

In *Commonwealth v. Northern Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107, the Supreme Court of Pennsylvania said, of a company engaged in iron roof, bridge, and structural work, that the meaning of the word "manufacture"—

"has expanded with the advance of the arts and sciences until it has come to mean, as a verb, the making of anything by human art or skill, and, as a noun, anything made by art or skill."

And referring later to this definition in *Commonwealth v. Keystone Bridge Co.*, 156 Pa. 503, 27 Atl. 2, in a case involving a similar corporation:

"If the definition just quoted is to be applied to the present defendant, then putting a roof or bridge together is the making of something by art or skill, and is manufacture as truly as making the constituent parts."

The Circuit Court of Appeals of the Eighth Circuit in *Re First Nat. Bank of Belle Fourche*, 152 Fed. 67, 81 C. C. A. 263, 11 Ann. Cas. 355, held:

"The word 'manufacture' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions."

Where the question involved was whether a corporation engaged in constructing in place cement arches, walls, bridges, and buildings was engaged in manufacturing within the bankrupt law, the Supreme Court of the United States in *Friday v. Hall*, 216 U. S. 451, 30 Sup. Ct. 262, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475, said:

"The production of concrete arches, or piers, or abutments, is the result of successive steps. The combination of raw material, the sand, the limestone, the cement, and the water, produced a product, which undoubtedly was manufactured. This concrete had then to be given shape. That required the manufacture of molds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the mold was another step. Do all of these steps, each a step in 'manufacturing,' cease to be 'manufacturing' because the molds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the concrete is done at the place used seems rather a matter of convenience, due to the quick hardening in molds and difficulties of transportation. But, as we may take notice, the operation which in the end is to produce an arch, or abutment, or pier, or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor, who puts together the brick or stone or wood or iron, as finished by another. If the builder made his brick, shaped his timbers, and joined them altogether, he would plainly be a manufacturer, as well as a builder; and if the former was the principal part of the business, he would be within the definition of the bankrupt act. To say that one who makes and then gives form and shape to the product made is not engaged in manufacturing, because he makes his product and gives it form and shape in the place where it is to remain, is too narrow a construction."

Applying the principle of this last decision to the facts in hand, we may say that the infringing defender, instead of making his brick, shaping his timber, and joining them together, whereby "he would plainly be a manufacturer," is none the less a manufacturer because he has substituted for timber and brick the steel trusses and roof supports incident to building development, manufactures such roof sections part by part in his factories, and then removes and assembles them in a permanent structure. And if the making of these constituent parts is manufacture, we see no logical escape from the conclusion that the roof wherein these parts are assembled and used is in fact a thing manufactured, and therefore within the word "manufacture" as used in the patent law. The reasoning in support of this conclusion can be summed up in no clearer words than those found in *Commonwealth v. Keystone Bridge Co.*, *supra*, where the Supreme Court of Pennsylvania adopted the opinion of our Brother McPherson, then on the common pleas bench of Pennsylvania, as follows:

"The defendant is unquestionably a manufacturing company up to the point when the various parts—beams, girders, rods, bolts, and the rest—are ready to be put together in order to form the complete structure for which they

were intended. The preparation of these parts from material, either raw or unfinished, is clearly manufacturing within any accepted definition of the word; and if in all cases the transaction was finished by a sale of the parts to a purchaser, who would himself put them together and thus complete the structure for use, the exclusively manufacturing character of the corporation could not be questioned. Is this character destroyed simply because the defendant, after having manufactured the various parts of a contemplated bridge, or viaduct, or turntable, or roof, goes one step further and finishes the structure? Upon reason we think this question ought to be answered in the negative, and especially because the separate parts are comparatively useless, and are made for no other purpose than to put them together. In the case of such a corporation as this, the power to build or erect (if, indeed, it ought to be considered as a distinct and separate power) is a proper and perhaps a necessary incident to the powers which are unquestionably manufacturing. In other words, if a corporation may frame and fashion all the parts of a bridge, it has an implied power to put the parts together in their intended seat. If it may build the bridge or the roof experimentally in its yard, it may surely build it in the very place for which it was designed. It is not easy to see why it becomes necessary to divide a business which seems to be a natural unit, and to regard it as incapable of being carried on unless two distinct franchises are given—one to prepare the material, and the other to erect the structure. It seems to us more reasonable to hold that, if a corporation may manufacture a bridge in parts, it may under the same franchise put the parts together and deliver the bridge as a whole in place to the purchaser, and that it is exclusively manufacturing as truly when it is finishing the work as when it is only beginning. We see no escape from the conclusion, if the subject is to be examined from this point of view."

In accordance with the views here expressed, the decision of the court below is affirmed.

ELBS v. ROCHESTER EGG-CARRIER CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 119.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—EGG-CARRIER.

The Jenne patent, No. 722,512, for an egg-carrier, while not for a generic invention, covers a simple and ingenious device, which is a distinctive improvement on those of the prior art, and the patent is entitled to a sufficiently liberal construction to protect the same. As so construed, *held* infringed.

Appeal from the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suit in equity by John G. Elbs against the Rochester Egg-Carrier Company. From a decree (197 Fed. 764) dismissing the bill based upon letters patent No. 722,512, on the ground that the two claims involved, the second and the sixth, are not infringed by the defendant's device, complainant appeals. Reversed.

Frederick F. Church and G. Willard Rich, both of Rochester, N. Y., for appellant.

Harold H. Simms, of Rochester, N. Y., and George P. Keating, of Buffalo, N. Y., for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

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COXE, Circuit Judge. This action is founded upon letters patent No. 722,512 granted to Henry S. Jenne March 10, 1903 for improvements in egg-carriers. The court decided that, in view of the prior art, the claim in controversy must be narrowly construed, and, when so limited, were not infringed by the defendant's structure. These claims are as follows:

"2. An egg-carrier consisting of a case provided with partitions forming egg-receiving pockets, a removable cover formed with a flange interposed between the walls of the case and ends of the upper portions of the partitions, and means adjustably connected to the case for engaging and releasing said cover as set forth."

"6. In an egg-carrier, the combination of a case provided with partitions having the upper portions of their end edges clear from the interior of the case, and a tray-shaped cover disposed inverted in the case and having its flanges passing across the clear portions of the ends of the partitions as set forth."

The patentee has not made a generic invention but the record contains persuasive proof that he has made a distinct improvement upon the egg-carriers shown in the prior art. The persistent effort of the defendant, and those in cahoot with it, to use the Elbs carrier, or one embodying all its advantages, is inconsistent with the theory that the claims cover nothing of importance which is not found in the prior art.

The elements of claim 2 are as follows:

First. An egg-carrier consisting of a case provided with partitions forming egg-receiving pockets.

Second. A removable cover formed with a flange interposed between the walls of the case and ends of the upper portion of the partitions.

Third. Means, adjustably connected to the case, for engaging and releasing said cover.

Claim 6 is substantially similar except that it omits the third element of claim 2 and also the provision of claim 2 that the flange of the tray must be interposed between the walls of the case and the "ends of the upper portions of the partition."

It seems to us that the patentee has invented a simple and ingenious receptacle for packing, carrying and delivering eggs, which obviates many of the difficulties shown in the carriers previously in use.

The claims are, therefore, entitled to an interpretation sufficiently liberal to give effect to the distinctive improvements added by the inventor. The carriers made and sold by the defendant have all the valuable features of claims 2 and 6, in fact, they are almost a Chinese reproduction of the patented device, with the single exception that the defendants have removed the portion of the partitions which extends above the lower edges of the tray when it is inverted and used as a cover. The parts thus removed perform no important function in the operation of the device. It operates as well without as with them, except perhaps, in certain possible, but unlikely, contingencies, their presence may add some additional strength to the carrier. For instance, if a weight should fall on the inverted tray, additional resistance might be added by the fact that the walls of the partition extend

upwards, so that the top of the inverted cover is but a short distance above them. Neither of the claims in issue requires that the partitions shall extend beyond the top of the eggs. The drawings show the partition as ending below the top of the eggs, so that a heavy blow on the inverted tray would break it down and destroy the eggs, the partitions offering little, if any, resistance.

Claim 6 simply requires that the inverted tray-shaped cover shall be disposed in the case "having its flanges passing across the clear portions of the ends of the partitions." Reducing the height of the partitions, as is shown in defendant's device, merely removes some superfluous pasteboard, but in no way changes the operation of the carrier. The flange of the defendant's cover may fairly be construed as interposed between the walls of the case and the ends of the upper portions of the partitions. The only difference is that in the defendant's carrier the walls do not extend upward as far as in the structure shown in the patent. The portion removed performs no function; it is, so to speak, surplusage, and its removal does not, in our opinion, enable the defendant to appropriate the invention of the claims.

The decree is reversed with costs and the cause is remanded to the District Court with instructions to enter a decree in favor of the complainant.

YALE & TOWNE MFG. CO. v. FORD.

(Circuit Court of Appeals, Third Circuit. February 15, 1913.)

No. 1,668.

TRADE-MARKS AND TRADE-NAMES (§ 11*)—NAME OF PATENTED ARTICLE—EFFECT OF EXPIRATION OF PATENT.

Where the maker of a patented article marked it as patented, and also designated it by an arbitrary name by which it became known to the public, on the expiration of the patent other manufacturers, having the right to make the article, had also the right to use the name, provided they took proper care to prevent their product from being confused with that of the original maker.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. § 11.*]

Appeal from District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Suit in equity by the Yale & Towne Manufacturing Company against Frank J. Ford. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 196 Fed. 176.

Archibald Cox and Louis H. Porter, both of New York City, for appellant.

Augustus B. Stoughton, of Philadelphia, Pa., for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and RELLS-TAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below the Yale & Towne Manufacturing Company, a corporate citizen of Connecticut,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

filed a bill against Frank J. Ford and another, citizens of Pennsylvania, to restrain them from an alleged unlawful use of plaintiff's trade-name "Triplex," as applied to spur-gear'd hoisting blocks and from unfair competition. After final hearing the court filed an opinion as follows:

"I cannot distinguish this case from *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169 [16 Sup. Ct. 1002, 41 L. Ed. 118], and similar decisions. The 'Triplex' block was patented in 1889, but, as the patent has now expired, the defendant had a lawful right to make the article. Moreover, as the word 'Triplex' is not a descriptive but an arbitrary word, and is undoubtedly associated in the public mind with the patented article, the defendant had the right to use the word on the expiration of the patent, provided he took the proper care to prevent his own goods from being confused with the goods of the original manufacturer. This he has taken; he uses the word 'Tri-bloc' instead of 'Triplex,' and (what is probably more important) he adds his own name as the name of the maker, and also the place of manufacture. On the authority of the cases referred to, the bill must be dismissed with costs."

From a decree dismissing the bill the plaintiff took the present appeal. After argument and full consideration, we think this brief opinion accurately summarizes and correctly decides the case. The plaintiff a number of years ago began manufacturing a hoisting block in which the spur gears of the block wheel engaged the links of a pull chain. The testimony of the plaintiff's president was that plaintiff commenced the manufacture of chain blocks—

"by the obtaining of an exclusive license for the United States under the patents of Thomas A. Weston, covering the differential pulley block. A little later we took over the business of three or four other manufacturers who had been infringing the Weston patents, included among whose lines were a spur-gear'd type of differential pulley block. The business grew from year to year, and was combined later with the manufacture of cranes in which we did a large business for some time. We then discussed with Mr. Weston the desirability of a chain block having higher mechanical efficiency than the differential block, with the result that he took up the study of this question, developed successive ideas and designs, which we tested experimentally, this work covering upwards of three years. The final result was the development of the block which is in issue in this suit, which we put upon the market in 1890. * * * During the three years or more of experimentation preceding the placing of the block upon the market, we commonly referred to it as the 'spur-gear'd block,' to which we also frequently added the inventor's name, thus calling it, 'Weston's spur-gear'd pulley block.' * * * We have always used those names as descriptive of the block and its type of mechanical construction, but, when we were preparing to place it on the market, we thought it expedient to associate another name which would be indicative of the source of origin; that is, would indicate briefly by a handy word, when that word became familiar to the public, the fact that the block was made by the Yale & Towne Manufacturing Company. We considered a large number of arbitrary and fanciful words and finally selected the word 'Triplex' from among them."

The blocks were marked "patented June 5th, 1886, October 18th, 1889," which were the successive patents, granted to Weston, and which references, as testified by the same witness, "indicate or are intended to indicate that the block embodies the invention of those patents." On the expiration of these patents, the exclusive right of the plaintiff ended, and the complete right to the enjoyment of Weston's invention became vested in the public, and the enjoyment of that right by the public was its first benefit in return for the exclusive right given to Weston. But during the years of his enjoyment of that ex-

clusive right Weston and his grantees had seen fit, for their own trade purposes, to give to the patented article an arbitrary name which individualized and designated it in the public mind. "We considered a large number of arbitrary and fanciful words, and finally selected the word 'Triplex' from among them." In other words, they had by so marking Weston's block as patented and designating it as a Triplex block brought it about that at the expiration of the patent the block which the public acquired the right to make was the hitherto patent-restricted Triplex block. It is true that during that time, in addition to its association with the Weston patents and its significance as designating a patent connection, the Triplex block had also gained a further significance as indicating the work and product of the plaintiff company, who alone had the right to make the patented block. And it is over this fact, and at this point, where the public is entitled to the full and untrammelled enjoyment of the invention, that the due adjustment of the trade rights of the former exclusive user becomes a troublesome question. To us it is clear the commercial value of a patent is the creation of a public desire for its product. And if the invention is such that its product has acquired a distinctive name, then the public, when its time of enjoyment comes, cannot enjoy to the full the freed invention, unless coupled thereto is the right to use the name by which alone the invented article is known. Nor is there injustice in this, for, when the real situation is analyzed, it will be seen that by enjoying the monopoly of his patent for a series of years the patentee impliedly agrees, as maker and seller of the invented article, that, when his patent expires, he will not only surrender to the public the mechanical right to duplicate the article, but also the distinctive name the public has appropriated to the patented article; for it is apparent that the public cannot use the invention to the full without having the incidental right to vend its product by the distinctive name which the public has given it. In other words, taking this case, the public cannot now enjoy an untrammelled right to make the Triplex block of the seventeen-year monopoly, unless it has the incidental right of saying we now make and sell a Triplex block. Any other construction would make the patent a mere incident to trade-names, and would nullify the basis which alone justifies the grant of patented rights, namely, the right, on the expiration of the patent, to the full commercial use of the freed invention. For illustration, suppose that Benjamin Franklin had for seventeen years made his stoves under a patent, and that during that time these stoves had come to be known as Franklin stoves. Can there be any doubt that when a foundryman, at the expiration of the patent, wanted to manufacture and sell such stoves, that he could not call them Franklin stoves, and mark them and sell them as Franklin stoves? If he could not, the invention would be of diminished practical use, and the monopoly of the patent measurably retained by the patentee. The consideration which the public enjoys in return for the patent only begins when the patent expires, but, when it does expire, the invention and the designation by which, as a patented article, it has become known, passes into the general public right, subject, of course, to the limitation that the person who uses it shall so act as not to lead the public to believe that when buying such article they are buying one

made by some other person, including, of course, the patentee. To that end, the law has required the article to be so marked with the maker's name or otherwise as shall prevent confusion and deception in this respect. How that marking shall be done is a matter for decision in each case. But, subject to such condition, which courts should in the interest of commercial morality efficiently enforce, the right of the public at the expiration of the monopoly to make and market the released article by the name it had acquired during the restricted period is unquestioned. Tested by these considerations, it is clear to us that the Triplex block embodied patented features and was marked, when sold as patented; that the name Triplex was not descriptive but was an arbitrary name designedly given by the maker to the patented article; and that such name was accepted by the public and became associated in the public mind with the patented article. It follows, therefore, that under *Singer v. June*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, and kindred cases, on the expiration of the patent, the defendant had a right to use that name as a designation of the patented device, provided he used proper care to prevent it from being confused with the goods of the original manufacturer. "This," as said by the court below, "he has taken," and as proof thereof instead of using, as he contends he had a right to do, the word "Triplex," he further evidences his good faith by putting on his block both the name and place of his company as makers, and giving it the name "Tribloc." In selecting the place for the maker's name the defendant has put his name on the same side the plaintiff did. This location would seem to evidence good faith as it is calculated to at once attract the notice of one familiar with plaintiff's block and its marks. However, as objection was made thereto at bar and as defendant has signified its willingness to adopt any style of differential marking suggested, we will, in pursuance of such consent, direct that as soon as practical the name and place of the defendant company be cast on the same side of the block with the name "Tribloc," and that all lettering be in such contrasted color to the color of the block as will challenge attention.

In accordance with these views, the decree below will be affirmed.

In re KEYSTONE PRESS, Inc.

(District Court, D. Minnesota, Fourth Division. March 25, 1913.)

1. BANKRUPTCY (§ 302*)—SECURED CLAIMS—AMOUNT—ANSWER.

Where, in proceedings to determine the amount of a secured claim against the bankrupt, the trustee alleged that claimant, through its agent, took from the bankrupt on a specified date a trust deed of all its property, that such agent thereafter exercised control over all the bankrupt's financial affairs until adjudication, that the claimant through the agent received a large sum of money from the bankrupt, and praying for an accounting, was sufficient to justify evidence that the amount claimed to be due on the security was not the true amount, and therefore was a sufficient answer to a rule to show cause why the proceeds of the mortgaged property should not be turned over to the claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 311*)—SECURED CLAIMS—PREFERENCES—SURRENDER—“CREDITOR.”

Bankruptcy Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), declares that claims of creditors who have received preferences shall not be allowed unless they shall surrender their preferences. *Held*, that the word “creditor” as so used was not intended to refer to a secured creditor, and that such a creditor who had received a preference was only required to surrender the same in case he attempted to have his claim allowed as an unsecured claim for any sum in excess of the value of the security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622-7627.]

3. BANKRUPTCY (§ 224*)—PREFERENCES—DETERMINATION—REFEREE'S JURISDICTION.

A referee in bankruptcy has jurisdiction to determine whether a preference has been received by a creditor attempting to prove an unsecured debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

4. BANKRUPTCY (§ 288*)—RECOVERY OF PREFERENCES—JURISDICTION.

A bankrupt's trustee cannot require a creditor who has received a preference, and who has not become a party to the bankruptcy proceedings, to appear before the referee and litigate the question of preference, but the trustee is bound to institute a plenary suit against the creditor in a proper court to recover the preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

5. BANKRUPTCY (§ 300*)—ADMINISTRATION OF ESTATE—SECURED CREDITOR—PREFERENCES—APPEARANCE.

In response to an order to show cause why property of a bankrupt should not be sold free from liens, a secured creditor answered, setting up three mortgages on the property, and asked that the trustee be ordered to surrender the property or pay the amount due on the mortgages without prayer to have its claim allowed, either as a secured or unsecured claim. The claimant consented that the property might be sold free from liens and the lien transferred to the proceeds, and after sale presented a petition stating that it had filed its proof of a secured claim in the shape of certain notes and mortgages and asked that the claim as filed be allowed and that the proceeds of the property be turned over to him. In reply the trustee alleged that the creditor had received a preference and asked that the amount be determined and set off against its secured claim, but the claimant objected that the court had no jurisdiction to determine the question of preference. *Held*, that the claimant's proceedings did not amount to an appearance generally so as to confer jurisdiction to determine whether it had received a preference, unless it appeared that the claimant intended to prove, as an unsecured claim, any balance remaining unpaid after applying the proceeds of the mortgaged property to its secured debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 416, 449; Dec. Dig. § 300.*]

In Bankruptcy. In the matter of Keystone Press. Proceedings to determine the amount of a mortgage debt owing by the bankrupt to the John Leslie Paper Company, and whether the latter had received a preference. Referee's order reversed and remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stevens & Stevens, of Minneapolis, Minn., for the trustee.

A. M. Breeding, of Minneapolis, Minn., for John Leslie Paper Co.

WILLARD, District Judge. [1] The amount due on the mortgages held by the John Leslie Paper Company has not yet been determined by the referee, and before he does determine that amount the trustee has a right to be heard. His answer alleged that the Paper Company, through its agent, McCombs, took from the bankrupt on March 23, 1911, a trust deed of all its property; that McCombs was to and did exercise control over all the moneys and financial affairs of said corporation until its adjudication in bankruptcy; and that the Paper Company, through McCombs, received a large amount of money from the corporation. The answer asks for an accounting between the bankrupt and the Paper Company.

This part of the answer is, I think, sufficient to justify the introduction of evidence for the purpose of showing that the amount claimed by the Paper Company to be due upon its mortgages is not the true amount. That evidence could properly consist of the books of account of the Paper Company which it could be required to produce under subpoena. This part of the answer therefore states a defense to the order to show cause, and the objection to it should not have been sustained.

From the argument of the trustee, both in his brief and at the hearing, it may turn out that he has no real defense in regard to the amount due on the mortgages. There has, however, been no agreement on his part as to that amount, and he is entitled to make such showing as he can upon the hearing of the order to show cause.

The principal question discussed in the brief and in the argument before me, and probably before the referee, was this: Admitting that the Paper Company is entitled to have the amount of its mortgages paid out of the money realized from the sale of the property covered by the mortgages, is the trustee entitled to have set off against that amount a preference which he claims the Paper Company received in other transactions with the bankrupt?

[2] Section 57g of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443) declares that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences. The Circuit Court of Appeals of this circuit, in *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, said on page 5, 54 C. C. A. 387, on page 391:

"The unequivocal language and the unquestionable legal effect of this section are to prohibit the allowance of any claim of a creditor who has received a preference, either upon that or upon any other claim he holds against the estate of the bankrupt, unless he has first surrendered his preference."

The court, however, was not then considering the matter of a secured claim, and it does not clearly appear that by the phrase "any creditor" it intended to refer to a secured creditor. Of course, if a secured creditor attempts to have his claim allowed as an unsecured claim for any sum in excess of the value of his security, he would

come clearly within the terms of section 57g. He could not have the excess allowed without surrendering the preference.

Does the evidence in this case show that the Paper Company is attempting to have any part of its secured claim allowed as an unsecured claim? The evidence is in such a condition that it is impossible to answer this question. All of the personal property used in the bankrupt's business was sold for \$2,000. The amount due on the mortgages is claimed to be about \$1,200. Whether the mortgages cover all of this property does not clearly appear. It also appears that there is another creditor claiming a lien upon some of the property to the extent of \$350. If the amount of the Paper Company's lien is less than the sum realized from the property upon which the lien rested, then there has been no attempt by the Paper Company to prove for any unsecured balance. If, on the contrary, there is any such unsecured balance, the pleadings filed by the Paper Company would indicate that it did intend to claim for such excess.

The proceedings in the case, so far as this matter is concerned, have been as follows: On August 21, 1912, at the petition of the trustee, the Paper Company and other creditors claiming liens were ordered to show cause why the property on which they claimed liens should not be sold free from lien, and such liens be transferred to the proceeds of the sale. In response to this order to show cause, the Paper Company filed an answer setting up three mortgages which it claimed to hold on the property of the bankrupt, and asked that the trustee be ordered to surrender to the Paper Company the property described in its mortgages, or to pay to it the amount alleged to be due thereon. In this answer the Paper Company did not ask to have any claim allowed either as a secured or an unsecured claim. Upon the hearing of the order to show cause the Paper Company appeared and consented that the property might be sold free from liens, upon the condition that the money derived from the sale should be impressed with a lien for the amount of the claims of the Paper Company pending a determination as to such claims. The property was so sold, and the money paid into court. Thereafter, and on the 18th day of January, 1913, the Paper Company presented a petition in which it stated that it had filed its proof of a secured claim, in the shape of certain notes and mortgages, and asked that the secured claim as filed be allowed, and the money due the Paper Company in the hands of the trustee be turned over to it. In answer to the order to show cause made upon this petition the trustee appeared and filed the answer to which reference has been made. In addition to what has already been stated as appearing in this answer, he alleged that within four months of the adjudication the Paper Company had received a preference amounting to upwards of \$400, and asked that the amount of the preference be determined by the referee and set off against any amount found due the Paper Company on account of its secured claims. The Paper Company objected to the hearing of any evidence upon the answer, on the ground that the court had no jurisdiction to determine the question of preference. This objection was sustained by the referee, and from the order sustaining it the trustee has presented this petition for review.

[3] As has been said before, if the Paper Company seeks to prove as an unsecured claim any excess of its claim over the amount that is secured, then it must surrender any preference which it received, and the referee has jurisdiction to determine whether a preference has been received or not, and the objection was improperly sustained. The evidence is in such a condition that it is not possible to say whether or not the Paper Company intends to prove for any unsecured portion of its claim. The objection therefore should have been overruled.

In view, however, of the fact that upon further hearing it may appear that the Paper Company makes no such claim, it is proper to decide the question whether, admitting that its only purpose is to secure the money realized from the sale of the property on which it has a lien, the trustee is entitled to have in this proceeding the referee determine whether the Paper Company has or has not received a preference, and if it has, if the trustee has a right to have the amount thereof set off against the sum due the Paper Company by virtue of its lien.

[4] It is undisputed that the trustee cannot require a creditor who has received a preference, and who has not in any way become a party to the bankruptcy proceedings, to appear before the referee and litigate the question of the preference. It is necessary that the trustee institute a plenary suit against him in the proper court to recover the preference.

[5] It is said, however, by the trustee that this particular creditor has appeared voluntarily and submitted itself to the jurisdiction of the court for all matters, and that therefore the question of preference can be determined in this proceeding. The appearance by the Paper Company in answer to the first order to show cause was a submission by itself to the jurisdiction of the referee for the sole purpose of having its right to the property involved or its liens thereon determined. That submission gave the referee full power to determine all questions with regard to the title to the said property or the validity of any lien thereon. It did not, however, I think, go any further. The Paper Company did not thereby submit itself to the jurisdiction of the referee for all other purposes. It did not thereby agree to litigate before him questions relating to any preferences which it might have received growing out of other transactions. A person, such as a bailor, for example, who owns property in the possession of the bankrupt, has a right to appear in a bankruptcy court for the purpose of securing his property in the possession of the bankrupt as bailee, without subjecting himself to the jurisdiction of the bankrupt court for the purpose of having determined in a summary manner the question as to whether in other transactions he had received a preference from the bankrupt. In *re Franklin* (D. C.) 151 Fed. 642.

The second appearance by the Paper Company when it asked to have its secured claim allowed was somewhat broader. But if it turns out that its petition was only for the purpose of securing the money to which it was entitled by reason of its chattel mortgages, then I do not think that it can be said to have appeared generally, for the purpose of litigating other questions.

It is suggested by the trustee that not to allow a set-off in such a

case as this might result in loss to the estate, in a case where the creditor against whom a preference was alleged was insolvent. It is possible that in such a case the bankrupt court could stay proceedings on the application of the creditor, to have the money upon which he has a lien paid to him, until the trustee could commence and have determined in the proper court a suit against the creditor to recover the preference, and when it was recovered offset it against the amount due the creditor by reason of his lien. It is not necessary, however, to decide anything of this kind now, for there is no allegation nor claim that the John Leslie Paper Company is insolvent.

The order of the referee is reversed, and the case remanded, with directions to hear such competent evidence as the parties may present relating to the amount due upon the mortgages set up by the Paper Company, and, if the Paper Company claims the right to prove any part of the mortgage debt as an unsecured claim, to hear any evidence which the parties may present relating to any preference which the Paper Company may have received growing out of other transactions. If, however, the Paper Company does not seek to prove any part of such mortgage debt as an unsecured claim, then the referee should reject all evidence tending to prove a preference.

AMERICAN BANK PROTECTION CO. v. CITY NAT. BANK OF
JOHNSON CITY.

(District Court, E. D. Tennessee, N. E. D. February 1, 1913.)

No. 1,475.

1. COSTS (§ 184*)—WITNESS FEES—WITNESSES NOT SUBPENAED.

Per diem and travel fees of witnesses who attend voluntarily in a federal court without subpoena are taxable as costs under Rev. St. § 848 (U. S. Comp. St. 1901, p. 654), fixing witness fees for witnesses attending in federal courts.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715-736; Dec. Dig. § 184.*]

2. COSTS (§ 147*)—TAKING TESTIMONY—EXAMINER'S FEES—STATUTES.

Act Cong. May 28, 1896, c. 252, § 19, 29 Stat. 184, abolishing the offices of commissioners of the Circuit Court and providing for the appointment of United States commissioners, who by section 21 were only to be entitled to 10 cents a folio for taking and certifying depositions in civil cases, did not repeal or amend by implication Act Cong. Aug. 15, 1876, c. 304, 19 Stat. 206, authorizing notaries public of the several states to take depositions in the same manner as commissioners of the United States Circuit Courts, who, by Rev. St. § 847, were authorized to charge 20 cents a folio, and hence the only fee thereafter taxable as costs for taking depositions by a notary public, who is himself a stenographer and who takes the depositions down stenographically and afterwards reduces them to typewriting, is 20 cents a folio for the original transcript.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 570, 571; Dec. Dig. § 147.*]

3. COSTS (§ 190*)—TAKING DEPOSITIONS—COPIES.

Fees of a notary public taking depositions for filing for additional copies furnished to counsel for each of the parties is an individual ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pense to be paid by the party whose convenience has been served, and is not taxable as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 660-662; Dec. Dig. § 190.*]

In Equity. Suit between the American Bank Protection Company and the City National Bank of Johnson City. On defendant's motion to retax costs. Granted in part.

Paul & Paul, of Indianapolis, Ind., and Webb & Baker, of Knoxville, Tenn., for complainant.

Harr & Burrow, of Johnson City, Tenn., for defendant.

SANFORD, District Judge. [1] 1. The first ground of the motion is to retax the costs of various witnesses aggregating \$109.00, the specific objection being that these witnesses voluntarily traveled to the place of examination and testified before the officer taking the testimony, without having been placed under subpoena.

I am of opinion, however, that the mere fact that the witnesses had not been summoned, is not a ground for disallowing as costs their per diems and mileage otherwise taxable as part of the costs.

The question whether the per diem and travel fees of witnesses who attend voluntarily in a Federal Court, without subpoena, are taxable as part of the costs under section 848 of the Revised Statutes (U. S. Comp. St. 1901, p. 654) and earlier statutes, has been a question as to which there has been a direct conflict of opinion, as appears from the cases on this subject collected and digested in Gunckel's Costs in Federal Courts, § 25, p. 97. Prior to 1886 the weight of opinion appears to have been about evenly divided. In that year, however, it was held in *United States v. Sanborn* (C. C.) 28 Fed. 299, in a carefully prepared opinion by Gray, Circuit Justice, in which Colt, Circuit Judge, concurred, and after a full and elaborate review of the authorities, that under section 848 of the Revised Statutes the mileage of witnesses who had attended a trial without subpoena should be taxed as part of the costs. Since the publication of this opinion it appears that the case of *Lillienthal v. Railway Co.* (C. C.) 61 Fed. 622, is the only one in which it has been held that the fees and mileage of witnesses who attend voluntarily without subpoena are not taxable as costs, and it furthermore appears that in reaching this conclusion Ross, District Judge, who delivered the opinion, felt constrained, without regard to his individual views, to adhere to the construction that had been previously put upon the statute by Sawyer, Circuit Judge, in two earlier reported cases in the same circuit.

On the other hand it appears that since the publication of the opinion in the *Sanborn* case, it has been uniformly held—except in the *Lillienthal* case—that the per diems and travel fees of witnesses who attend in good faith, should not be disallowed, if otherwise taxable, merely because the witnesses were not subpoenaed, but attend voluntarily at the request of one of the parties. *Cahn v. Monroe* (C. C. Mich.) 29 Fed. 675 (Severens, J.); *The Vernon* (D. C. Mich.) 36 Fed. 113, 116 (semble, Brown, J., afterwards Mr. Justice Brown); *The Syracuse* (C. C.) 36 Fed. 830; *Eastman v. Sherry* (C. C.) 37 Fed. 844; *Burrow*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

v. Railroad Co. (C. C. W. D. Tenn.) 54 Fed. 278 (Hammond, J.); Pinson v. Railroad (C. C.) 54 Fed. 464; Simpkins v. Railroad (C. C.) 61 Fed. 999; Sloss Iron Co. v. Railroad Co. (C. C.) 75 Fed. 106; Hanchett v. Humphrey (C. C.) 93 Fed. 895; St. Matthews Sav. Bank v. Casualty Co. (C. C.) 105 Fed. 161.

After careful consideration, I am of opinion that the rule laid down in the Sanborn case and followed in the later cases, is based upon the sounder reasoning, and that as that case has been followed in every case in which the question has arisen in any district within this circuit, including the Western District of Tennessee, it should now be followed in this district; and the first ground of the defendant's motion to retax the costs will accordingly be overruled.

[2] 2. The second ground of the motion relates to the item of \$700.00 taxed by the clerk as examiner's fees for taking complainant's testimony, which was taxed by the clerk as 2,800 folios, the number claimed, at the rate of 25 cents per folio of 100 words.

By stipulation of counsel it was agreed that the testimony in this case might be taken anywhere in the United States before any qualified notary public or other officer competent to administer oaths; that it should be taken orally under the 67th equity rule and reduced to type-writing by the officer or by a skilled stenographer under his direction; and that when so taken it should have the same force and effect as if taken before a standing officer of the court or a special examiner duly appointed. It furthermore appears that the testimony in question was taken in Minnesota by a notary public, who was also a stenographer; that he made an original typewritten transcript of the testimony, which was filed in the court, and also made two carbon copies, one of which was furnished to counsel for complainant and one to counsel for defendant; that he charged 25 cents per folio for the original and the two copies (which was concededly paid by the complainant); and that the charge of 25 cents per folio is the regular and customary charge for taking testimony in the Federal Courts in Minnesota where three copies are thus made.

In passing upon the present motion, it is unnecessary to determine the unsettled question as to the fees to be properly taxed when depositions have been taken by an officer whose compensation has not been fixed by the Federal Statutes, upon which, as appears from the cases collected and digested in Gunckel's Costs in Federal Courts, §§ 15 to 17, inc., p. 42 et seq., a great diversity of opinion has been expressed; or to determine whether in such case the standard adopted should be the reasonable charges customarily allowed for similar services in the place where the depositions were taken (Sedgwick v. Grinnell, 10 Ben. 6, 21 Fed. Cas. 979; Kitchin v. Parker [D. C.] 27 Fed. 480); or the fees now allowed by the Revised Statutes to clerks and formerly to commissioners of the Circuit Court for similar services (Jerman v. Stewart [C. C.] 12 Fed. 276; United States v. Construction Co. [C. C.] 158 Fed. 833, 834); or a sum fixed by the practice in the particular circuit (Edison Light Co. v. Elec. Co. [D. C.] 63 Fed. 559); or the established rate of charges in the State courts (Indianapolis Water Co. v. Straw-Board Co. [C. C.] 65 Fed. 534). Nor is it necessary to

determine the effect of the 8th clause of the former 67th equity rule in reference to the taxation of the expenses of taking down depositions by a stenographer other than the officer taking the depositions.

The sole question now presented is as to the costs which may be properly taxed where the depositions are taken before a notary public, who is himself a stenographer, and who, instead of writing out the depositions, takes them down stenographically and afterwards reduces them to typewriting.

By the Act of August 15, 1876, c. 304, 19 Stat. 206, notaries public of the several states were authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States "in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do." At that time section 847 of the Revised Statutes provided that the fees of the commissioners, that is, commissioners of the Circuit Courts (R. S. § 627; *United States v. Construction Co.*, supra), should be 20 cents per folio "for taking and certifying depositions to file." And since the Act of 1876 expressly provided that notaries public might take depositions in the same manner and with the same effect as commissioners of the Circuit Courts might *then* take them, I am constrained to hold that one of the necessary effects, coming plainly within the intent of Congress, was that notaries public, upon taking such depositions, should be allowed the same fees as were then allowed to commissioners of the Circuit Courts, that is to say, 20 cents per folio for taking and certifying depositions to file; and that this amount, and no other, can hence be properly allowed as taxable costs, regardless of the reasonableness of the sum actually paid or the customary local charges for such services.

It is true that by section 19 of the Act of May 28, 1896, c. 252, 29 Stat. 184, the offices of commissioners of the Circuit Courts were abolished, and provision made for the appointment of United States Commissioners, with the same powers and duties, and that by section 21 of this Act it was provided that United States Commissioners should be entitled to a fee of 10 cents per folio, and none other, "for taking and certifying depositions to file in civil cases." However, I cannot regard this provision as either repealing or amending by implication the earlier Act of 1876 providing for the taking of depositions by notaries public in the same manner and with the same effect as they were *then* taken by commissioners of the Circuit Courts, and, as a necessary incident, fixing their fees at the amounts then allowed commissioners of the Circuit Courts for such services.

Under this construction of the statutes, it results, it is true, that there is now great diversity in the fees allowed different officers for the same services in taking and certifying depositions in the Federal Courts; the fees of clerks for such services being expressly fixed at 20 cents per folio (Rev. Stat. § 825 [U. S. Comp. St. 1901, p. 634]); those of United States commissioners at 10 cents per folio; and the fees of special examiners and other officers for whose compensation express provision is not made being apparently taxed according to diverse standards in the different circuits. However, the functions of

the court in the enforcement of statutes are limited to the ascertainment of the legislative intent, and cannot extend to either legislation or amendment, even to remedy apparent hardship. *Schlitz Brewing Co. v. United States*, 181 U. S. 584, 589, 21 Sup. Ct. 740, 45 L. Ed. 1013; *Petri v. Lumber Co.*, 199 U. S. 487, 495, 26 Sup. Ct. 133, 50 L. Ed. 281; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Grace v. Collector of Customs* (C. C. A. 9) 79 Fed. 315, 318, 24 C. C. A. 606. Hence, if a remedy be required to render uniform the fees of officers taking depositions in Federal Courts and to establish them upon a fixed and certain basis, depending upon the service rendered, rather than upon the character of the officer taking them, this can only be properly obtained by legislation, and, under the present statutes, is, so far at least as specific statutory provisions are concerned, a matter beyond the province of the court.

[3] Furthermore, independently of the statutory provisions hereinabove considered, I am otherwise led to the conclusion that the entire 25 cents per folio paid the notary by the complainant is not properly taxable as costs therein, since it appears that part of the fee thus charged by the notary and paid by the complainant, was for furnishing additional copies of the testimony to counsel for each of the parties, and there is nothing to show what is the customary fee paid in Minnesota where only the original transcript of the testimony is made and certified by the officer. The fees of clerks and United States commissioners for furnishing copies of depositions to a party on request, are fixed at 10 cents for each folio. Rev. Stat. § 828 (U. S. Comp. St. 1901, p. 635); Act of 1896, *supra*, 29 Stat. 185. It is clear, however, that whatever may be the proper rate to be charged by a notary for furnishing additional copies of the testimony to counsel for the parties, with or without a special agreement to that effect, the cost of such additional copies is in no event part of the taxable costs of the cause, but is merely an individual expense to be paid to him by the party whose convenience has thus been served. *Tesla Elec. Co. v. Scott* (C. C.) 101 Fed. 524, 525. And see, by analogy, *Caldwell v. Jackson*, 7 Cranch, 276, 3 L. Ed. 341.

The second ground of the motion to retax costs will accordingly be sustained to the extent of allowing as the costs of the notary public only 20 cents per folio for the 2,800 folios of complainant's testimony, that is, the sum of \$560.00, instead of \$700.00, as taxed by the clerk; but otherwise it will be overruled.

An order will be entered retaxing the costs in accordance with this opinion.

In re TICHENOR-GRAND CO.

Ex parte HARTIGAN.

(District Court, S. D. New York. February 28, 1913.)

CORPORATIONS (§ 82*)—CONTRACT WITH SUBSCRIBER TO REPURCHASE STOCK—
VALIDITY.

Under Penal Law N. Y. (Consol. Laws 1909, c. 40) § 664, which prohibits a corporation from purchasing its own stock, except out of surplus, a contract by a corporation with a subscriber to its stock, where the stock is issued and paid for, to repurchase the same after a stated time on notice of the subscriber's election, is invalid, and not enforceable as against a trustee in bankruptcy of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285†295, Dec. Dig. § 82.*]

In the matter of the Tichenor-Grand Company, bankrupt. On review of order of referee disallowing claim of Hubert M. Hartigan. Affirmed.

On July 25, 1908, the bankrupt company wrote to claimant the following letter:

"In consideration of your taking two hundred and fifty shares, twenty-five thousand dollars, of the preferred seven per cent. stock of this company, we agree to give you a position at a remuneration of five hundred pounds per annum and a commission of ten per cent. on all horses you sell. If you wish to leave the company at the end of three years from date, we agree to take back your shares at par (twenty-five thousand dollars) with a sixty days' notice."

In accordance with this notice, claimant paid to the bankrupt \$25,000, and there was issued to him a stock certificate for 250 shares of the preferred stock, and he was carried upon the books like any other stockholder. On March 25, 1911, the company was adjudicated a bankrupt, up to which time claimant had never given notice, oral or written, that he wished to give back his stock.

William Byrd, of New York City, for petitioner.

Goldsmith, Cohen, Cole & Weiss, of New York City, for trustee.

HAND, District Judge (after stating the facts as above). Since the result is the same, it is better to dispose of this case upon the question of substantive law raised, rather than to let it turn upon the question whether it is contingent within the meaning of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

It is no doubt quite true that courts have at times enforced contracts for the repurchase of corporate stock when the condition or option was part of the original subscription, as here. *Ophir Consolidated Mines v. Brynteson*, 143 Fed. 829, 74 C. C. A. 625. The trustee says that the case involved only treasury stock; but there is no evidence that it was paid up, nor did the court in any sense rely upon such an assumption. Moreover, if a corporation which supposes itself solvent may buy its own stock (*Re Castle Braid Co.* [D. C.] 145 Fed. 224), I

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

can see no reason why it may not buy it from an original subscriber under an option of resale originally reserved to him. I must say that all such rights appear to me to be quite contrary to a reasonable protection of creditors, unless they are limited to purchases which leave the original capital intact—i. e., purchases from surplus—because they necessarily result in keeping up the appearance of a capital which has been actually depleted. If a corporation has received property into its treasury of the value of its authorized shares, that is no doubt subject to the vicissitudes of its enterprises, which will be represented by public knowledge of its success or of the value of its shares. If, however, it purchases its own shares, this affects neither the value of the other shares, the success of its enterprises, nor the amount of its apparent share capital. It is merely a method of secret distribution, against the deceit of which its creditors have absolutely no means of protection. The fund which they have the right to rely upon has been surreptitiously taken from them. It seems to me very little relief against the evils which such a right causes to limit it to cases where the corporation is thought to be solvent. It is a strange thing, I think, that there have been cases which permit the practice, which seems to me to be inevitably mischievous commercially.

Now, section 664 of the Penal Law (Consol. Laws 1909, c. 40) forbids the purchase of stock, except out of surplus, and so aims at just this evil. It is quite clear that this would have made illegal Hartigan's right of resale, had it not been incorporated into the original purchase, and I do not understand that he claims the contrary. What he does say is that, since he reserved the option when he bought the stock, the statute does not apply. If one considers the evil at which the statute was directed, I think it appears plainly enough that this makes a difference only in case the stock is not treated as issued to the buyer until the time for the election has passed. If he is entered upon the books as a stockholder, and if his shares figure as a part of the share capital actually issued, certainly all the evils which the statute means to forbid will arise from allowing him thereafter secretly to deplete the treasury of the company, as would arise if he had reserved no right to do so. Creditors have no means of knowing what part of the shareholders have reserved this right, and how many may dip into the corporate treasury, or, as in this case, come in to share with them in insolvency. From the reason of the thing, therefore, the fact should make no difference.

In *Richards v. Wiener Co.*, 207 N. Y. 59, 100 N. E. 592, the Court of Appeals had before it a contract somewhat similar to this, except that no stock was issued to the subscriber, and his shares apparently never figured as part of the issued share capital. The court noticed this fact, and seemed disposed to treat the contract as a contract of purchase, and not as a purchase itself, which, of course, avoids the difficulty of the statute altogether. In such a case there has never been any stock issued, and so there can be none purchased. The case at bar cannot possibly be treated in that way, because Hartigan became in every sense of the word a full stockholder. Had the court in *Richards v. Wiener Co.*, supra, so construed the contract, that case could not be an authority for me; but they did not, for they went on to assume that

the plaintiff had title to the stock. They then adopted another construction of the contract, under which they limited its application to a purchase out of surplus profits, thus avoiding the statutes. Now, it is too obvious for discussion that they felt the necessity for adopting such a construction, which, with deference, was certainly not a very apparent one, only because they recognized that otherwise the contract would be illegal. Thus they say (207 N. Y. 65, 100 N. E. 593):

"He could resell, but for the provisions of the Penal Law."

Again, quoting Scott, J., below:

"If, when the time came, defendant had a sufficient surplus, the contract would be enforced. If it had not, the contract could not be enforced."

Surely here is a ruling of the highest court of New York as to the interpretation of a statute of that state which controlled this transaction. I do not mean that the statute was necessary to the result, and if nothing is authoritative which is not necessary, then this is obiter. I do mean that it is authoritative in the sense that the court could not have treated the case in the way it did, or used the language as it did, unless its interpretation of the statute had been in accord with the trustee's contention.

However, the creditor asserts that, even though the contract was illegal, he may recover in quasi contract. This I must say seems to me quite impossible. The very purpose of making the contract illegal is to prevent the shareholder from taking money out of the corporate treasury. It would be an absurd result to allow him to do it in another way. All cases which allow a recovery by contract implied in law do so for reasons of equity, to prevent the defendant from unjustly retaining what should go to the plaintiff. It would be quite paradoxical to declare illegal a contract because the corporation should in justice retain its capital for its creditors and not distribute it among shareholders, when in the next breath one directed the corporation to pay over the same capital to shareholders because it was unjust for the corporation longer to retain it. No authority based upon a transaction between a corporation and third parties has any application, when the real question turns upon the priority of creditors to shareholders, as here.

Petition denied; order affirmed.

REDLICH MFG. CO. v. JOHN H. RICE & CO.

(District Court, E. D. Pennsylvania. March 24, 1913.)

No. 851.

1. INJUNCTION (§ 241*)—WRONGFUL ISSUANCE—REMEDY—ASSESSMENT OF DAMAGES—ACTION ON BOND.

Where an injunction has been improvidently issued, a District Court sitting in equity has power to assess the damages, without compelling defendants to sue at law on the bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INJUNCTION (§ 241*)—WRONGFUL ISSUANCE—ASSESSMENT OF DAMAGES.

Whether the court from which an injunction has been improperly issued will itself assess the damages, or remit the defendant to an action on the bond, is a matter of discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

3. INJUNCTION (§ 241*)—WRONGFUL ISSUANCE—DAMAGES—ASSESSMENT—TIME.

Where it had been determined that a preliminary injunction had been wrongfully issued, but it did not appear that on final hearing plaintiff might not be able to show that the injunction was in fact justified, an application for an ascertainment of damages caused by the issuance of the injunction prior to final decree was premature.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.*]

In Equity. Action by the Redlich Manufacturing Company against John H. Rice & Co. On motion for appointment of a special master to assess damages for the wrongful issuance of an injunction. Denied.

Cyrus N. Anderson, of Philadelphia, Pa., for complainant.

Frank S. Busser, of Philadelphia, Pa., for respondent.

J. B. McPHERSON, Circuit Judge. [1-3] In this case the District Court granted a preliminary injunction in July, 1912, but the Court of Appeals disapproved the order, and accordingly it was dissolved on March 8, 1913. The plaintiff had given security, conditioned to "indemnify the said defendants for all damages which may be sustained by reason of said injunction"; and the pending motion asks the immediate appointment of a special master to ascertain these damages. The plaintiff objects, on the ground that the motion is premature, because the evidence has not yet been heard and a final decree has not been entered. In my opinion the objection is well founded. I agree that the District Court, sitting in equity, has the power to assess the damages itself without compelling the defendants to sue at law on the bond. *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060; *Lea v. Deakin* (C. C.) 13 Fed. 514; *Coosaw Co. v. Farmers' Co.* (C. C.) 51 Fed. 107; *Lehman v. McQuown* (C. C.) 31 Fed. 138; *Tyler Co. v. Last Chance Co.*, 90 Fed. 15, 32 C. C. A. 498; *West v. Cedar Co.*, 113 Fed. 742, 51 C. C. A. 416. But the exercise of the power is a matter of discretion, and usually the final result of a litigation will be an important factor in determining whether the power shall be used. As a general rule I think the ascertainment of the damage caused by the erroneous issue of a preliminary injunction should await the final decree. The case before the court affords an example of the reasons for this conclusion. At the present stage of the controversy it has been decided that on the evidence thus far offered the preliminary injunction should have been refused; but whether a final injunction should be granted after all the evidence has been heard may be a different matter, and at all events has not yet been considered. Conceivably, the situation disclosed at the preliminary hearing may be greatly modified, or may even be wholly changed, after fuller investi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gation; and, if the final decision should be in the plaintiff's favor, this might have a good deal of influence when the court came to decide whether damages should be recovered by reason of the premature issue of the injunction, and how they should be assessed. There is likely to be some difference between the penalty for obtaining an injunction that has altogether failed of support, and the penalty for obtaining an injunction that may, indeed, have been granted somewhat hastily but has in the end been justified. The result of the cases is thus stated in 22 Cyc. 1027:

"Although under the peculiar conditions of particular bonds it has been held that the right to damages is not postponed until after a final hearing on the merits, as a general rule no action at law can be maintained upon an injunction bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved because improperly granted. It is held that no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision."

See, also, 16 A. & E. Ency. (2d Ed.) 454 (c), note 4, and 27 Cent. Digest, col. 2323, § 560.

The pending motion is premature, and is therefore refused; but the refusal is without prejudice to the defendants' right to renew the motion after final decree.

McDONALD v. McDONALD et al.

(District Court, D. Oregon. March 24, 1913.)

No. 5,803.

QUIETING TITLE (§ 38*)—SUIT TO REMOVE CLOUD—DISCLAIMER—ANSWER.

Where, in a suit to remove a cloud on title, defendant S. was charged with having conspired and confederated with the other defendants to create the cloud sought to be removed and which prevented the quieting of title in complainant, S. was not entitled to answer merely by disclaiming any interest, right, or title in or to the lands, but, in addition, was required to answer the bill so as to determine the fact as to the alleged conspiracy to defraud.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 79; Dec. Dig. § 38.*]

In Equity. Action by Mary J. L. McDonald against M. J. McDonald and others. On motion to strike the disclaimer of defendant Henry Sengstacken from the files. Granted.

Platt & Platt, of Portland, Or., for complainant.

Cassius R. Peck and Arthur K. Peck, both of Marshfield, Or., for defendants.

WOLVERTON, District Judge. This is a motion to strike out the answer of the defendant Henry Sengstacken, interposed herein to the complaint, disclaiming any interest, right, or title in or to the lands which are the subject of the suit. The motion has been submitted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upon briefs of counsel, without argument, and the question presented is whether Sengstacken is in a position which entitles him to file a disclaimer without accompanying same with an answer to the bill.

The bill sets out that the complainant is the owner and entitled to the possession of certain real property, situated in Coos county, Or., describing it by legal subdivisions; that the lands are unoccupied; that the defendants, including Sengstacken, have confederated together with the false and fraudulent purpose of asserting and claiming an interest and estate in said property adverse to the legal and equitable title as vested in the complainant; that, in pursuance of said false and fraudulent purpose, the defendants M. J. McDonald and Alice McDonald have executed, at the instance of Sengstacken, and delivered to him, a power of attorney authorizing and empowering him to employ attorneys to prosecute a claim on the part of the defendant M. J. McDonald, to the effect that he has an interest or estate in said lands adverse to the complainant, and to record said power of attorney in the records of Coos county, Or.; that, in pursuance of such conspiracy, Sengstacken has executed, and caused to be recorded in the record of deeds for Coos county, Or., a false and fraudulent and pretended claim that the said deed of July 24, 1889, under which the complainant claims title, was a mortgage to secure the payment of a sum of money pretended to have been loaned by J. M. McDonald, now deceased, to said M. J. McDonald, and which said defendants in said document allege has since been paid, which document constitutes the claim of an interest or estate in said property adverse to the complainant, and is false and untrue (the document being set out in *hæc verba*); and that complainant has no plain, adequate, or speedy remedy at law. The prayer is that defendants, and each of them, be restrained from conveying or further incumbering said property; that the power of attorney to Sengstacken be canceled and annulled; that the instrument by which it is claimed that the deed under which complainant holds is a mortgage be also canceled and annulled; that the defendants, and each of them, be decreed to be without right, title, or interest of any kind in the property described; that the title in complainant be quieted; and that such other and further relief be granted as may seem meet in equity.

Sengstacken, without answering to the merits, simply disclaims all right, title, and interest in or to the lands described, and every part thereof, and offers to execute and deliver to complainant a quitclaim deed of whatsoever right, title, or interest he may have in said premises.

One of the specific objections made to this form of disclaimer is that it is not accompanied with an answer to the bill.

It is said that a disclaimer cannot often be put in alone, for, if the defendant has had an interest in the property and has parted with it, he may be required to answer at least sufficiently to ascertain whether that is a fact or not. Bates on Federal Equity Procedure, § 305. It is also declared by the same author (section 306) that:

"While a defendant can disclaim an interest, he cannot disclaim a liability."

And, further:

"A defendant who has improperly interfered with a plaintiff's rights, so as to render a suit necessary for the protection of those rights, may be compelled to answer the whole bill and have the costs decreed against him, notwithstanding his disclaimer."

The suit in question is essentially one for the removal of a cloud and for quieting the title to the premises described. Ordinarily, no one excepting such as claim an interest in the property itself can properly be made a party, or be required to answer concerning the allegations of the bill. But in the present suit Sengstacken is charged with having conspired and confederated with the other defendants for the purpose of creating the very cloud which it is now sought to remove, and which stands in the way of quieting the title in the complainant. As to this, at least, it would seem that Sengstacken should be required to answer the bill, so as to determine the fact as to the alleged conspiracy to defraud.

In view of the authority cited and of these allegations, the motion should be allowed and the disclaimer stricken. Such will be the order of the court.

COLLINS et al. v. PENN-WYOMING COPPER CO. et al.
CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK v. SAME.

(District Court, D. Wyoming. December 30, 1912.)

No. 555, In Equity.

1. CORPORATIONS (§ 213*)—STOCKHOLDERS' SUIT—MEASURE OF RELIEF.

The measure of relief that can be granted in a stockholders' suit for the benefit of the corporation is such only as could be granted to the corporation if it was the complainant.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 213.*]

2. CORPORATIONS (§ 204*)—DIVIDENDS—WRONGFUL DECLARATION—MORTGAGE—VACATION—STOCKHOLDERS' ACTION.

Under Wyoming statutes providing that if the directors of a corporation declare and pay a dividend when the company is insolvent, or authorize the payment of a dividend when the payment would render it insolvent, the directors shall be jointly and severally liable for all debts of the company, or debts that shall thereafter be contracted while the directors continue in office, and making the directors assenting thereto liable to creditors personally for the excess, if the indebtedness shall at any time exceed the capital stock, neither the corporation nor a stockholder for the corporation's benefit could maintain an action to set aside a mortgage on the corporation's property because the dividends had been declared and paid when no profits had been earned.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. § 204.*]

3. CORPORATIONS (§ 204*)—STOCKHOLDERS' ACTION—PARTIES.

Stockholders in a representative action could not maintain a suit to set aside a mortgage on the corporation's property, because of an alleged unconscionable contract between the corporation and a securities company, voidable because certain directors of the corporation were also directors of the securities company; the latter not being a party defendant to the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. § 204.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CORPORATIONS (§ 204*)—INDEBTEDNESS—ASSUMPTION—PAYMENT—COLLATERAL.

Certain subsidiary corporations being indebted in the sum of \$1,390,000, the creditors pledged notes evidencing such debt as collateral for their own note for \$558,000, which note was thereafter assumed and paid by the consolidated company under an agreement that it should have the collateral when it paid the note. *Held*, that such transaction was not fraudulent, and did not amount to a settlement of the subsidiary indebtedness for the amount so paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. § 204.*]

5. CORPORATIONS (§ 204*)—INDEBTEDNESS—SALE OF ASSETS.

A corporation owing debts which it was unable to meet, with suits pending and threatening for the collection thereof, referred the question of a sale of its assets to a committee of stockholders, and a plan was decided on to sell to a new company, in such a way that every shareholder of the old company had the privilege of entering the new company on the same terms as every other shareholder of the new company. *Held* that, such proposed transfer having been ratified by 93 per cent. of the old company's stockholders, who exchanged their stock for stock in the new company, it was neither fraudulent nor unlawful.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. § 204.*]

6. CORPORATIONS (§ 209*)—MORTGAGES—VALIDITY—OBJECTIONS.

Where a corporation was indebted in a large sum, and all the stockholders were promptly advised of the exact situation, and that bonds were being sold to raise money with which to pay the corporation's debts, but none of the stockholders took any steps to restrain the issuance of the bonds or the execution of the mortgage for almost 2½ years, they were barred by laches from thereafter attacking the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 806, 807; Dec. Dig. § 209.*]

7. CORPORATIONS (§ 205*)—SALE OF ASSETS—MORTGAGES—VACATION—STATUS QUO.

Stockholders of a corporation in a representative action were not entitled to set aside a mortgage securing bonds issued by the company to pay debts, without offering to return the money received from the bondholders, so as to place them in statu quo.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 205.*]

In Equity. Suit by Vivan E. Collins and others against the Penn-Wyoming Copper Company and others, in which the Continental & Commercial Trust & Savings Bank filed its cross-bill to foreclose a mortgage on the corporation's property. Complaint dismissed, and decree for foreclosure on the cross-bill.

Willard A. White and Seymour Stedman, both of Chicago, Ill., for complainants.

James Mann, of Norfolk, Va., and Charles Hall Davis, of Petersburg, Va., for interveners.

Charles L. Powell, of Chicago, Ill., for defendant Continental & Commercial Trust & Savings Bank.

Wesley W. Hyde, of Grand Rapids, Mich., and John W. & H. V. Lacy, of Cheyenne, Wyo., for defendants Pennock and another.

RINER, District Judge. This is a bill in equity, brought by Vivan E. Collins and others, stockholders, against the Penn-Wyoming Cop-

per Company and others, whereby it is sought to set aside the conveyance of certain mining and other property conveyed by the Penn-Wyoming Copper Company to the United Smelters, Railway & Copper Company. The bill prays for the appointment of a receiver; that the United Smelters, Railway & Copper Company and its officers be enjoined from voting the stock of the Penn-Wyoming Copper Company; that the court cancel all bonds, scrip, or other evidence of indebtedness of the Penn-Wyoming Copper Company, or its subsidiary companies, which the court shall find to have been fraudulently or wrongfully issued; that the present receiver, Isaac N. Pennock, be directed to turn over to a receiver to be appointed by the court all of the assets and property of the Penn-Wyoming Copper Company found in his hands; that discovery may be had from Eugene N. Cobb, and that he be required to answer to whom he transferred 6,000,000 shares of the stock of the Penn-Wyoming Copper Company; that the defendant Edmund F. Richardson be required to show what bonds, in number and value, he holds, either in person or as a member of the stockholders' committee; that the Penn-Wyoming Copper Company be required to make full and complete discovery to the court, by its officers, showing in detail each and every person to whom the company transferred title to any of the bonds of an issue of \$2,500,000; that all books, papers, and other property of the Penn-Wyoming Copper Company now in the possession of Isaac N. Pennock, receiver, be brought into the jurisdiction of the court, and be turned over to a receiver to be appointed by the court; that a decree be entered determining the ownership of the various bonds of the \$2,500,000 issue to the Penn-Wyoming Copper Company, and that in case any of them shall be declared invalid that the defendant the Penn-Wyoming Copper Company be required to surrender them for cancellation; that the defendant the Continental & Commercial Trust & Savings Bank be enjoined from foreclosing the trust deed executed by the Penn-Wyoming Copper Company to the American Trust & Savings Bank, and that the bank be enjoined from selling or otherwise disposing of the bonds of the subsidiary companies; that the title of the complainants' stockholders in the Penn-Wyoming Copper Company to the stock and properties of that company and its subsidiary companies be quieted against all holders of mortgages, trust deeds, and bonds alleged to be illegally issued; that Isaac N. Pennock, as receiver, and also as president of the Saratoga & Encampment Railway Company, and also all its officers, be restrained and enjoined from selling, leasing, mortgaging, or in any manner incumbering or transferring any of the property of that company, except under orders and directions of the court. The bill also prays for leave to all other stockholders similarly situated to become parties.

The bill was filed September 8, 1910. December 21, 1910, the defendant the Continental & Commercial Trust & Savings Bank, trustee, filed its cross-bill to foreclose the trust deed made, executed, and delivered to American Trust & Savings Bank by the Penn-Wyoming Copper Company January 1, 1909. January 3, 1911, complainants filed a supplemental bill, to which answers were filed. March 15, 1911, the

complainants filed their answers to the cross-bill, and, replies having been filed thereto, the case was, on the 12th day of May, 1911, referred to the master. Answers to the original and supplemental bills of complaint were filed by all the defendants served with process; but in the view the court takes of this case, after a very careful and painstaking examination, it becomes unnecessary to refer to all of these pleadings.

The objections to the applications for leave to file the "joinder of Charles Hall Davis in the bill of complaint," and of Joseph W. Seward and others and of E. W. Albee and others to intervene, will have to be sustained, for the reason that all of these applications, in the opinion of the court, come too late. The views just expressed render it unnecessary to file the answers to the proposed joinder of Davis and the intervening petitions of Seward and others and Albee and others; also the replications to these answers, as well as the answers to the resistances.

[1] Coming, then, to a consideration of the rights of the parties under the pleadings and evidence, it may be well to notice at the outset in just what capacity the complainants bring this bill. It is averred in the bill that they are stockholders of the Penn-Wyoming Copper Company, and the wrongs which they seek to redress are wrongs against that company, and their rights are the rights of the Penn-Wyoming Company, if that company had brought the suit. Sufficient is averred in the bill to authorize the complainants to sue in the right of the company, but the measure of their relief is the measure of relief that could be granted to the company—no more, no less. The wrongs complained of against the company, and which the complainants, suing in its right, can redress, if the company itself would be entitled to relief, are: First, that dividends were declared by the Penn-Wyoming Copper Company when no profits had been earned; second, that the contract with the Equitable Securities Company was void; and, third, that it was a fraud not to credit the subsidiary corporations with the difference between the amount paid by the Penn-Wyoming Copper Company on its own debt and the amount of the notes of the subsidiary corporations which the Penn-Wyoming Copper Company had used as collateral to its debts. These propositions will be noticed in their order.

[2] The statutes of this state make no provision for a suit by a company to recover the amount of the debts owed by the company; and in this respect the statute differs from the statutes in some other states. Our statute provides that if the directors of a company declare and pay a dividend when the company is insolvent, or authorize the payment of a dividend when the payment would render it insolvent or would diminish the amount of its capital stock, they, the directors, shall be jointly and severally liable for all debts of the company then existing and for all debts that shall thereafter be contracted while the directors continue in office, relieving from liability any director or directors who object to declaring the dividend. Another section of the statute makes the directors assenting thereto liable to the creditors of the company, personally, for the excess if the indebt-

edness of the company shall at any time exceed the amount of its capital stock. These statutes must, I think, by the decided weight of authority, be strictly construed; and unless the statute provides that the directors shall be liable to the corporation it could not maintain the suit. In some states the statute provides that the directors shall be liable to the corporation and to its creditors, but our statute does not contain such provision. In 2 Cook on Corporations, § 546, the author says: "A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability." Whether or not any relief could be had in this suit against the directors, if they were before the court, it is unnecessary to discuss, for the reason that they are not made parties. In any event, I do not see how the fact, if it be a fact, that unlawful dividends had been declared, or the fact that the subsidiary companies had created excessive debts, would affect the rights of the Continental & Commercial Trust & Savings Bank as trustee, for the parties represented by it stand in the position of secured creditors. I think it is perfectly clear that the Penn-Wyoming Copper Company could not, and therefore the shareholders in a suit in its right could not, avoid the mortgage, or trust deed, because at some time in the past the Penn-Wyoming Copper Company had unlawfully declared dividends upon its stock. And the same would be true if at some time the subsidiary companies had created debts in excess of their capital stock. As to the last suggestion, however, I think the evidence shows that the capital stock of each subsidiary company was in excess of its debts.

[3] It was urged at the argument that the Equitable Securities Company had obtained an unconscionable contract from the Penn-Wyoming Copper Company, and that the directors of the Penn-Wyoming Copper Company, or some of them, at least, were likewise directors of the Equitable Securities Company, and thus made a contract with themselves, and thereby committed a fraud upon the Penn-Wyoming Copper Company. Conceding that this is all true, and that the contract in a proper suit could be set aside for that reason, either by the Penn-Wyoming Copper Company or the plaintiffs suing in its right, yet I think it is quite uniformly held that such a contract is not void, but voidable. The Equitable Securities Company is not made a party defendant, and I think it entirely clear that, until that contract is avoided, no right accrues against the defendant in this suit.

[4] It was also said at the argument that the debt of \$1,390,000 was settled for \$558,000, and that the continuance against the subsidiary companies for the full amount of the claim constituted a fraud. As I understand the record, the subsidiary companies owed \$1,390,000, and that the creditors of these companies pledged notes evidencing this debt, and with those notes as collateral gave their own note for \$558,000, and thereafter this \$558,000 note was assumed and paid by the Penn-Wyoming Copper Company, with the agreement that it should have the collateral when it paid the note. This it did, and the collateral was turned over to it. I am wholly unable to see where there was any fraud in this transaction.

It appears in the record that \$690,000 in bonds were issued by the subsidiary corporations prior to the organization of the North American Copper Company, or the Penn-Wyoming Copper Company, its successor; and it was suggested at the argument that these bonds were obtained without consideration and passed on down to the new corporation. The evidence offered in support of this contention is most unsatisfactory. In the first place, it came in as rebuttal, and is subject to technical objection for that reason. But, passing that, the testimony of Mr. West and Mr. Best was, when testifying in chief, that bonds were sold and moneys received prior to 1902. The testimony of Mr. Knapp shows that he was the local accountant at Encampment, and was not familiar with the business of the general offices of the North American Copper Company, which at that time were located at Denver. He also testified that moneys were received and placed by the North American Copper Company to the credit of these subsidiary companies, and that the source from which the moneys came was unknown to him. The little black book which was offered in evidence, while it shows that certain stocks were issued as a bonus, does not show that the bonds were issued as a bonus, nor did it indicate that the bonds were delivered to any one without consideration. The books of the North American Copper Company showing the transaction are not in the record, nor a statement of their contents by any witness who examined them; and for the court to say that these bonds were delivered without consideration, when there is no testimony as to whether they were or were not, and especially in a suit where the question is not in issue and the American Copper Company is not a party, would be violative of every presumption which the law indulges in favor of the validity of business transactions, until the contrary is made to appear by sufficient proof. And, again, I am unable to see how that fact, if it be a fact, could possibly affect the issues now before the court, for the owners of these bonds are not parties to this suit; and how the court could render a decree declaring the bonds invalid in the absence of their owners is difficult to understand. The only way the question could possibly be reached in this litigation, if at all, would be on distribution of the proceeds of the sale of the property, and whether it can be so reached it is not now necessary to decide.

The same suggestion applies to the \$500,000 issued, designated in the record as the "Ferris-Haggerty purchase bonds."

It was also urged at the argument that the \$394,450 of bonds issued to the Ferris-Haggerty Company were of doubtful validity. This contention is, I think, without any merit whatever. The testimony of Mr. James A. Rendle, secretary of the Ferris-Haggerty Company, is perfectly clear as to this transaction and stands undisputed. The parties seem to have been dealing at arm's length in this transaction. The shareholders and directors of the Ferris-Haggerty Company were not shareholders or directors of the Penn-Wyoming Copper Company, and Mr. Rendle's testimony shows clearly that the \$394,450 worth of bonds of the Penn-Wyoming Copper Company were accepted by the Ferris-Haggerty Company in payment and satisfaction of the pur-

chase-price mortgage which the Ferris-Haggerty Company had upon the mine.

[5] As to the sale of the property to the United Smelters, Railway & Copper Company, but little need be said. The Penn-Wyoming Copper Company owed debts in very large amounts, which it was then unable to meet. There were suits pending and threatened for the collection of these debts, and the situation of the company was such that it could not go on. The whole question was referred to a committee of stockholders, and a plan was decided upon to sell to a new company in such a way that every shareholder of the Penn-Wyoming Copper Company had the privilege of entering the new company on the same terms as every other shareholder in the new company. No one was preferred, and about four-fifths of the stock agreed to the proposition. This action was subsequently ratified by 93 per cent. of the shareholders of the Penn-Wyoming Copper Company, who exchanged their stock for stock in the new company. In the circumstances in which the company found itself, the court is of the opinion that a sale in this way was perfectly lawful. The company was no longer able to profitably continue in business. There seems to be no proof of unfairness, oppression, or fraud in relation to this sale, for every stockholder was notified, and, as suggested, 93 per cent. ratified and approved it, which alone would, perhaps, be sufficient.

[6] But there is another reason why the court ought not now to interfere. All of the stockholders, as we have seen, were advised promptly of the exact situation and that the bonds were being sold for the purpose of raising money to pay the debts of the company. Yet, notwithstanding this information, the mortgage was executed by the Penn-Wyoming Copper Company without objection, and the bonds secured thereby were in most part sold in the market almost 2½ years before this suit was brought, and all of them were sold before the suit was brought. The delay must, I think, be held to be fatal.

[7] One other matter may be briefly noticed. The rule is, I think, quite universal that to entitle the vendor to rescind a sale of goods, and recover them from the purchaser, he must first restore the party to the same condition and advantage, as far as reasonably can be done, as he occupied before the purchase. Applying the rule to this suit, if no sale had been made to the United Smelters, Railway & Copper Company, and if no bonds of the Penn-Wyoming Copper Company had been sold, the plaintiffs would have their shares of stock subject to the rights of creditors, and subject to the mortgage given to the Ferris-Haggerty Company, which was taken up by the bonds of the Penn-Wyoming Copper Company. There is no offer in the bill to restore the Ferris-Haggerty mortgage, or to pay the debts which have been paid by the proceeds received from the sale of the bonds. This, I think, is necessary. To hold otherwise would be to return to the shareholders the property of the Penn-Wyoming Copper Company in better condition than it was before, and freed of all the liens which were ahead of any claims the stockholders might have.

As stated at the outset, I have given this case painstaking and very laborious examination, and while in this memorandum I have only

briefly noticed the principal questions involved, it is sufficient to advise counsel of the view the court has taken of this suit. A decree will be entered foreclosing the trust deed as prayed in the cross-bill, with this additional provision: If upon sale of the property it shall be bid in by the bondholders, they shall pay into the registry of the court an amount in cash sufficient to pay all costs due and to become due to the clerk of the court in this suit, and all costs, expenses, and allowances made to the master for services in conducting the sale.

JOHNSTON v. KRAMER BROS. & CO. et al.

(District Court, E. D. North Carolina. March 10, 1913.)

No. 341.

1. DEEDS (§§ 54, 66*)—REQUISITES—DELIVERY.

No title passes by a deed, though signed and sealed, until delivery; and what constitutes a delivery is a mixed question of law and fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 116, 127, 633; Dec. Dig. §§ 54, 66.*]

2. DEEDS (§ 208*)—DELIVERY—EXECUTION—ACKNOWLEDGMENT IN OPEN COURT.

That the grantor in open court, to bring a deed to registration, acknowledged its execution, was sufficient, in the absence of evidence to the contrary, to sustain a finding that it had theretofore been, or was at that time, delivered, subject to be overcome by evidence showing that there had been no delivery in fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

3. DEEDS (§ 87*)—STATE LAW—EFFECT OF REGISTRATION.

Under Laws N. C. 1715, c. 7, § 1, providing that no conveyance of land other than a mortgage shall be available in law, unless acknowledged by the grantor, or proved and registered in the county where the land lies, within two years after date, and that all deeds so executed shall be valid to pass estates in land without livery of seisin, the registration of a deed gives it the force and effect of a feoffment with livery of seisin.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 227; Dec. Dig. § 87.*]

4. DEEDS (§ 87*)—REGISTRATION—PASSING TITLE—DATE.

Notwithstanding Laws N. C. 1715, c. 7, § 1, requiring registration of deeds, a deed, when registered, has the effect of passing title by relation as of the date of its delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 227; Dec. Dig. § 87.*]

5. DEEDS (§ 192*)—SEPARATE DEEDS BY SAME GRANTOR—IDENTITY OF DATE—PRESUMPTIONS.

Where an owner of land received a valuable consideration therefor and made a deed to different persons on the same date, it would be presumed that he intended to vest the title in the land conveyed in the grantees named in one of the deeds.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 562, 563; Dec. Dig. § 192.*]

6. DEEDS (§ 200*)—EXECUTION—DATE—DELIVERY—DATE OF ACKNOWLEDGMENT—EFFECT.

Where a grantor executed two deeds to the same land to different persons on the same date, but acknowledged them at different dates,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the date of acknowledgment was competent evidence to be considered as bearing on the date of delivery of the deeds.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.*]

7. DEEDS (§ 208*)—EXECUTION—DELIVERY—TIME.

Where a grantor executed two deeds to the same land to different grantees on the same date, but acknowledged the same at different dates, evidence held to warrant a finding that one of the deeds under which defendants claimed title was delivered in escrow to secure an advancement made by the grantees to the grantee in the other deed, to be paid on the purchase price, and that thereafter, on payment of the amount so advanced, the first deed had been surrendered to the original grantor, and the second deed executed as of the date of the purchase by the original grantor to the purchaser, which passed the title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

8. TAXATION (§ 746*)—TAX DEEDS—LOCATION OF LAND.

Tax deeds, executed by a sheriff, purporting to convey lands which in fact lay in another county, were void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1491, 1492; Dec. Dig. § 746.*]

9. QUIETING TITLE (§ 23*)—PROOF.

Under Revisal N. C. 1908, § 1589, relating to suits to quiet title, plaintiff may maintain a suit to remove a cloud on title, without showing possession, on proving that he has the legal title to either the whole or an undivided interest in the land.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

10. COURTS (§ 371*)—STATE STATUTES—ENFORCEMENT IN FEDERAL COURT.

A state statute, relating to the remedy of a suit to quiet title or remove a cloud from the title to land located in that state, may be enforced in the federal court as between parties of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*]

11. QUIETING TITLE (§ 10*)—REMOVAL OF CLOUD—DEFENSES—PAYMENT OF TAXES.

In a suit to remove a cloud on title, failure of plaintiff's ancestors for many years to pay taxes on the land was immaterial, since such failure did not work a forfeiture of title, otherwise than by a sale of the land for taxes in conformity with the law.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.*]

12. PUBLIC LANDS (§ 164*)—LANDS OF STATE—CONFLICTING GRANTS.

Under the express provisions of Laws N. C. 1893, c. 490 (Revisal 1908, § 1699), where land in controversy has been previously granted to plaintiff's predecessor in title, a subsequent grant of the same land, under which defendants claimed title, was void for all purposes.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 466-476; Dec. Dig. § 164.*]

13. QUIETING TITLE (§ 7*)—CLOUD ON TITLE—INVALID DEED—EXTRINSIC EVIDENCE.

A court of equity has jurisdiction to remove as a cloud on title any grant, deed, or other monument of title valid on its face, the validity of which can only be shown by extrinsic evidence.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

14. QUIETING TITLE (§ 7*)—"CLOUD ON TITLE."

A "cloud on title" is in itself a title or incumbrance apparently valid, but in fact invalid; something which, nothing else being shown, constitutes an incumbrance on or defect in title; something which shows *prima facie* the right of a third person, either to the whole or some interest in the title, or to a lien thereon.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1233-1235.]

15. QUIETING TITLE (§ 7*)—EQUITY JURISDICTION—GROUNDS.

Equity has jurisdiction to remove a cloud on title, when the illegality or defect does not appear on the face of the record, but must be shown by evidence aliunde, so that the record would make out a *prima facie* right in one who would become a purchaser, and the evidence to rebut the case may be lost, or become unavailable from the death of witnesses, or when a tax deed would be presumptive evidence of a good title in the purchaser, who might rely thereon for recovery of the land until irregularities were shown.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14-33; Dec. Dig. § 7.*]

In Equity. Suit by Tilghman Johnston against Kramer Bros. & Co. and another, to remove a cloud on title. Decree for complainant.

Winston & Biggs, of Raleigh, N. C., for plaintiff.

E. F. Aydtlett, of Elizabeth City, N. C., for defendants.

CONNOR, District Judge. Plaintiff alleges: That he is the owner in fee of $11/128$ undivided interest in a tract of land lying and being situate in the county of Perquimans in the Eastern district of North Carolina, described by metes and bounds. That defendant Leonard Vyne claims to be the owner of said tract of land, and that said claim is based upon a grant issued to him by the state of North Carolina, bearing date February 7, 1906. That defendant Kramer Bros. & Co., a corporation, claims an interest in the timber standing upon said land by virtue of a contract made by said corporation with said Vyne. He asks the court to declare the grant to be a cloud upon his title, and to make a decree removing same and quieting his title. Defendants deny that plaintiff is the owner of, or owns any interest in, said land. They admit that defendant Vyne claims title thereto under the grant from the state, and allege that he acquired from the state a good and indefeasible title thereto.

Plaintiff deraigns his title as follows: (1) A grant from the state of North Carolina to John Hamilton, bearing date December 27, 1792. (2) A deed from Hamilton to John McKinney, bearing date October 20, 1794. (3) A deed from John McKinney to William Cathcart and Francis Johnson, bearing date March 2, 1795. (4) A deed from Francis Johnson and wife to Alexander W. Johnson for an undivided interest, bearing date February 5, 1806. (5) Descent from A. W. Johnson, deceased.

Defendants rely upon the grant set out in the complaint and answer,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

averring that, by reason of the facts hereinafter set out, no title passed by the deed from Hamilton to McKinney; that, if title did pass, it has been divested by certain sheriff's deeds introduced by defendants.

The grant to John Hamilton describes a large boundary, recited, in the grant, to be situate in Pasquotank county, but conceded to include land situate in both Pasquotank and Perquimans counties, containing 26,000 acres. It is denied that the locus in quo is within the boundaries of said grant. It is apparent, however, that the plaintiff's contention in that respect is correct. The land is within the calls of the grant, and is in that portion of it situate in Perquimans county, which is one of the oldest counties in the state. On its records is found the first deed of which there is any record in the state, executed by the king of the Yeopim (Indians) to George Durant, bearing date March 1, 1662. 1 Col. Records. Pasquotank county was set apart in 1729. The fact that the entry was made and the grant issued for lands in both counties, although described as in only one, brings it within the curative provisions of Acts 1807, c. 727 (1 Rev. Stat. c. 42, § 29).

The evidence from both plaintiff and defendants is amply sufficient to show that the land granted to defendant Vyne February 7, 1906, is within the boundaries of the Hamilton grant of December 27, 1792, and is conceded to be in Perquimans county. It is so described in his grant. The question presented, therefore, is whether plaintiff has such title or interest in the land as entitles him to ask the court to remove a cloud from his title, and whether the Vyne grant, by statute declared to be void, constitutes a cloud upon his title.

Defendants, for the purpose of showing that McKinney acquired no title under the deed from Hamilton, introduced the record of a deed, over plaintiff's objection, from Hamilton to Lindsey and Myers, conveying the same land described in his deed, of same date as the deed to McKinney. Defendant contends that, in this condition of the title, two deeds of same date for the same land to different grantees, it is impossible for the court to find, as a fact, which was delivered first.

[1] It is elementary that delivery is essential to the execution of a deed; that, although signed and sealed, no title passes from the grantor, or vests in the grantee, until it is delivered. The deed takes effect from the delivery. *Goodson v. Whitfield*, 40 N. C. 163; *Vaughan v. Parker*, 112 N. C. 96, 16 S. E. 908; *Fortune v. Hunt*, 149 N. C. 358, 63 S. E. 82. What constitutes delivery is a mixed question of law and fact. *Smith v. Moore*, 149 N. C. 185, 62 S. E. 892. It is held in North Carolina that the certificate of a probate court that the due execution of a deed has been acknowledged or proven includes the finding that it was delivered. In *Younge v. Guilbeau*, 3 Wall. 636, 18 L. Ed. 262, Mr. Justice Field says:

"The delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might perhaps justify, in the absence of opposing evidence, a presumption of delivery."

[2] That the grantor, in open court, for the purpose of bringing it to registration, acknowledges the execution of a deed, is certainly sufficient, in the absence of any evidence to the contrary, to sustain a finding that it has theretofore been, or was at that time, delivered, subject to be overcome by evidence showing that there had not been in truth a delivery. Neither party produces the original deed, nor is there any evidence that either of the grantees went into possession under the deeds. It does appear, however, that McKinney, on the same day upon which the deed was acknowledged by Hamilton and registered, executed a deed for the land to Cathcart and Johnston, which was acknowledged by him, and on the same day admitted to registration. It is also worthy of note, in our quest for an explanation of this singular transaction, that Isaac Sexton is the attesting witness to both deeds—and a memorandum on one of them. It sufficiently appears, from the certified copies of both deeds introduced, that their execution was acknowledged "in open court," before the court of pleas and quarter sessions of Pasquotank county, and "ordered to be registered." That court had jurisdiction in the premises.

The question remains open, however, which was first delivered. In the absence of any evidence, other than such as may be gathered from the date of acknowledgment, as to the date of delivery, the question is presented whether any presumption arises as to the date of delivery as between two deeds bearing the same date. In *Crabtree v. Crabtree*, 136 Iowa, 430, 113 N. W. 923, 15 Ann. Cas. 149, it is held that:

"Where a deed bears an earlier date than the certificate of its acknowledgment, the deed is, in the absence of other evidence, presumed to have been delivered on the date of its acknowledgment."

Weaver, C. J., concedes that many courts, probably the majority, hold that the presumption, in such cases, is that the delivery is of the day of its date. It is held by the Supreme Court of the United States, in *United States v. Le Baron*, 19 How. 73, 15 L. Ed. 525, that:

"The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day."

In an exhaustive note to the case of *Crabtree v. Crabtree*, *supra*, the cases holding the two views are collected. In *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. 311, 46 C. C. A. 305 (C. C. A. Fifth Cir.) it is held that, in the absence of any evidence of the date of delivery of a mortgage, the presumption will be indulged that it was delivered on the day of its acknowledgment. Among the cases holding this view are *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500, and *Loomis v. Pingree*, 43 Me. 299.

In *Nichols v. Palmer*, 4 N. C. 319, it was held that where a deed bears a date different from the date of its attestation, and there is no evidence of the date of its delivery, it will be presumed to have been delivered on the date of its attestation. Court of Conference, Cameron, J.

[3] In several of the cases it is said that a deed is not complete until acknowledged. At the date of the execution of both deeds from

Hamilton, the statute in force in North Carolina (Laws 1715, c. 7, § 1) provided that:

"No conveyance, or bill of sale for land (other than mortgages) in what manner or form soever drawn, shall be good and available in law, unless the same shall be acknowledged by the vendor or grantor or proved by one or more evidences upon oath, either before * * * or in the county court, and registered by the public register of the county where the land lieth within two years after the date of said deed; and that all deeds so done and executed shall be valid and pass estates in land or right or other estate, without livery of seisin, attornment, or other ceremony in law whatsoever."

It is held in North Carolina that, by virtue of the language of the statute, the registration of a deed gives it the force and effect of a feoffment with livery of seisin. *Hogan v. Strayhorn*, 65 N. C. 279; *Ivey v. Granberry*, 66 N. C. 223; *Bryan v. Eason*, 147 N. C. 289, 61 S. E. 71.

[4] It is true that the courts of this state held that, notwithstanding the language of this statute, which remained in force until 1885, the deed, when registered, had the effect of passing title by relation, at the delivery of the deed. We are now dealing with the question whether the deed to McKinney, by reason of its acknowledgment and registration March 3, 1795, vested title paramount to the deed to Lindsey and Myers, acknowledged in September, 1797, and registered July 19, 1798. If it were shown by evidence, aliunde the deed, that the Lindsey and Myers deed was delivered prior to March 3, 1795, although acknowledged subsequently, it must be conceded that it would have vested title paramount to the McKinney deed. It was to remove this uncertainty in regard to title that Acts 1885, c. 147 (Rev. 1905, § 980), was enacted.

[5] In endeavoring to find some explanation of the peculiar conduct of the parties to the two deeds, bearing even date, consistent with their intention, so far as, after more than 100 years has elapsed, it is possible to do so, we may indulge the presumption that the grantor intended to vest the title in the land conveyed in the grantees named in one of the deeds. He received a valuable consideration for the land and intended to convey it. He did not intend that one deed should be so played off against the other as to leave the title in so much uncertainty that neither of his grantees could hold the land. It is a more reasonable presumption that he completed the execution of the deed in the manner prescribed by the law.

[6] All of the decided cases hold that either presumption as to the date of delivery is one of fact, and may be rebutted by competent evidence showing the true date upon which it was delivered to the grantee. Whether the date of acknowledgment must be given the probative weight of a rebuttable presumption, it is clear that, taken in connection with other facts and circumstances, it is competent evidence to be considered by the trier of the fact.

[7] An examination of the certified copies of the deeds, with memoranda thereon, discloses the following conditions: On October 20, 1794, John Hamilton signed a deed containing language sufficient to convey the land covered by his grant to William Lindsey and Moses Myers, of Norfolk, Virginia (merchants); the consideration recited

being "two thousand Spanish mill dollars." The attesting witnesses are Isaac Sexton and Peter Mercer. The following indorsement is found on this deed:

"Memorandum. 3 March, 1795. The above deed was this day delivered up to John Hamilton by John McKinney, and a new conveyance of the 20th October, 1794, was made by John Hamilton to said McKinney, for the nominal consideration of thirteen thousand Spanish mill dollars.

"[Signed] John McKinney.

"Isaac Sexton.

"Camden County, 28th October, 1794. Then received of Moses Myers and William Lindsey, by the hands of Isaac Sexton, the within sum of two thousand Spanish mill dollars in full of the within premises.

"J. Hamilton."

"Memorandum. 3 March, 1795. Nixonton.

"Borrowed, and received from Hamilton, the patent within mentioned, dated 27 December, 1792, for 26,000 acres of land, which patent, being the title of the said Hamilton, I hereby promise to return him when demanded.

"John McKinney."

"State of No. Carolina, Pasquotank County.

"September Term, 1797.

"Present: The worshipful justices.

"This may certify that the within deed of bargain and sale of land from John Hamilton to Lindsey and Myers was exhibited, and acknowledged in open court, and ordered to be registered. At the same time a memorandum on the said deed, signed by John McKinney and witnessed by Isaac Sexton, who is since dead, was proved by the oath of Benjamin Jones, and also ordered to be registered.

"Test: Will T. Muse, Clk.

"Registered the 19th of 7th Mo. July, 1798.

"By Thomas Jordan, P. Reqr."

The deed from Hamilton to McKinney, of October 20, 1794, contains the following recital:

"Witnesseth, that the said John Hamilton, for and in consideration of the sum of thirteen thousand Spanish milled dollars to him in hand paid by William Lindsey and Moses Myers for the aforesaid John McKinney, the receipt whereof the said John Hamilton doth hereby acknowledge, and doth discharge and exonerate the said McKinney from any further demand whatsoever on that account."

John Brownrigg and Isaac Sexton are the attesting witnesses to this deed. McKinney's deed to Cathcart and Johnston of March 2, 1795, acknowledged and registered March 4, 1795, recites a consideration of "twenty-six thousand French crowns." Isaac Sexton and William Lane are the attesting witnesses thereto.

It will be noted that Isaac Sexton, the witness to the several deeds, who, it seems, was the person through whom the money was paid to Hamilton, was dead September, 1797, at the time the Lindsey and Myers deed was acknowledged. It is impossible to explain, with entire satisfaction, the unusual course pursued by the parties to these deeds. It will be observed that Mr. Hamilton was an attorney, and it may be presumed that he was familiar with the statute regarding the execution of deeds—their probate and registration. The inference which I think may reasonably be drawn from the indorsements found on the deed, which are competent, not as affecting or controlling the terms of the deeds, but as explaining the ambiguous conduct of

the parties, is that McKinney was the purchaser of the land, and that Lindsey and Myers advanced the purchase money, and that the deed to them was held in escrow until McKinney paid the amount advanced by them; that the deed was, upon its payment, put in the possession of McKinney, and by him delivered up to Hamilton, who executed the second deed, dating it as of the day of the deed to Lindsey and Myers, and immediately acknowledging its execution for the purpose of registration, thereby enabling McKinney to convey to Cathcart and Johnston. This large body of land, it will be noted, is described as being "commonly called desert," and its value was then, as now, largely speculative. Until the deed to Lindsey and Myers had been recorded, the title was imperfect—sometimes said by the court inchoate; it could be arrested by a redelivery to the grantor. *Linker v. Long*, 64 N. C. 298.

The fact that McKinney had the Lindsey and Myers deed, before acknowledgment and registration, in his possession, and surrendered it to Hamilton, who, on the same day, executed the deed to McKinney, is explained by the indorsements found on it. It is also significant that Lindsey and Myers, so far as the record discloses, made no conveyance of the land, and no one asserts any title or claim under it. This would seem to lead to the conclusion that the deed to McKinney of October 20, 1794, was signed and delivered on March 3, 1795, and that the Lindsey and Myers deed was, at that time, surrendered to Hamilton. The effect of this arrangement was to vest the title in McKinney, and, by his deed, in Cathcart and Johnston. Why, two years thereafter, Hamilton acknowledged and put to registration the Lindsey and Myers deed, is difficult to understand; but whatever his purpose may have been, his act did not affect the title of McKinney and those claiming under him. By virtue of the statute his act, in acknowledging and registering the deed on March 4, 1795, was valid to pass the estate in the land to McKinney. That McKinney accepted the deed is manifested, both by his declaration, indorsed on the Lindsey and Myers deed, and his conveyance of the land, on the same day, to Cathcart and Johnston.

[8] Defendant, however, insists that, conceding the title to have been in them, it has been divested by the sales for taxes and the deeds executed by Grice, sheriff, September 8, 1812, and Pool, sheriff, September 10, 1818. It will be noted that both were sheriffs of Pasquotank county. The first deed conveys 19,520 acres, by metes and bounds; and the second conveys the remainder of the Hamilton grant, less one acre, all described as lying and being situate in Pasquotank county. Whatever portion of the land covered by the grant may have been included within the boundaries set forth in these deeds, it is manifest that no part of the land lying in Perquimans county passed under them. The sheriffs of Pasquotank county had no authority, under the tax list of that county, treated as an execution, to sell land in Perquimans county, and their deeds were ineffectual to pass any title to such land. It being conceded that the land covered by the grant to defendant Vyne is situate in Perquimans county, it must follow that the title thereto was not affected by these two deeds, or either of them.

The defendant relies upon the recitals in these deeds to sustain the tax sales, and cites the case of *State Board of Education v. Remick*, 159 N. C. —, 76 S. E. 627, for that purpose. That case is correctly decided. There the land, at the sale by the sheriff, was bought by the Governor for the state, and, by legislation, the title thus acquired was vested in the Board of Education. The statute making the recitals presumptive evidence of their truth is clearly constitutional, as held by the court in that case. Giving to the recitals in the two sheriff's deeds full force and effect, several fatal defects are apparent. It is unnecessary to discuss them, because the sheriff had no authority to sell the land in Perquimans county. They locate the land in Pasquotank, although the defendant's evidence tends to show that the boundaries set out include the land in controversy in Perquimans.

Defendant further insists that the evidence shows that the grantees in those deeds conveyed portions of the land to other persons, and that by successive conveyances, set out in the evidence, the title to such portions is in persons who are strangers to plaintiff's title. Conceding this to be true, and conceding that, in an action of ejectment, defendants could defeat a recovery by plaintiff by showing an outstanding title in a stranger, it is evident that no adverse possession of the locus in quo is shown. The defendant's entire contention in regard to the land claimed by them, and the only contention upon which the grant to Vyne can be sustained, is that the land covered by it was, prior to the date of his grant, vacant and unappropriated land. It is uncleared, and its chief value consists of the standing and growing timber thereon. It is a part of the Dismal Swamp—low, flat land. The evidence tends to show that it is not included in the boundaries contained in the deeds under which the persons living upon other portions of the Hamilton grant claim title. I am of the opinion that there is no evidence of an ouster, followed by adverse possession, sufficient to take title out of the plaintiff.

[9] It is conceded that before plaintiff can maintain his suit, and have a decree removing a cloud from his title, he must show that he has the legal title to either the whole or an undivided interest in the land. *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201. But for the provisions of the North Carolina statute (Pell's Rev. § 1589), plaintiff would be required to show that he was in possession. *New Jersey, etc., L. Co. v. Gardner-Lacy & Co.*, 178 Fed. 772, 102 C. C. A. 220. Under the provisions of the North Carolina statute, the owner of land, although not in possession, may bring an action to remove a cloud from his title.

[10] It has been held that the remedy given by statutes of this character may be enforced in the federal court when the parties are inhabitants of different states. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52.

[11] To the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, it is sufficient to say that the failure to do so does not, under any statute in force in this state, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law.

[12] At the date upon which the grant of the locus in quo to Vyne was issued the statute provided that:

"Every entry made, and every grant issued for lands not authorized by this chapter to be entered or granted shall be void, and every grant of land made since the sixth day of March, one thousand eight hundred and ninety three, in pursuance of the statutes regulating entries and grants, shall if such land or any portion thereof has been heretofore granted by this state, so far as relates to any land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights whatever, upon the grantee or grantees therein, or those claiming under such grantee or grantees, and shall in no case, and under no circumstances constitute color of title whatsoever to any person whomsoever." Laws 1893, c. 490; Pell's Rev. § 1699.

If, therefore, the land in controversy is included within the boundaries of the Hamilton grant, as it manifestly is, the grant to Vyne is absolutely void for all purposes. If the plaintiff is the owner of an undivided interest in the land, it would seem that he is entitled, to the extent of such interest, to have the relief for which he prays in his bill.

[13, 14] It seems to be well settled that a court of equity has jurisdiction to remove, as a cloud from title, any deed, grant, or other muniment of title, valid upon its face, the invalidity of which can only be shown by extrinsic evidence. It is said:

"Equity interferes to remove clouds upon title, because they embarrass the owner of the property clouded, and tend to impede his free sale and disposition of it. A cloud upon title is, in itself, a title or incumbrance, apparently valid, but in fact invalid. It is something which, nothing else being shown, constitutes an incumbrance upon or a defect in it; something which shows *prima facie* the right of a third party, either to the whole or some interest in it, or a lien upon it. The doctrine relating to cloud upon title is founded upon true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding the same to retain it, since he can only do so with some sinister or wrongful design. * * * If it is a deed purporting to convey lands, which creates an apparent incumbrance, its existence in an uncancelled state necessarily is calculated to throw a cloud over the title." Note to *Busbee v. Macy*, 85 N. C. 329, in *Remedies by Selected Cases*, Mordecai, 184; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

[15] In *Ogden City v. Armstrong*, 168 U. S. 224, 238, 18 Sup. Ct. 98, 103 (42 L. Ed. 444), it is said:

"One branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land and possibly threaten the loss of it to the owner. * * * When the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence aliunde, so that the record would make out a *prima facie* right in one who should become a purchaser, and the evidence to rebut this case may be lost, or become unavailable from death of witnesses, or when the deed given on a sale of the land for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the land until the irregularities were shown, courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent." *Acord v. West Poc. Corp.* [C. C.] 156 Fed. 989.

The case made upon this record comes clearly within the principle announced. The grant to Vyne is regular, and, upon its face, valid

to vest title in him. Its invalidity can only be disclosed by showing that the land granted is within the boundaries of a grant issued more than a century since for 26,000 acres of land. To do this involves immense trouble and expense. The surveys made in this case and the evidence necessary to locate the boundaries of the Hamilton grant, showing that the grant to Vyne is included in it, must have required a large expenditure of money. Until this was done, the claimant under the Vyne grant had an apparently perfect title, and in an action of ejectment by him it would have been very difficult to have successfully resisted a recovery; yet it is manifest, in the light of the evidence and the surveys, that the state parted with its title on December 27, 1792. A decree may be drawn in accordance with this opinion.

It appears that, prior to filing the bill, plaintiff took actual possession of the land, so far as it is capable of being occupied. The evidence tends to show that defendant Leonard Vyne has never been in the actual possession; that he entered into some contract, the exact terms of which are not shown, with defendant Kramer Bros. & Co., a corporation, for the sale of the timber on the land. It is manifest that its chief value consists in the timber. The defendants will be enjoined from setting up said grant, or asserting title thereunder to the land described in the said grant, from the state to Leonard Vyne of February 7, 1906, No. 16,788, as against the plaintiff, and from cutting or removing any timber from said land. Plaintiff will recover his cost.

RICHARDSON v. PENNSYLVANIA COAL CO.

(District Court, M. D. Pennsylvania. January 31, 1913.)

No. 154.

1. COURTS (§ 262*)—JURISDICTION OF FEDERAL COURTS—EQUITY—ADEQUATE REMEDY AT LAW.

The adequate remedy at law which will exclude the equity jurisdiction of a federal court is that which existed when the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) was adopted, unless subsequently changed by Congress, and a matter which was then cognizable in equity is so still notwithstanding enlargement of legal remedies by the states; but, unless it comes within some of the then recognized heads of equitable jurisdiction, it cannot be entertained.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

2. QUIETING TITLE (§ 35*)—SUIT TO REMOVE CLOUD—EQUITY JURISDICTION.

A bill in equity, alleging that complainant is the owner and in possession of certain land, but without setting out his title, and that defendant repeatedly commits trespass thereon under some claim of right and interest in the land, the nature of which is unknown to complainant, does not state a cause of action for removal of a cloud on title, since such a suit will not lie where there is a mere verbal assertion of ownership by defendant, and it does not appear that complainant has not an adequate remedy at law.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. INJUNCTION (§ 118*)—SUFFICIENCY OF BILL.

Such bill also *held* insufficient to state a cause of action within the equity jurisdiction to avoid a multiplicity of suits, or for an injunction to prevent continued trespasses or waste, the only allegation as to the effect of defendant's acts being that they would create ruts, beaten tracks, and roadways on the land, which does not constitute waste in a legal sense, and the bill furthermore, taken as a whole, leaving it open to inference that the question involved is one of title which should be determined in an action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

4. DISCOVERY (§ 19*)—IN EQUITY—SUFFICIENCY OF BILL.

It is essential to a bill of discovery that it set forth a title in the complainant which is sufficient to support or defeat a suit, and that it pray a discovery pertinent to that title and nothing beyond.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26; Dec. Dig. § 19.*]

In Equity. Suit by Henry Richardson against the Pennsylvania Coal Company. On demurrer to bill. Demurrer sustained.

Frank S. Moore, of New York City, Edward T. Moore, of Passaic, N. J., and Watson, Diehl & Watson, of Scranton, Pa., for plaintiff.
Warren, Knapp & O'Malley, of Scranton, Pa., for defendant.

WITMER, District Judge. This is a bill in equity, wherein Henry Richardson, a citizen of the state of New Jersey, is plaintiff, and the Pennsylvania Coal Company, a Pennsylvania corporation, is defendant. Upon its face the bill involves a question of disputed title to 3,500 acres of land, more or less, situate in Shohola township, Pike county, Pa., which disputed title the plaintiff seeks to have determined by a chancellor in equity. The defendant has demurred to the bill, and the controversy is before the court upon bill and demurrer. The demurrer is to matters of substance and form, and must be taken to admit all such matters of fact as are sufficiently pleaded therein. Stephen's Pleading (Heard's Ed. 1867) p. 143. But it does not confess matters of law deduced from facts therein pleaded. Stephen's Pleading, *supra*, p. 143, note 2-i; Preston v. Smith (C. C.) 26 Fed. 884.

After describing the lands particularly, the bill proceeds, in the fourth paragraph thereof, as follows:

"That your orator is the owner of the title of said land. That the said defendant claims an interest and certain rights in said premises adverse to the claim of your orator, but that the nature of said claim of defendant is unknown to your orator. That the claims of said defendant and each of them is without any right whatsoever, and that the defendant has no estate, right, title, or interest whatsoever in said land and premises or any part or portion thereof."

Averring, in the third paragraph, that the plaintiff "now, and for a long time hitherto, has been in the possession" of the lands and premises described in the bill, the plaintiff proceeds to charge, in the sixth paragraph, as follows:

"That defendant is the owner of or in possession of certain land and premises adjacent to and adjoining the above mentioned and described land and premises (being the lands described in the bill) belonging to your orator,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and is engaged in the business and occupation of cutting timber and lumber from the said land so held in possession by it. The said defendant daily, constantly, continuously, and repeatedly trespasses and enters upon the above land and premises of your orator and carries and places upon, and stores upon, your orator's said premises, lumber and timber cut from the adjoining land and premises and threatens to so continue to trespass. That defendant has already stored upon your orator's premises about 5,000,000 feet of lumber cut on adjoining property. That defendant constantly, continuously, and repeatedly enters upon and drives logs through the said property of your orator, and has permitted thousands of them to accumulate in the bed of the streams which flow through your orator's property, and threatens to so continue to trespass. That defendant constantly, continuously, and repeatedly trespasses and enters upon said land and premises of your orator and operates locomotive engines, cars, and trains from adjoining property into, over, and upon said premises of your orator in the regular course of its business and threatens to so continue to trespass in the future. That said defendant constantly, continuously, and repeatedly commits trespasses and enters upon said land and premises of your orator for the purpose of operating a sawmill thereon and to make use of a storehouse, a woodshed, and an oilroom situate in the said premises of your orator, and threatens to so continue to trespass. That all of the manifold acts of trespass committed by the defendant as aforesaid alleged are a daily occurrence committed again and again in the regular course of defendant's business."

Proceeding, in the seventh paragraph of the bill, the plaintiff avers:

"That when said acts of trespass were discovered said defendant has refused and still refuses to heed the warning of your orator and to desist and refrain therefrom and asserts the right to continue to trespass and waste as aforesaid, under color of some right thereto, which defendant well knows is false and fraudulent. That the pretenses of defendant to the right to enter upon and trespass upon the said land and premises of your orator is a cloud upon the title of your orator and are an impediment to the sale of said land and premises of your orator and are a great damage to value of your orator's estate."

By the eighth paragraph the plaintiff avers:

"That defendant is doing the acts complained of with full knowledge of the truth as above stated, and threatens and avers that it will continue the same, and your orator avers that, unless defendant is restrained and enjoined by the process of this honorable court, the damages so threatened to be committed will further despoil the surface of said premises, will create ruts, beaten tracks and roadways and prevent your orator from effecting a sale of said land and premises and will be irreparable; and your orator further avers that the acts complained of are contrary to equity, and that he has no complete and adequate remedy at law and sues to avoid a great multiplicity of suits."

The bill then in the prayer seeks: (a) Disclosure and discovery, by the defendant, of its claim of title. (b) A decree by this court "that the alleged claims of the defendant and each of them are invalid and void; that the defendant has no estate, rights, or interest in or to said property, land, or premises above described, or any part thereof; that your orator is the owner in fee of said property; that the title and rights of your orator are good, valid, and absolute in all respects to each and every part of said premises and in respect to all rights in or concerning the same; that the defendant be forever barred from asserting or claiming any rights, interest, or estate therein; and that all clouds thereon be removed." (c) An injunction, preliminary until hearing and perpetual thereafter restraining the defendant, its servants

and employés "from entering into or upon the above-described premises." And (d) that the plaintiff's title "be quieted and confirmed" in all "respect in said land and that it be decreed that the defendant has entered upon said land in fraud."

[1] As to the distinction between law and equity in the federal courts, it is said in Foster's Fed. Prac. vol. 1, § 4, p. 7:

"Although a great number of the states of the American Union and even England itself have fused together the two systems, in the courts of the United States while the same judges have jurisdiction in each, the common law and equity are still as distinct as they were in the time of Coke and Bacon.

"By the judicial act of 1789, by which the first Congress established the courts of the United States and defined their jurisdiction, it was enacted that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The effect of this provision, as often stated by the Supreme Court of the United States, is:

"That whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. * * * But the adequate remedy at law, which is the test of equitable jurisdiction in the federal courts, is that which existed when the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 73) was adopted, unless subsequently changed by Congress; and, where the matter belongs to what was at that time the jurisdiction of equity, no change in state legislation giving, in like cases a remedy by action at law, can of itself curtail the jurisdiction of such courts. Beach, Mod. Eq. Jurisp. vol. 1, § 3, pp. 4, 5."

It follows, therefore, that while the statutes and decisions in Pennsylvania may have shifted the 1789 line of demarcation between equity and common-law jurisdiction, the question whether this bill is here cognizable in equity must be determined by the "essential character of the case," and this essential character must be determined by the federal decisions in the light of the jurisdiction of the courts of equity in England of 1789 at the time of the adoption of the federal Constitution and the enactment of the Judiciary Act thereunder.

In the case of *Van Norden v. Morton*, 99 U. S. 378-380 (25 L. Ed. 453), the Supreme Court of the United States held:

"We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes, and acts of Congress, the jurisdiction of such cases as between the law side and the equity side of the federal courts must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other."

Again, the same court held, in *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765:

"The remedies in the courts of the United States are at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of these principles; and although the forms of proceedings and practice in the state courts shall have

been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit."

To the same effect are: *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Jones et al. v. McMasters*, 20 How. 8, 15 L. Ed. 805; *Basey v. Gallagher*, 20 Wall. 680, 22 L. Ed. 452; *United States Life Ins. Co. v. Cable*, 98 Fed. 764, 39 C. C. A. 264; *New Orleans v. La. Const. Co.*, 129 U. S. 45, 46, 9 Sup. Ct. 223, 32 L. Ed. 607; *Alderson v. Dole*, 74 Fed. 30, 20 C. C. A. 280; *Smyth v. Ames*, 169 U. S. 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Ewing v. City of St. Louis*, 5 Wall. 418, 18 L. Ed. 657; *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hanewinkle v. Georgetown*, 15 Wall. 548, 21 L. Ed. 231; *State R. R. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. These cases clearly and emphatically support the ancient principle that equity will not entertain jurisdiction where the plaintiff has a plain, adequate, and sufficient remedy at law. If the plaintiff, upon the allegation of fact contained in his bill, has failed to bring himself within one or more of these ancient and well-recognized heads of equity jurisdiction, the demurrer must be sustained.

[2] Let us analyze the bill, for the purpose of determining what its essential character is, in order that we may determine whether the plaintiff has brought himself within our equitable jurisdiction. In the third paragraph the plaintiff avers that "he is now, and for a long time hitherto has been, in the possession of the 3,500 acres of land described therein." The plaintiff does not fully disclose his muniments of title, nor does he give a reference thereto, but contents himself with the declaration that he has a deed therefore, and in the fourth paragraph says he "is the owner of the title of said land." However, in the same breath he avers that "the said defendant claims an interest and certain rights in said premises adverse to the claim" of the plaintiff. The exact nature of the adverse claim is unknown to the plaintiff. This is immediately followed by the assertion "that the claims of the said defendant, and each of them, is without any right whatsoever, and that the defendant has no estate, right, title, or interest whatsoever in said land and premises or any part or portion thereof."

After setting forth at length, in the sixth paragraph, certain alleged acts of trespass of a continuing nature committed by the defendant upon the lands described in the bill, the plaintiff charges, in the seventh paragraph, that, "when said acts of trespass were discovered said defendant refused and still refuses to heed the warning" of plaintiff, "and to desist and refrain therefrom, and asserts the right to continue to trespass and waste as aforesaid, under color of some right thereto." Then follows the allegation that this assertion of right by defendant to do the things it is doing upon the lands constitutes a cloud upon plaintiff's title which equity should remove. A court of equity has jurisdiction to remove clouds from title irrespective of any statute upon the subject. Usually this remedy is enforced by requiring the surrender and cancellation of the instrument, or the setting aside of

the proceedings which create the cloud. The relief is granted on the principle of *quia timet*; that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass or affect the plaintiff's title. Beach, *Mod. Eq. Jurisp.* vol. 2, § 556, pp. 628, 629. However, this bill is barren of any allegations that the defendant is using a deed or other instrument of writing or proceeding of any nature injuriously or to vexatiously embarrass or affect the plaintiff's title. The plaintiff's bill avers that the defendant asserts a claim of some kind, the nature and character of which is unknown to the plaintiff. It is well settled that "a bill will not lie to remove a mere verbal or oral assertion of ownership in property, or a cloud upon the title." *Parker v. Shannon*, 121 Ill. 452, 13 N. E. 155.

The foundation of the jurisdiction in equity to quiet title or remove a cloud from the title is the inability of the plaintiff to obtain relief by an action at law or the inadequacy of the legal remedy. Hence, it is settled law that, where the estate is legal in its nature, and the remedy at law is adequate, and full and complete justice can be done thereby, the party will be left to his legal remedy. The exception to this rule is where the case presents some special ground for equitable interposition, such as fraud, accident, or mistake, requiring the setting aside or reformation of deeds or instruments of conveyance. If these elements be wanting, a bill to establish the plaintiff's title is no more than an action of ejectment; and, if the situation of the parties be such that the plaintiff may have an action to establish his title, his remedy is in a court of law. 2 Beach, § 557, p. 629. The allegations in this bill do not appear sufficient to permit this court to take jurisdiction for the removal of a cloud on the plaintiff's title. In the case of *Phelps v. Harris*, 101 U. S. 374, 25 L. Ed. 855, it was said:

"The questions, what constitute such a cloud upon title (sufficient to give a court of chancery jurisdiction), and what character of title the complainant himself must have in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established by those courts (courts of chancery). Prominent amongst these are: First, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it must not only be clearly invalid or inequitable, but must be such as may either at the present or at a future time, embarrass the real owner in controverting it. For it is held that, where the complainant himself has no title or a doubtful title, he cannot have this relief. 'Those only,' said Mr. Justice Grier, 'who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity, to give them peace or dissipate a cloud on the title.' *Orton v. Smith*, 18 How. 263 [15 L. Ed. 393]. And see *Ward v. Chamberlain*, 2 Black. 430, 444 [17 L. Ed. 319]; *West v. Schnebly*, 54 Ill. 523; *Huntingdon v. Allen*, 44 Miss. 654; *Stark v. Starr*, 6 Wall. 402 [18 L. Ed. 925]. And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. *Overing v. Foote*, 43 N. Y. 290; *Meloy v. Dougherty*, 16 Wis. 269. Justice Story says: 'Where the illegality of the agreement, deed, or other instrument appears upon the face of it so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up would not seem to apply; for in such case there can be no danger that the lapse of

time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.' 2 Eq. Jur. § 700a.

"The Supreme Court of Mississippi, in their opinion in *Phelps v. Harris*, 51 Miss. 789, a case between the present parties, say: 'This jurisdiction of equity cannot properly be invoked to adjudicate upon conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law the trial of ejectments. He who comes into a court of equity to get rid of a legal title, which is allowed to cast a shadow on his own title, must show clearly the validity of his own title and the invalidity of his opponent's.' *Banks v. Evans*, 10 Smedes & M. (Miss.) 35 [48 Am. Dec. 734]; *Huntingdon v. Allen*, 44 Miss. 662. Nor will equity set aside the legal title on a doubtful state of case. The complainant, to enable him to maintain such a suit, must be the real owner of the land, either in law or equity. * * * The proper forum to try title to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure and transferred to a court of equity under the pretence of removing clouds from title."

In the case of *Greenwalt v. Duncan* (C. C.) 16 Fed. 35, it is said:

"A suit to remove a cloud upon a title cannot be maintained in a court of equity where the plaintiff has a full, complete, and adequate, remedy at law."

Said Judge Treat (page 36 of 16 Fed.):

"The unquestioned rule obtains in all cases in equity to remove a cloud upon a title that it must be clear that plaintiff has not a full, complete, and adequate remedy at law; otherwise he will be remitted to his common-law remedy. This, under the Constitution of the United States, the acts of Congress, and repeated decisions of the United States Supreme Court, is an inflexible rule. Mere questions as to conflicts of supposed legal titles can ordinarily be decided in actions of ejectment."

Mr. Justice Sharswood lays down the Pennsylvania rule in *Stewart's Appeal*, 78 Pa. 96, as follows:

"Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceeding at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled or by making any other decree which justice or the rights of the parties may require."

It seems clear, under these authorities, and it is so decided, that this court is without jurisdiction of the plaintiff's bill on the theory of a removal of a cloud on plaintiff's title.

[3] It is undoubtedly the rule that one may have equitable intervention by injunction to prevent a trespass of a continuing nature and where a multiplicity of suits is involved in the legal remedy. *Beach*, Eq. Jurisp. § 22, p. 22. However, it does not certainly appear by the plaintiff's bill that the acts of the defendant complained of are trespasses. It appears upon the face of the plaintiff's bill that the defendant asserts the right to do and continue to do the things complained of, if based upon a title vested in the defendant by purchase or prescription, or, if the right be based upon an easement by grant or prescription, appurtenant to its adjoining land, it could not be said to be a trespasser. This can only be determined upon an adjudication of the title in an action at law. This action may be either trespass or

ejectment. If plaintiff is in possession of the lands upon which he alleges the defendant is trespassing, he cannot, of course, maintain ejectment; but his remedy would then be trespass. His title would necessarily be determined in this action, and upon proper notice he might recover his damages to the trial, if he established his title. However, if the acts of the defendant amount to an ouster of the plaintiff as to all or any part of the premises, he may bring ejectment against the defendant for the recovery of the possession and, upon proper notice under the statute, claim and recover mesne profits by way of damages to the time of the verdict. *Boyd v. Cowan*, 4 Dall. 138, 1 L. Ed. 774; *Dawson v. McGill*, 4 Whart. (Pa.) 230. There is nothing upon the face of this bill to lead one to the conclusion that there is a multiplicity of suits involved in the pursuit of the legal remedy. We are of the opinion, upon a reading of the bill, that the very reverse is the case, and that the controversy between these parties may be determined in one suit at law.

The plaintiff has not disclosed even a reference to his muniments of title in his bill. He avers he owns the land, and in the next sentence avers that the defendant claims an interest and certain rights in said premises and asserts the right to do the things the plaintiff complains are trespasses. Equity frequently asserts jurisdiction by injunction to prevent repeated trespasses and likewise to prevent a multiplicity of suits. In the case of *Pennsylvania Coal & Coke Company v. Jones*, 30 Pa. Super. Ct. 358, it is held:

"A court of equity has no jurisdiction over a bill which involves the title to real estate, and the determination of which requires the construction of legal conveyances formally and solemnly executed as muniments of title, the ascertainment from contradictory testimony of the facts as to notice and possession, and the application of proper legal principles to them. In such a case either party has a constitutional right to have his cause tried before a jury in an action of trespass or ejectment, and may not be deprived of it. Averments in the bill as to multiplicity of actions and irreparable injury are no basis for jurisdiction in equity, if the evidence in support of such averments fail."

Said Mr. Justice Clark, in *Washburn's Appeal*, 105 Pa. 480:

"Where rights which are legal are asserted on one side and denied on the other, the remedies are at law. They cannot be settled under equity forms."

In the case of *Duncan Iron Works*, 136 Pa. 478, 20 Atl. 647, Mr. Justice Sterrett, says:

"The legal rights of the defendants to do the acts complained of was thus the controlling question in the case. In view of that the learned master rightly held that the plaintiffs had mistaken their remedy."

The inadequacy of the remedy at law is the basis of jurisdiction in equity in cases of trespass, and likewise to avoid a multiplicity of suits. We do not think the plaintiff's bill brings him within our equitable jurisdiction upon either ground.

In addition to this, where, as in this case, the legal right is asserted by the plaintiff, and in the next sentence of his bill he says "the defendant asserts a right and claims an interest" in the premises, we are of the opinion that the case presented for equitable consideration is a bold assertion of a legal right on the one side and a denial on

the other. Surely we cannot take jurisdiction upon such a showing upon the face of the bill. True, the bill charges that the defendant "fraudulently asserts" this claim and right. But this is a mere legal conclusion with no facts disclosed in support thereof, and will not enable a chancellor to reach out the strong arm of the equity side of this court, grasp the suit, and bring it in for all purposes, in the face of our conclusion that the essential character of this case is an attempt to try title to land in equity, when the plaintiff has a full, complete, and adequate remedy at law.

In addition to injunctive relief, the plaintiff prays discovery. Discovery of what? Discovery of the plaintiff's or the defendant's title? Or does the plaintiff seek discovery relative to the alleged acts of trespass? Now, it is true that the discovery is one of the principal heads of equity jurisdiction. However, it is held in the courts of the United States:

"That a bill in equity for discovery will not lie when full disclosure may be compelled by examination of the adverse party in an action at law." *Rindskopf v. Platto* (C. C.) 29 Fed. 130; *United States v. McLaughlin* (C. C.) 24 Fed. 825; *Guyot v. Hilton* (C. C.) 32 Fed. 743.

[4] The plaintiff in this controversy may have a full and complete disclosure by the defendant as to the alleged acts of trespass, and as to title, either plaintiff or defendant, in an action at law. Furthermore, it is essential to a bill for a discovery that it set forth a title in the party which is sufficient to support or defeat a suit, and that it pray a discovery pertinent to that title and nothing beyond. A party has no right to a discovery except of facts and deeds and writings necessary to his own title or under which he claims, for he is not at liberty to pry into the title of another party.

There is an allegation, in the seventh paragraph, that the defendant "asserts the right to continue to trespass and waste as aforesaid, under color of some right" so to do. There is also the allegation, in the eighth paragraph, that the defendant, by continuance of the acts complained of in the sixth paragraph, "will further despoil the surface of the said premises, will create ruts, beaten tracks and roadways." These allegations do not go to the substance of the estate.

"In its essential elements, waste is the same in this country and in England, being a spoliation or destruction of houses, trees, etc., to the permanent injury of the inheritance. * * * The term 'waste' is not an arbitrary one, to be applied inflexibly, without regard to the quality of the estate, the nature or species of the property, or the relation to it of the person charged to have committed the wrong; but the question as to whether it has been committed in a given case is to be determined in view of the situation of the property, and the particular facts and circumstances appearing in that case, and by the conditions which exist at the time the act is committed." 40 Cyc. 501 (111, A).

It is well-settled law that injunction is a proper remedy to prevent waste, but as a general rule equity will interfere only to restrain future waste, and will not interfere in a case of waste already committed, unless perhaps under very special circumstances; for example, where the court has original jurisdiction of the case, or the party is

properly before the court for some other purpose, in which event the court may extend its protection to waste committed. 40 Cyc. 523, 524.

In order to maintain injunction for waste, it is not necessary that the plaintiff be in possession, but as a general rule it is essential that he show a good title to the premises wasted. But, even where the title is in dispute and the right is doubtful, if the waste be attended by irreparable mischief, or if, from the irresponsibility of the defendant or otherwise, plaintiff cannot obtain adequate relief at law, a court of equity may interfere by injunction. In some of the older cases it is said that equity will not restrain waste except upon unquestioned evidence of the plaintiff's title. 2 Beach, Mod. Eq. Jurisp. § 730, citing, *inter alia* (note 1) *Preston v. Smith* (C. C.) 26 Fed. 884. However, the more modern doctrine and common practice is that, where the waste goes to the substance of the estate, such as the extraction of ores, coal, etc., from a mine, the cutting of timber or the like, to issue the injunction, though the title to the premises be in litigation. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Lanier v. Alison* (C. C.) 31 Fed. 100.

There is no allegation in the bill that the defendant is cutting or threatening to cut any timber growing upon the lands in dispute, or the like whereby the substance of the estate of the plaintiff is liable to suffer irreparable injury, whereby waste could be inferred.

It is therefore concluded that the court is without jurisdiction upon the allegations of waste as contained in the bill; (1) Because they do not go to the substance of the estate; (2) because it appears on the face of the bill that there is a substantial dispute as to the title; and (3) because the threatened acts of the defendant, complained of, do not amount to waste.

Now, as to matters of form, the bill should show with some degree of certainty and particularity the time and place of the alleged trespasses and the character of the acts relied upon to bring the case within the confines of equitable jurisdiction. This it fails to do. It fails to show by what manner or by what means irreparable or permanent injury is being done or threatened to be done to the property. The bill does not, even to a certainty, disclose or describe acts of the defendant upon which the vague charge of waste might be predicated. As to "cloud upon the title," there is no reference to any deed, instrument of writing, or proceeding of any character whatsoever being made use of by the defendant to injuriously or vexatiously embarrass or affect the plaintiff's title. If the cloud of title is based upon oral assertions or declarations by defendant's officers or agents, these should be set forth at least with a certainty to a common intent. This the bill fails to do, and it is as defective in form as in substance.

For these reasons the preliminary injunction will be refused, and the bill dismissed, with reasonable costs to the plaintiff. Counsel will prepare and submit a decree in accordance with this opinion.

In re SIGNOR.

(District Court, N. D. New York. March 17, 1913.)

1. EVIDENCE (§ 419*)—PAROL EVIDENCE—WRITTEN INSTRUMENT—CONSIDERATION—VARIANCE OF TERMS.

Where a chattel mortgage assigned as collateral security was attacked in bankruptcy proceedings against the mortgagor on the ground that the amount due had been materially overstated on refiling, parol evidence of the mortgagee as to the items making up the amount of the mortgage, and that on the date of the first renewal the mortgage had been reduced to \$5,600, but at that time the mortgagor was indebted to the mortgagee for much more than the face of the mortgage, was admissible to show the exact consideration of the mortgage at that time, but not to vary, limit, or extend its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

2. CHATTEL MORTGAGES (§ 194*)—ASSIGNMENT AS SECURITY—RENEWALS.

Where a chattel mortgagee assigned a mortgage to W. as collateral security, it was the mortgagee's duty to keep the mortgage alive by filing renewals required by Lien Law N. Y. (Consol. Laws 1909, c. 33) § 235, and to state the amount due and unpaid, or to grow due on the indebtedness secured by the mortgage; and hence the mortgage was not rendered invalid as against the assignee by an overstatement of the amount due, alleged to have been negligently made by the mortgagee without fraud.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 426, 427; Dec. Dig. § 194.*]

3. MORTGAGES (§ 461*)—PAROL EVIDENCE—WRITTEN CONTRACT—CHATTEL MORTGAGE—INDEBTEDNESS SECURED.

Where from the language of a chattel mortgage in controversy a question of fact was presented whether it was intended to secure future indebtedness at all times up to \$6,800, it would have been competent for the mortgagee to have testified as to the book accounts and notes which existed, and what indorsement had been made, and especially what "other indebtedness" secured by the mortgage existed, and what was said between the parties connected with the execution of the mortgage, but it was error to permit him to state what the mortgage was given to secure in explanation of the terms of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1353–1360; Dec. Dig. § 461.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Arthur M. Signor. Petition to review a referee's order holding certain chattel mortgages void as to creditors for omission on refiling to correctly state the amount due or due and unpaid thereon on the ground that the amount was materially overstated. Remanded for rehearing.

Curtiss, Keenan & Tuthill, of Binghamton, N. Y., for Caleb P. Whipple, claimant.

Roger P. Clark and William H. Riley, both of Binghamton, N. Y., for trustee.

RAY, District Judge. On or about January 15, 1910, Arthur M. Signor was duly adjudicated a bankrupt, and in due course a trustee was appointed and qualified. March 8, 1905, said Signor gave to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Hobbs Bros. a chattel mortgage on certain personal property to secure the payment of the sum of \$1,500 and this mortgage was filed September 14, 1908; October 22, 1906, said Signor gave to Hobbs Bros. another chattel mortgage to secure the payment of the sum of \$6,800, which was filed November 2, 1906; and October 15, 1907, said Signor and Cora C. Signor, who was his wife, gave to said Hobbs Bros. another chattel mortgage to secure the payment of the sum of \$11,650, which was filed on the same day, October 15, 1907. The indebtedness secured by said \$1,500 chattel mortgage constituted part of the consideration for the \$6,800 mortgage and said \$1,500 and said \$6,800 mortgages formed part of the consideration for said \$11,650 mortgage, but said prior mortgages were not satisfied or paid by the giving of the last-mentioned mortgage. On the said 15th day of October, 1907, said Hobbs Bros. duly assigned the said \$6,800 mortgage and said \$11,650 mortgage to the claimant Caleb P. Whipple to secure him for certain indebtedness owing by Signor to Whipple, and the assignment was duly filed the same day. It contained no comment as to the amount due and unpaid thereon, and contained no reference to any payments on same or either of them. That assignment of such mortgages was on the condition:

"That if a certain promissory note for the sum of \$2,117.49, with interest, bearing date October 10, 1907, given by the said A. M. Signor to the said Caleb P. Whipple and any and all renewal or renewals thereof, together with any payments on account of any principal or interest which the said Whipple shall make upon a certain chattel mortgage given by the said Arthur M. Signor to May L. Signor and Fred D. Signor May 25, 1905, then this assignment to be void."

The assignment has not been returned, but I find two copies both reading as above. I will presume it was intended to provide that the assignment should be void if such note and other sums mentioned were paid to Whipple. November 27, 1907, there was a further assignment, or so-called enlargement of the first assignment, so as to make the assignment security to Whipple for a note of \$807.49 dated that day, and also such sums as Whipple might pay for fire insurance on the property covered by the mortgages.

It seems that at the time of the institution of the bankruptcy proceedings there was due and owing from Signor to Whipple, secured by such assignment of such mortgages, the sum of \$5,077.88. The mortgage of October 22, 1906, for \$6,800 contains the following:

"Know ye that I, A. M. Signor, of Binghamton, N. Y., party of the first part, am indebted unto Hobbs Bros., of Nineveh, Broome Co., N. Y., of the second part, in the sum of six thousand eight hundred dollars, being for promissory note (conceded to be notes) and book account due and to become due Hobbs Bros. from me, and for indorsing with me by either Geo. W. Hobbs or Chas. H. Hobbs, and other indebtedness from me to either or both of the Hobbs Bros. Now for securing the payment of the said debt and the interest thereon from the date of the said Hobbs Bros. I do * * * Provided always and this mortgage is on the express condition that if the said A. M. Signor shall pay to the said Hobbs Bros., or assigns, the sum of six thousand eight hundred dollars and ——— cents, with interest thereon as follows, viz.: As per terms of above mentioned notes and accounts all within *one year* together with all expenses of renewals or extensions of all or any part of the within mentioned note or mortgage, or both, and looking after the prop-

erty mortgaged, also the cost of insurance on said property which I hereby authorize Hobbs Bros. or assigns, to obtain, which note and total expenses I do hereby agree to pay, then this transfer to be void and of no effect, but" [here follows power of sale, etc].

It is contended in behalf of Mr. Whipple that this mortgage was security, not only for the indebtedness of Signor to Hobbs Bros. as it existed at the date of the execution of the mortgage, but for indebtedness for notes thereafter given by Signor to or indorsed by Hobbs Bros. and also subsequent book accounts.

The \$11,650 mortgage contains the following:

"Being for loans made this day, goods furnished, labor performed, services rendered, indorsing notes and for promissory notes due and to become due, signed or indorsed by A. M. Signor or Cora C. Signor, or both, and indorsed by Hobbs Bros. and other obligations owing from either or both of us to either or both of said Hobbs Bros., including a debt of six thousand eight hundred dollars (\$6,800) secured by a chattel mortgage given October 22, 1906, which mortgage is to remain in force as a claim against property therein named until six thousand eight hundred dollars (\$6,800) of this total shall be paid."

This was a claim and assertion by Hobbs Bros. and an admission by Signor and Cora C. Signor that \$6,800 was unpaid thereon on the 15th day of October, 1907.

After this assignment Mr. Whipple did not file any renewal of such chattel mortgages, but Hobbs Bros. did, and it is claimed, first, that Hobbs Bros. in making such renewals largely overstated the amount due on same, respectively, wherefore they are void as to creditors, and the referee so found; and, second, that as Whipple, the assignee, did not file renewal statements or a copy of the mortgage, same are void as to creditors. This the referee declined to hold. As to such renewal statement of the mortgage for \$11,650 the same read:

"The interest of the mortgagee in the property thereby claimed by them by virtue thereof is (\$11,650) eleven thousand six hundred and fifty dollars."

And as to each renewal statement of the mortgage for \$6,800 the same read:

"The interest of the mortgagee in the property thereby claimed by them by virtue thereof is (\$6,800) six thousand eight hundred dollars."

These renewal statements are silent as to the assignments to Mr. Whipple, and contain no reference thereto or to Mr. Whipple as an assignee of any interest in the property.

[1] Mr. George W. Hobbs was permitted to testify under objection to the consideration for the \$6,800 mortgage giving the items making up that sum, and which amount to about \$6,800. October 22, 1907, the date of the first renewal of this mortgage, these items of indebtedness had been reduced so as to total only \$5,600, but Signor at that time was owing Hobbs Bros. much more than \$6,800. This evidence was competent to show the exact consideration of the mortgage at that time but not to vary, limit, or extend its terms. *State Bank, etc., v. Lighthall*, 46 App. Div. 396, 61 N. Y. Supp. 794; *Farr v. Nichols*, 132 N. Y. 327, 30 N. E. 834; *Emmett v. Penoyer*, 151 N. Y. 567, 45 N. E. 1041.

There is no evidence that Hobbs Bros. in filing the renewals of these chattel mortgages designed or intended to overestimate or overstate the amounts due and unpaid or to grow due thereon, respectively, and in view of the involved condition of the dealings between Hobbs Bros. and Signor and Hobbs Bros. and Mrs. Signor, and the fact that there was a running account and other indorsements of notes, I think Hobbs Bros. did not know they were making and filing an overstatement of such debt, if they did. Hence it must be found and held that there was no intent or purpose to defraud or mislead any one.

[2] One question, then is: Does the mere fact that in filing these statements Hobbs Bros. carelessly or negligently overstated their interest in the mortgaged property—that is, the amount due and unpaid or to grow due on such mortgages—make them void in favor of creditors and as against Mr. Whipple? The Lien Law of the state of New York (article 10, § 235 [“Chattel Mortgages”] c. 33, Consolidated Laws), provides, so far as applicable here, as follows:

“Mortgage invalid after one year, unless statement is filed. A chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless, (1) within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or any person who has succeeded to his interest in the property claimed by virtue thereof, or (2) a copy of such mortgage and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office in the city or town where the mortgagor then resided.”

The assignment to Mr. Whipple from Hobbs Bros. of these chattel mortgages did not make him the owner thereof except by way of collateral security. It was in the nature of a pledge, and Hobbs Bros. at any time, by paying Whipple the amount due him, could have demanded the mortgages, and could have proceeded to enforce and collect the same for their own benefit. It was their duty to file renewals and state the amount due and unpaid or to grow due on same correctly. As they did file renewals and in such renewals did state the amount due and unpaid or to grow due, it would seem Whipple had the right to rely thereon. Clearly this is so as between Whipple and Hobbs Bros. Whipple did not know, and could not know, except by inquiry of Hobbs Bros. and Signor, how much was unpaid. He, of course, knew his interest in the mortgaged property, which was less than the sums stated in the renewals. So far as Whipple is concerned, no creditor was misled or defrauded by anything he did.

The learned referee cites *Marsden v. Cornell*, 62 N. Y. 215, 219, *Ely v. Carnley*, 19 N. Y. 496, and *Tremaine v. Mortimer*, 128 N. Y. 1, 27 N. E. 1060, as conclusive that these mortgages were invalidated as to creditors by reason of these overstatements as to the amount due and unpaid or secured and unpaid made in and at the date of such renewals, respectively. *Tremaine v. Mortimer* has no application here whatever. In that case there was *no refiling* whatever; here

there was. *Marsden v. Cornell et al.* is not at all decisive of this case, as there no statement whatever as to the amount due or secured and unpaid at the date of refileing was filed. There was no compliance with the statute. And all that the court said, obiter, was that an omission to state the amount due or secured and unpaid at the date of refileing is a "badge of fraud." That is, it may and it may not justify a finding of fraud. This is what was held in *Frost v. Warren*, 42 N. Y. 204, where it was held:

"A mortgage is *not fraudulent in law* from the mere fact of its expressing a greater sum secured than the real amount of the debt which the mortgagor owes to the mortgagee."

Ely v. Carnley, 19 N. Y. 496, is a case where the mortgagee did not file the original mortgage, but undertook to file "a true copy" as the original filing, and as the statute of 1833 required. The paper filed overstated the amount by \$100. This was held *not a fraud*, but a noncompliance with the statute as to filing. In *Porter v. Parmley*, 52 N. Y. 185, and *Steele v. Benham*, 84 N. Y. 634, there was no refileing at all. In *Russell v. St. Mart.*, 180 N. Y. 355, 73 N. E. 31, it was held that a chattel mortgage given by two persons residing in different places must be filed in the towns and county of the residence of both, or there is no compliance with the statute as to filing. *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136, affirmed by Court of Appeals, 165 N. Y. 633, 59 N. E. 1125, is a case where there was no compliance with the statute as to refileing. In *Craft v. Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364, the name James B. Stead, by mistake, was inserted as mortgagee in place of that of Sylvester B. Sage. Stead made no claim under the mortgage, and there was no proof that any creditor was misled. The mortgage was held valid, and it was also held that the true mortgagee could enforce it without reformation. In *Chafey v. Mathews*, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558, a mortgage securing an indebtedness due to the bank ran to the cashier of the bank in his individual name only, but the other creditors of the mortgagor knew the purpose of the mortgage, and were not in fact prejudiced and it was held valid.

But, leaving this for the moment, what is the true construction and meaning of the following language used in the \$6,800 mortgage: "I, A. M. Signor, of Binghamton, N. Y., party of the first part, *am indebted* unto Hobbs Bros., of Nineveh, Broome Co., N. Y., of the second part, in the sum of six thousand eight hundred dollars, *being for* promissory notes and book account due *and to become due* Hobbs Bros. from me, and *for indorsing with me* by either Geo. W. Hobbs or Chas. H. Hobbs, and *other indebtedness* from me to either or both of the Hobbs Bros. now for securing the payment of the said debt, and the interest thereon from the date of the said Hobbs Bros.," etc.? The words are, I "am indebted," not am to become indebted, and "*being for* promissory notes," and "book account due and to *become due*" and "for indorsing with me" and "*other indebtedness* from me to either or both," etc. Book accounts may be due in *præsenti* or in *futuro* and "indorsing with me" might refer to future indorsements; but, if intended to refer to future indorsements, would not the parties have

said, "for indorsing with me heretofore or hereafter," and, if intended to cover future book accounts, would they not have said book account existing or to exist hereafter and due or to become due? The claimant's attorney ably contends that the words "for indorsing with me" mean indorsing hereafter, now, and heretofore, or the words would have been "for having indorsed" and "for notes which have been indorsed," and that "for indorsing with me" is necessarily a contemplated act, an act in futuro, and also that the words "and other indebtedness" are general, elastic, and comprehensive in their meaning, and indicate that the mortgage was intended as security for further and subsequent indebtedness, inasmuch as the then existing indebtedness under the undisputed evidence was for book accounts and promissory notes indorsed solely, and that these words "and other indebtedness" could only refer to indebtedness thereafter arising or incurred. That otherwise the words "and other indebtedness" were surplusage or meaningless. He invokes the familiar rule that some meaning must be given to all the words used in such an instrument, and that it is presumed they had a meaning and were so intended. He contends, and ably contends, that Mr. Whipple with such an instrument, and in view of the wording of the assignment made by Hobbs Bros. to him, already quoted, and the subsequent and larger mortgage, had the right to assume that indebtedness incurred subsequent to the execution of this \$6,800 mortgage was secured thereby. It is urged that as the wording of this mortgage is susceptible of two constructions, or, rather, that if it is, Hobbs Bros. and the mortgagors, Mr. and Mrs. Signor, gave it practical construction when the larger subsequent mortgage was given, and treated and construed it as one in force to its full amount and necessarily as covering indebtedness and indorsements subsequent to its execution, but limited always to the sum of \$6,800. The larger mortgage covers property not included in the \$6,800 mortgage, and this fact, it is contended, with the fact that it was limited to \$6,800, does away with any presumption that the larger mortgage was given for the reason the \$6,800 mortgage did not cover subsequent indebtedness.

In *Farr v. Nichols*, 132 N. Y. 327, 30 N. E. 834, the language of the mortgage was the payment of "any and all notes, checks and drafts indorsed by the said Archibald Farr for the benefit or accommodation of said Robert H. Doxstater, or of any firm in which said Robert H. Doxstater is interested or in any manner connected." It was held that this language covered notes subsequently made and indorsed as well as those then in existence. The court, all concurring, said:

"The mortgage was for the protection of the plaintiff. The words 'any and all notes, checks and drafts indorsed' are comprehensive words; there are no words restricting the meaning of the word 'indorsed,' such as now, heretofore, already, or which have been. The plaintiff may construe the promise as beneficially to himself as its terms will fairly admit."

It should be stated that in that case the mortgage was for an expressed consideration of \$15,000, and the only note indorsed at the time of its execution was one for \$3,000. Here there was room for the inference which the court drew that the mortgage was intended to

cover a large indebtedness up to \$15,000, which must have been a subsequent indebtedness. In *Simons v. First National Bank, etc.*, 93 N. Y. 269, the language was, "intended as collateral security for the payment of any indebtedness" of the mortgagors to the mortgagees, and when the mortgagors "shall have paid all such indebtedness this mortgage shall become null and void." It was held this covered a debt subsequently incurred. The court said:

"It will be observed that there are no express words confining the security to debts existing when the mortgage was made. The words are *any* indebtedness. The language may refer as well to contemplated as to existing debts," etc.

At the date of the execution of the instrument no debt existed, but one was thereafter incurred.

In *Merchants' National Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434, the language was, "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. Held this covered debts subsequently incurred, as well as those then existing. Here there was, of course, from the words "from time to time hold" a fair inference that it was intended to include indebtedness subsequently incurred by the mortgagor to the mortgagee.

In *Huntington v. Kneeland*, 102 App. Div. 284, 92 N. Y. Supp. 944, a deed absolute in form was held to be in fact a mortgage to secure future advances. The court said:

"It is undoubtedly true, within proper limits, that an agreement to secure future advances must be confined to such as are in the contemplation of the parties at the time when the agreement is made, for nothing not within the intention is included in any contract; all the intention must be derived from the words and surrounding circumstances, * * * but here the language used is general in its nature with no suggestion that it is limited to any particular transaction," etc.

The court then goes on to say that if the instrument, general in its language, was not intended to cover future advances, Mr. Huntington, who continued to make advances without other security, "must have departed materially from the practice of a prudent business man." In this case the evidence shows that all of Signor's property, real and personal, was covered by mortgages to its full value substantially, and that Hobbs Bros. knew this. Still, until the giving of the larger chattel mortgage, Hobbs Bros. continued to indorse notes and give credit on account. From this the court is urged to construe the words quoted as intended by the parties to cover the future indebtedness, especially the words "and other indebtedness"; there being none at the time. As there was after-acquired property which was not covered by the \$6,800 mortgage, and which the parties desired to cover, and as the debts to Hobbs Bros. concededly had increased, and the \$6,800 mortgage was limited to that sum, it is urged that no significance can be given to the giving of the second mortgage as indicating that the \$6,800 mortgage was intended to secure only the indebtedness to Hobbs Bros. existing when it was given, and certain items thereof aggregating, in round numbers, that sum.

[3] From the cases cited, it is quite clear that, in view of the language of the chattel mortgage, a question of fact was presented wheth-

er the mortgage was intended to secure at all times indebtedness up to \$6,800, even if some of it was thereafter incurred. If so, and payments were made on certain items and notes, but other notes were given or indorsed, and other book account incurred so that the indebtedness was at all times substantially \$6,800, then this continuing security was good to that amount, and there was no overstatement in the renewals.

From the cases cited it is clear that the true construction of the language of the mortgage and its true meaning could be aided by ascertaining the actual intent of the parties to it. In doing this, it was competent to show, first, the indebtedness of Signor to Hobbs Bros. at the time it was given including indorsements of notes; and, second, the mortgage; and, third, the agreement of the parties, if any, as to what was or should be included in and secured by the mortgage. What was said between Signor and Hobbs Bros. at the time and in connection with the giving of the mortgage on this subject was competent, not to vary the terms of the mortgage, but to explain and make clear. But it was not competent or proper for either Signor or Hobbs or either of the mortgagees to testify under objection that the mortgage covered indebtedness then existing, and no other; certain notes and no others; certain book accounts, and no others. It was not for either Hobbs or Signor to say that the mortgage was given to secure promissory notes given up to October 22, 1906, and not others given later, and book accounts for work done and materials furnished before that only, and indorsements made up to the same date. This was the very question in issue, and the conclusion or opinion of Mr. Hobbs was not competent. The conclusion was to be drawn by the court from relevant facts proved. Mr. Hobbs, under objection, was allowed to cover the whole controversy by giving his conclusion or opinion as to what the mortgage was given to secure, and as to the meaning of the terms used in the mortgage:

"Q. What was the \$6,800 chattel mortgage given to secure?

"By Mr. Keenan: That is objected to on the ground that it is incompetent, irrelevant, and immaterial. The mortgage is the best evidence, and speaks for itself. (Objection overruled.)

"By the Referee: I will allow the witness to explain what these terms mean, what promissory notes, what book accounts, and what notes or other indebtedness on the mortgage. (Exception.)

"A. The promissory notes given up to that time, October 22, 1906, by Signor, and the book accounts was work done on carriages, stock furnished, freight paid, and other items. The indorsing mentioned was for what had been done up to that date by myself and my brother."

The referee has accepted this as uncontradicted and conclusive. In short, Mr. Hobbs was allowed to interpret the language of and construe the mortgage, state what it secured, and determine the whole controversy. I repeat, it would have been competent for Mr. Hobbs to have stated fully what book accounts and notes existed, what indorsements had been made, and *especially* what "other indebtedness" then existed, and also all that was said between the parties to the mortgage connected with its execution. When this was done, it was for the court to say what the mortgage was given to secure, and whether it covered any "other indebtedness" than that then existing.

If the question had been whether or not there was any agreement as to what was to be secured by the mortgage, and the witness had answered in the affirmative, and he had then been asked what indebtedness and had given the answer quoted, in the absence of an objection that the witness must state what was said, I should be disposed to regard the answers as a mere statement or listing of the debts agreed to be secured by the mortgage, but this is not the purport of the question and ruling of the referee or of the answer. "Q. What was the \$6,800 chattel mortgage given to secure?" The objection was that the mortgage spoke for itself, and was the best evidence. The referee then ruled that he would let the witness "*explain what these terms mean,*" referring to the terms or words of the mortgage itself—"what promissory notes, what book accounts, and what notes or other indebtedness on the mortgage." It was a direct ruling that Mr. Hobbs might testify that the following words in the mortgage: "Being for promissory notes and book accounts due and to become due Hobbs Bros. from me, and for indorsing with me by either Geo. W. Hobbs or Chas. H. Hobbs, and *other indebtedness* from me to either or both of the Hobbs Bros"—referred to and covered and meant "promissory notes given up to that time, October 22, 1906, by Signor," and book accounts for work then done and carriages and stock furnished and freight paid, etc., prior to that date, and notes indorsed prior to that time only. This construction and interpretation of the language of the mortgage by Hobbs, especially as against Whipple, was harmful and prejudicial and illegal and incompetent evidence. As already stated, and as shown by all the authorities, the language of the mortgage quoted is broad enough to cover notes *then given* and in existence and notes *thereafter* given, notes *then* indorsed and notes *thereafter* indorsed, book accounts then existing, due or to grow due, and book accounts *thereafter* incurred. It was not for Mr. Hobbs to construe the meaning of the language or expressions of the mortgage quoted, but for the court in the light of surrounding circumstances and what was said at that time or in connection with the giving of the mortgage. This is an important case to both the trustee and the creditors and to Mr. Whipple, and here was the crucial point in the case. If in answering Mr. Hobbs had said it was *agreed* that the mortgage should secure certain things, naming them, or if the referee had ruled that Mr. Hobbs might state what indebtedness it was agreed should be included, the case would be quite different, and in such case Mr. Keenan would have been required to demand that the witness give the conversations. But the referee expressly ruled that Mr. Hobbs might construe the language of the mortgage and limit its meaning, which the witness proceeded to do. I do not find in the record anything showing the agreement, if any there was, between Signor and Hobbs as to what items should be covered or secured by the \$6,800 mortgage.

The order of the referee is reversed, and the case is sent back to Referee B. Roger Wales for a new trial on the issues certified and involved, with the suggestion that there be express findings, with other essential matters: When the mortgage was given: (1) What was the indebtedness of Signor to Hobbs Bros. by way of book accounts and otherwise? (2) What notes had then been indorsed which were out-

standing? (3) After the mortgage was given, what payments were made, and where and by whom and to whom? (4) What book accounts were incurred thereafter? (5) What notes were indorsed thereafter?

I express no opinion at this time, as there must be a new hearing on the other questions in the case.

LAWRENCE et al. v. P. E. SHARPLESS CO.

(District Court, E. D. Pennsylvania. March 17, 1913.)

No. 637.

1. TRADE-MARKS AND TRADE-NAMES (§ 21*)—PRIOR USE WITH REFERENCE TO DIFFERENT ARTICLE.

The use of the figure of a cow on defendant's butter prints, prior to complainant's use of the same figure as a trade-mark on cheese, would not invalidate complainant's trade-mark, if the figure was otherwise a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. § 21.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—VALIDITY OF MARK—GENERIC AND DESCRIPTIVE MARKS.

The figure or symbol of a cow is generic and descriptive, and cannot, therefore, be appropriated as a valid trade-mark to be applied to butter, cheese, and dairy products.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNLAWFUL COMPETITION.

Where defendant appropriated complainant's marks on cheese packages in order to palm off defendant's goods as those of complainant, complainant was entitled to injunctive relief on the ground of unfair competition, though he was unable to establish a technically valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 70*)—INFRINGEMENT—UNLAWFUL COMPETITION.

Complainants habitually since 1895 manufactured and successfully sold Neufchâtel cheese labeled with the figure of a cow, printed in blue ink in a rectangular square on the tin-foil covering. Defendant, prior to 1907, deliberately put out a similar cheese with a label identical in form, color, and design, printed in blue on tin foil, and after 1907 knowingly continued the use of the label to enable him to supply his customers with such cheese, by which the public might easily be defrauded to believe the cheese to be complainants'. It also appeared that the similarity had deceived purchasers, and that complainants' trade, in consequence, had fallen off. *Held*, that complainants were entitled to an injunction restraining defendant from further using such label, on the ground of unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

In Equity. Bill by William A. Lawrence and another, doing business under the name of W. A. Lawrence & Son, against the P. E. Sharpless Company to restrain infringement of a trade-mark and unfair competition. Decree for complainants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. H. Duell, F. P. Warfield, H. S. Duell, and R. W. France, all of New York City, for complainants.

Hector T. Fenton, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The complainants are in the business of making and selling domestic Neufchâtel cheese at Chester, Orange county, N. Y., where the business was established in August, 1862, by William A. Lawrence, who was the first person to make and, as late as 1875, was the only manufacturer of Neufchâtel cheese in this country. The Neufchâtel cheese made and sold in the business conducted by the complainants and their predecessors has had and has a favorable reputation, and has been and is widely sold in the state of New York and other states. In the year 1877 William A. Lawrence adopted as a trade-mark for Neufchâtel and cream cheese the figure of a cow, side view. On January 18, 1881, this label was registered in the United States Patent Office as a trade-mark, concerning which it was declared:

"The essential feature of which is the arbitrarily selected figure of a cow," and "the class of merchandise to which the trade-mark is appropriated is cheese, and the particular goods upon which I use my said trade-mark are Neufchâtel packages of cheese put up in one-quarter of a pound rolls and twenty-five and fifty rolls in a box. I have been accustomed to print or stencil it in black ink upon the outside of each box in which said cheese is packed for transportation."

During the early use of the trade-mark it was, as stated in the application for registration, stenciled upon the outside of the box which contained the individual cheeses, wrapped in paper. About 1895 William A. Lawrence adopted as a package for his cheese a tin-foil wrapper, upon which was printed in blue ink in the center of a rectangular border the figure of a cow, with the word "Neufchâtel" at the top, the word "trade-mark" and the words "Cream Cheese, Extra Quality," below. On January 26, 1904, this design was registered as a trade-mark for Neufchâtel cheese, and the statement set out:

"My trade-mark consists of the arbitrarily selected figure of a cow. This trade-mark has been continuously used in my business since August, 1877. The class of merchandise to which this trade-mark is appropriated is dairy products, and the particular description of goods comprised in such class upon which I use the said trade-mark is Neufchâtel cheese. The trade-mark is usually produced directly upon the tin foil or wrappers for the cheese and is likewise produced directly in or upon the boxes or other receptacles containing a number of packages."

On March 27, 1906, the design was again registered as a trade-mark by the firm of W. A. Lawrence & Son, the complainants, with the same description in the statement as in the registration of 1904. Since 1907 the complainants have used as a label upon their goods, printed in blue ink on a tin-foil wrapper, the same figure of a cow in a rectangular border, with the words "Reg. U. S." on one side, "Pat. Off." on the other, above the figure the words "Cow Brand," "Domestic," and below the figure the words, "Neufchâtel Cheese, Made in State of New York," and they have used the latter label continuously since that date.

The defendant and its predecessors have been engaged in the business of conducting a dairy for the production and sale of butter, cheese, and other dairy products since 1838, and during that time have used as a print upon their butter the figure of a cow (side view) surrounded by a circle, the words "P. E. Sharpless" in circular form above, and a design of leaves above and grass below the figure of the cow. In 1907 the defendant, which had been for several years making and selling a domestic Neufchâtel cheese, adopted as a label, printed in blue ink upon tin-foil wrappers, in which its cheese was packed, the figure of a cow in the center of a rectangular border in the same position as that upon the complainants' label, with the words "Trade-mark" below it, "Neufchâtel Cheese, P. E. Sharpless Co., Philadelphia, Pa.," above, to the left, "Absolutely Pure," to the right, "Fresh Daily," below "Main Office, Philadelphia, Pa." Subsequently the defendant adopted a label in the same shape, and printed in the same color of ink upon its tin-foil packages, with the following changes: Above the figure of the cow the words "P. E. Sharpless Co. Cheese." To the left the words "Made Daily," to the right, "At Concordville, Pa.," and below the words "Neufchâtel Style." The Neufchâtel cheese sold by the defendant with these labels has entered into competition with that sold by the complainants. The defendant justifies its use of the label by its prior and continuous use of the figure of a cow impressed upon its molds of butter, and upon the ground that the complainants' design is not a valid trade-mark for cheese, because the figure of a cow had been used by other manufacturers of cheese and manufacturers of butter and other dairy products before the complainants began its use, and that its use by the complainants has not been exclusive, as the figure of a cow had been used for cheese and other dairy products during the time the complainants claim to have been entitled to its use as a trade-mark.

[1] The use of the figure of the cow upon the defendant's prints of butter prior to its use by complainants for cheese would not, in my opinion, invalidate the complainants' trade-mark, if the figure of a cow is a valid trade-mark for cheese or butter. While butter and cheese are both dairy products, they are in such distinctly different classes that neither can be said in any sense to enter into competition with the other. Similar trade-marks put upon cheese as a product of one party could by no possibility deceive the purchaser intending to buy the butter of the other party, and vice versa. The defendant does not claim to have used its trade-mark of the side figure of a cow upon packages of cheese until after it had been for nearly 30 years in constant use on cheese by the complainants, and there is no proof that it was used by the defendant on cheese in such a manner as to give it any right thereto prior to the registration of the complainants' trade-mark in 1906. There was some evidence that more than 50 years ago the defendant's predecessor had impressed upon his molds of cottage cheese the same figure of a cow which he used upon his butter. There is no evidence of its continued use; and if continuous use in that manner would have constituted prior appropriation by the defendant the evidence is conclusive that it was abandoned many years before

1877, when the complainants first began to use it in stencil form upon their boxes containing packages of Neufchâtel and cream cheese. It continued to be used by the defendant exclusively as a print upon butter during the uninterrupted use by the complainants for nearly 30 years of their trade-mark upon cheese. The fact that the defendant was a maker and dealer in dairy products in general would not entitle it to appropriation of its trade-mark for butter to the whole field of dairy products, nor give it the right, as against its prior use upon cheese, to adopt it as a trade-mark for cheese. The defendant, in support of its claims of the use of the trade-mark prior to that of the complainants, has offered in evidence a trade-mark certificate showing a registration on October 10, 1882, by Mende Bros., of a trade-mark for cheese. The trade-mark in question is described as follows in the statement in the application for registration:

"Our trade-mark consists of a pictorial representation of a cow." "The essential feature * * * is the pictorial representation of a cow. This trade-mark we have used continuously in our business for sixteen years. The class of merchandise for which the said trade-mark is appropriated is cheese, and the particular description of goods comprised in such class upon which we use the said trade-mark is hand-cheese or hand-käse. We have been accustomed to stencil the trade-mark on the outside of the boxes containing the cheese."

Outside of the declaration contained in the statement that the trade-mark has been used continuously for 16 years, there is no evidence to show that its use antedated the time of registration. The Mende trade-mark was discontinued or abandoned in 1907 or 1908. The complainants knew of the use of this trade-mark for hand-cheese by Mende Bros., but did not object to it, because the hand-cheese did not enter into competition with their Neufchâtel cheese.

Evidence was also offered by the defendant to show the use of the trade-mark of a cow by Alvin R. Rieser, which trade-mark was registered May 8, 1894. In Reiser's statement accompanying his application, he states that:

"My trade-mark consists of the arbitrary word 'Anti-Rancidine.' This has generally been arranged as shown in the accompanying facsimile, which represents the form of a cow surmounted by the word 'Anti-Rancidine' in plain lettering; but the style of lettering is unimportant, *and the representation of the cow may be omitted* without materially affecting the character of my trade-mark, *the essential feature of which is the word 'Anti-Rancidine.'* This trade-mark I have used continuously in my business since the 20th day of March, 1894. The class of merchandise to which the trade-mark is appropriated is dairy products, and the particular description of goods comprised in such class upon which I have used it is milk, cream and butter, and cheese. It is my practice to apply my trade-mark to cans or packages containing the products by means of suitable labels on which it is printed, or by otherwise attaching it to the same."

Alvin F. Rieser died in June, 1910. It appears that he was in the wholesale butter and egg business; that the trade-mark in question was never used upon cheese; and that Alvin Rieser did not sell any cheese, except 60-pound cakes of store cheese.

The defendant offered in evidence a label, known as the Empire Brand, which was used as a wrapper by the Phoenix Cheese Company, and contained a side figure of a cow as a trade-mark upon cheese. It

is shown, however, that the complainants had objected to the use of this trade-mark, and that the Phoenix Cheese Company had discontinued its use on Neufchâtel cheese but it was still used on cream cheese. Its use on cream cheese was without the knowledge or consent of the complainants. Labels for cheese and butter, printed upon tin foil and containing varied representations of a cow, heifer, or cow's head, were offered in evidence for the defendant. In so far as the use of any of these labels bearing any similarity to complainants' label is concerned, it is conclusively shown that their use upon cheese was discontinued upon the protest of the complainants, or that they were never used upon cheese. As to other labels, the wrappers alone were offered in evidence by the defendant, without any evidence to show their use by any one. Under these conditions the evidence was immaterial and irrelevant.

[2] It is contended, however, by the defendant, and I think in that contention it is correct, that, even if the complainants' use of the cow trade-mark was exclusive as to Neufchâtel cheese, yet the figure of a cow is not capable of appropriation as a trade-mark by the complainants or defendant, or by any one, for any dairy product, because the symbol of a cow is generic, in that it is descriptive of the class of products produced of the milk of the cow. To entitle the complainants to the adoption of the figure of a cow as a trade-mark, not only must its use, but the right to its use, be exclusive; and such right cannot arise when others may employ the mark with as much truth as the complainants. All dealers in dairy products or manufacturers of dairy products could, with equal truth, represent the cow as the source of their product. Surely the figure of a cow could not be exclusively appropriated by a dealer in milk or cream. A dealer could not sell milk as cow milk or cream as cow cream and claim exclusive rights under that name; nor could he adopt the figure of a cow as a trade-mark for milk or cream. As butter and cheese are both produced from milk and cream, it follows, I think, that the figure of a cow or the word "cow" is not capable of exclusive appropriation by any dealer or manufacturer for butter or cheese.

As was said by the Supreme Court in the case of *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581:

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected; for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of the *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. [N. Y.] 599: 'The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.'"

See, also, *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144.

In the case of *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22, where the plaintiff claimed as a trade-mark for lard the figure of a hog, and the defendants, engaged in the same business, stamped their packages with a wild boar, the court said:

"The sign or symbol may be employed with equal truth in respect to any parts of the dead swine or the products of that animal put up for sale, and no one dealer has a greater right than any other to appropriate it to his own purposes. A serious question might be made as to the right of the plaintiff to appropriate to his exclusive use as a trade-mark the picture of the animal from which not only his lard, but the lard of all other dealers and manufacturers of lard, is derived, especially when the same emblem or symbol has been used by dealers in lard and other products of the slaughtered hog indiscriminately, as they have had occasion."

The case was decided, however, upon the ground that there was not sufficient resemblance in the mark used by the defendant to that used by the plaintiff to make it liable to deceive the public and enable the imitator to pass off his goods as those of a person whose trade-mark was alleged to be imitated.

[3] But it is not necessary that the complainant shall have established its right to a technical trade-mark to entitle it to relief, if the court is satisfied that there was an intent upon the part of the defendant to palm off its goods as the goods of the complainant. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

[4] The complainants have habitually since 1895 labeled their cheese with the figure of a cow, printed in blue in a rectangular square upon tin foil, and by their skill and industry in the manufacture of their cheese have obtained for it a reputation and a market under the particular label and device used by them.

"That a descriptive word or sign or symbol, descriptive from popular use in a descriptive sense, may acquire a secondary significance denoting origin or ownership is true: But this secondary significance is not protected as a trade-mark, for a descriptive word is not the subject of a valid trade-mark; the only office of a trade-mark being to indicate origin or ownership. When a descriptive or geographical word or symbol comes, by adoption, to have a secondary meaning denoting origin, its use in this secondary sense may be restrained, if it amounts to unfair competition. In such case, if the use of it by another be for the purpose of palming off the goods of one as and for the goods of another, a court of equity will interfere for the purpose of preventing such a fraud. But this kind of relief depends upon the facts of each case, and does not at all come under the rules applicable to the infringement of a trade-mark." *Lurton, J., in Vacuum Oil Co. v. Climax Refining Co.*, 120 Fed. 254, 56 C. C. A. 90.

"When the word is incapable of becoming a valid trade-mark, because descriptive or geographical, yet has by use come to stand for a particular maker or vendor, its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another." *Lurton, J., in Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965, 55 C. C. A. 459.

A comparison of the label of the complainants, printed in blue upon tin foil, with that of the defendant, also printed in blue upon tin foil, discloses such identity in form, color and design as to indicate an intentional imitation. Furthermore, the testimony of Myer Berman and Reuben Berman, even when taken in connection with that of Pennock E. Sharpless, president of the defendant corporation, is sufficient to show at least that the defendant in 1907 deliberately and knowingly continued the use of the label in blue ink upon its tin-foil wrappers containing domestic Neufchâtel cheese in unfair competition with the complainants, if it did not, in fact, adopt the label in 1907 at the suggestion of Berman, for the purpose of enabling him to supply his customers with Neufchâtel cheese with the figure of a cow, when he (Berman) could not procure the "cow brand" cheese from the complainants. That the cheese put upon the market by the defendant under its label would be mistaken by the ordinary purchaser for that of the complainants is inevitable. The similar shape of the package and the fact that it was wrapped in tin foil are not, in themselves, evidence of unfair competition, as it is undisputed that Neufchâtel cheese has been generally wrapped in that manner by the trade for many years. But when accompanied by the striking and predominant feature of the complainants' label, the figure of a cow nearly identical in shape and form, printed in blue ink in a rectangular border of the same general size and shape as upon the complainants' label, the labels show such striking similarity as to mislead and deceive a purchaser who had been accustomed to purchasing complainants' goods into the belief that he was obtaining those goods. The complainants' "cow brand" had obtained a reputation, and, through the complainants' continued efforts to place under that label a superior article of cheese upon the market, it had a well-established business. The defendant placed its labels upon its packages of Neufchâtel cheese with an intent to encroach upon the market which had theretofore been occupied by the complainants, and to palm off its goods under the similar and misleading label. That the label is misleading and deceived purchasers is apparent, and it is also apparent that the complainants' trade has, in consequence thereof, fallen off. As was said by Judge Bradford in the case of *Dennison Mfg. Co. v. Thomas Mfg. Co.* (C. C.) 94 Fed. 659:

"Two rivals in business, competing with each other in the same line of goods, may have an equal right to use the same words, marks, or symbols on similar articles produced or sold by them, respectively; yet, if such words, marks, or symbols were used by one of them before the other, and by association have come to indicate to the public that the goods to which they are applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such a manner, by trade dress or otherwise, as to deceive, or be capable of deceiving, the public as to the origin, manufacture, or ownership of the articles to which they are applied; and the latter may be required, when using such words, marks, or symbols, to place on articles of his own production, or the packages in which they are usually sold, something clearly denoting the origin, manufacture, or ownership of such articles, or negating any idea that they were produced or sold by the former. In *Coats v. Thread Co.*, 149 U. S. 562, 566, 13 Sup. Ct. 967 [37 L. Ed. 847], the court said: 'Irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and in-

duce him to believe he is buying those of the plaintiff. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.'"

And as to exclusiveness of use by a complainant in a case of unfair competition, Judge Dallas said in *Actiengesellschaft, etc., v. Amberg*, 109 Fed. 151, 48 C. C. A. 264:

"What, as respects exclusiveness of use, is requisite to support a demand by the originator of a distinctive style of dressing for his goods, that its use by others for similar goods shall be prohibited? It is no answer to his complaint against any particular person who has so used it to say that such person is not the only one who has done so, for a trespasser cannot justify upon the ground that others have committed like trespasses. Therefore the appropriation by the appellee of the appellant's box and labels is not excused by showing merely that others had similarly appropriated them. It is essential that it should also appear that the appellant had, by its acquiescence, abandoned its exclusive right, and, to establish a defense of abandonment, it is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon." *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19 [21 Sup. Ct. 7, 45 L. Ed. 60]."

I find that the defendant's use of its labels, "Complainants' Exhibit No. 3, Defendant's Cow Brand Tin-Foil Label," and "Complainants' Exhibit 20, Defendant's 1907 Label," is in unfair competition with the complainants in their business in the sale of domestic Neufchâtel cheese, and that the complainants' business has been injured thereby.

A decree may be entered for an injunction and an accounting.

In re WARD.

(District Court, D. New Jersey. March 13, 1913.)

1. BANKRUPTCY (§ 474*)—GUARDIAN AD LITEM FOR BANKRUPT—COMPENSATION.

Where a guardian ad litem was appointed for a bankrupt, as authorized by equity rule 87 (29 Sup. Ct. xxxvii), to defend an involuntary bankruptcy petition, because of the alleged mental incompetency of the bankrupt, such guardian ad litem must look to the estate of his ward for compensation, and cannot recover it from the unsuccessful petitioners in the bankruptcy proceeding; there being no provision in the Bankruptcy Act or in the general orders for any compensation to the bankrupt in case the petition against him is dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 476*)—INVOLUNTARY PETITION—DISMISSAL—COSTS.

Bankr. Act July 1, 1898, c. 541, § 2, cl. 18, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), empowers the court to tax costs whenever allowed by law, and render judgment therefor against the unsuccessful party, or the successful party for cause, or in part against each, and against estates in bankruptcy. Section 3e provides that, when an application to take or hold property of an alleged bankrupt is made before adjudication, the petitioner shall file a bond, conditioned for payment, in case the petition is dismissed, of all respondent's costs, expenses, and damages occasioned by the seizure and detention of the property, and that in such case the respondent shall be allowed all costs, counsel fees, expenses, and damages occasioned by the seizure. General order 34 (89 Fed. xiii, 32 C. C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—49

A. xxxiii) declares that if the debtor resists an adjudication, and the court adjudges him a bankrupt, the petitioning creditors shall recover from the estate the same costs allowed to a successful party in a suit in equity; and if the petition is dismissed the debtor shall recover like costs from the petitioner. *Held* that, under section 3e, only such costs, counsel fees, expenses, and damages as are occasioned by the seizure and detention of the bankrupt's property can be recovered, and that the recovery of all other costs and expenses depends on their being brought within section 2, cl. 18, and general order 34, which are but declaratory of the general equity power relating to costs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. § 476.*]

3. BANKRUPTCY (§ 477*)—INVOLUNTARY PETITION—CONTEST—EXPENSES.

Where an issue raised on an involuntary bankruptcy petition was referred to a master, and expenses incident to receivership and the taking of testimony were directed to be paid out of the funds in the possession of the receiver, such direction did not constitute an adjudication that they should ultimately be charged against the estate, but was merely provisional.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 900; Dec. Dig. § 477.*]

4. BANKRUPTCY (§ 474*)—INVOLUNTARY PETITION—CONTEST—SEIZURE AND DETENTION OF BANKRUPT'S PROPERTY—DAMAGES.

Where, on the filing of an involuntary bankruptcy petition, a receiver was appointed, and the property of the alleged bankrupt seized, damages occasioned by the seizure and detention of the property were not recoverable, on a subsequent dismissal of the petition, against the petitioning and intervening creditors generally, but only against the creditor on whose application the property was seized.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

5. BANKRUPTCY (§ 474*)—INVOLUNTARY PETITION—SEIZURE AND DETENTION OF PROPERTY—DAMAGES.

Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), providing for recovery from unsuccessful petitioners of damages occasioned by the seizure and detention of the bankrupt's property during the determination of the petition, has no application where the seizure and detention occasioned no loss, but rather had the effect of avoiding impending loss, in which case none of the costs and expenses incident to receivership could be charged against the applicant therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

6. BANKRUPTCY (§ 474*)—INVOLUNTARY PETITION—DISMISSAL—COSTS—DIVISION.

General bankruptcy order 34 provides that guardians can recover only such costs as are allowed to a party recovering in a suit in equity. By Bankr. Act July 1, 1898, c. 541, § 2, cl. 18, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), the court in its discretion may impose costs allowed by law on one or the other of the parties, or part against each and part against the estate. Equity rule 67 (29 Sup. Ct. xxxiv) provides for the imposition as costs of the expense of taking depositions, and rule 82 (29 Sup. Ct. xxxvi) declares that the compensation to every master in chancery shall be fixed by the court in its discretion, and shall be charged to and borne by such parties as the court shall direct. Bankruptcy rule 16 provides that an allowance to a special master, in case the involuntary petition shall be dismissed, with costs, may be taxed against the petitioning creditors. *Held*, that where creditors of an alleged bankrupt instituted proceedings against him for an act which, if performed by a competent person, would have been an act of bankruptcy, but they were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defeated because the alleged bankrupt was suffering from a form of insanity which was such that to ordinary persons he would often appear normal, it was a proper case for division of costs and expenses; and hence no counsel fees would be allowed to the bankrupt's guardians, general or ad litem, as against the creditors, but they would be required to pay the fee of the special master and the cost of taking testimony, together with the usual taxed costs in favor of the guardians, the remaining expenses and disbursements to be paid out of the estate in the hands of the receiver.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878-884; Dec. Dig. § 474.*]

In Bankruptcy. In the matter of bankruptcy proceedings against William R. Ward. A petition having been dismissed, the guardian ad litem and the general guardians of the bankrupt apply for compensation, reimbursement, etc. Application granted in part.

Vredenburgh, Wall & Carey, of Jersey City, N. J., for petitioners.

Robert R. Howard, of New York City, for petitioning creditors.

Riker & Riker, of Newark, N. J., for Merchants' National Bank, intervening creditor.

Wayne Dumont, of Paterson, N. J. (Louis H. Porter, of New York City, of counsel), for Alpha Portland Cement Co., intervening creditor.

RELLSTAB, District Judge. After the creditors' petition, praying that William R. Ward be adjudged a bankrupt, was dismissed upon the ground that he was insane at the time of the commission of the alleged act of bankruptcy, the guardian ad litem appointed to defend on behalf of said bankrupt, and the general guardians of the said bankrupt, who were subsequently permitted to intervene to make a like defense, presented their petitions; the former praying for an allowance of \$5,000 as compensation for services rendered as such guardian ad litem, to be paid by the petitioning and intervening creditors, and the latter praying the court to fix the costs, counsel fees, expenses, and damages occasioned by the seizure, taking, and detention of the bankrupt's property by the receiver of this court at \$11,063.20, to be paid by the same creditors.

First, as to the guardian ad litem's claim for compensation:

[1] This guardian was appointed pursuant to United States equity rule 87 (29 Sup. Ct. xxxvii), to defend on behalf of the bankrupt, because of the latter's alleged mental incapacity to defend for himself, and because there was then no general guardian of such bankrupt. He filed an answer, alleging, inter alia, that said Ward, at the time of the alleged act of bankruptcy, was so unsound of mind as to be incapable of committing such act.

His prayer for compensation is based on services alleged to have been rendered in preparing for and aiding in the defense. Upon the intervention of the general guardians and the filing by them of an answer, inter alia, raising the same mental irresponsibility, which took place before the taking of any testimony, the burden of defending the bankrupt passed to them; the guardian ad litem having no further duties to perform in that behalf.

Neither the Bankruptcy Act nor the general orders provide for any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

compensation to the bankrupt in case the petition filed against him is dismissed; and as the guardian, general or ad litem, merely stands in the place and stead of the bankrupt, he cannot recover compensation for services rendered in his behalf from the unsuccessful petitioners. For such compensation he must look to the estate of his ward. The prayer of the guardian ad litem for compensation is dismissed.

: *Second, as to the general guardians' claim for costs, etc.:*

[2] Section 2 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) empowers the District Court to:

"(18) Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."

Section 3e provides:

"Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, of all costs, expenses, and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

General order 34 (89 Fed. xiii, 32 C. C. A. xxxiii) provides:

"In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner."

These provisions, taken together, reveal that a distinction is made in the matter of costs and expenses between those that are due to the court's taking over of the bankrupt's property and holding it in advance of adjudication and those which are incident to the litigation over such adjudication. Under section 3e, only such costs, counsel fees, expenses and damages as are occasioned by the seizure and detention of the bankrupt's property can be recovered. The recovery of the other costs and expenses depends upon their being brought within said section 2, cl. 18, and general order 34, which are but declaratory of the general equity power in relation to such costs, etc. In re Ghiglione (D. C.) 93 Fed. 186, 1 Am. Bankr. Rep. 580; In re Morris (D. C.) 115 Fed. 591; In re Lacov, 142 Fed. 960, 74 C. C. A. 130, 15 Am. Bankr. Rep. 290; In re Hines (D. C.) 144 Fed. 147, 16 Am. Bankr. Rep. 538; Selkregg v. Hamilton Bros. (D. C.) 144 Fed. 557, 16 Am. Bankr. Rep. 474; In re Chas. W. Aschenbach Co., 183

Fed. 305, 105 C. C. A. 517, 25 Am. Bankr. Rep. 502; *In re J. A. Smith*, 16 Am. Bankr. Rep. 478.

[3] The litigation over such charge of bankruptcy was protracted, pending which the court directed the receiver to pay the master for fees earned and expenses incurred in the taking, and making copies, of the testimony, sums aggregating \$3,305.60, and to himself as compensation \$1,500, and petty disbursements incident to the receivership of \$329.94. An additional expense of \$80 was incurred in taking testimony in the presence of the court before a reference was made to the master. No objection is made to the propriety of such disbursements, or to the reasonableness of such fees; but the creditors contend that the court, in directing such payments to be made out of the funds in the hands of the receiver, adjudicated that such disbursements be charged against the estate.

An examination of the orders pursuant to which such disbursements were made fails to disclose any adjudication as to what person or fund should be ultimately chargeable therewith. These orders were made in consideration of the convenience of the master and receiver. Neither was a party to the litigation; they were officers of the court, acting in its stead. To require them to await the final outcome of this protracted litigation was neither necessary nor just. The using of the bankrupt's property in meeting such disbursements was but provisional, and the orders were made at a time when the question of ultimate liability for such fees and expenses was not ripe for adjudication. Such liability is now for the first time ready for determination. *Myers v. Dunbar*, Fed. Cas. No. 9,990, 17 Fed. Cas. 1109; *In re T. E. Hill*, 159 Fed. 73, 86 C. C. A. 263, 20 Am. Bankr. Rep. 73.

[4] The general guardians' claim, it will be observed, is limited to such costs and expenses, etc., as were occasioned by the seizure and detention of the bankrupt's property. So taken, such claim is not recoverable against the petitioning and intervening creditors generally, as prayed, but only against the person upon whose application such property was seized, which in this case is but one of such creditors.

[5] The present case is one where the seizure and detention was more constructive than actual. The estate that stood in the name of the bankrupt at the time of the appointment of the receiver consisted almost entirely of marketable securities pledged as collateral for loans. The appointment was made in the midst of a financial crisis attended with a falling market, and the restraining orders that were issued coincident with said receivership prevented a sacrifice of said collateral, with the result that they were intact at the close of such receivership, with a market value considerably more than when such receivership began. Such results are not those aimed at in section 3e. This section created a new right in the debtor. He is to be reimbursed in case such seizure and detention occasioned him pecuniary loss. It has no application where the seizure and detention occasions no loss; and such section cannot be invoked to recover costs and expenses occasioned in making a successful defense to the charge of bankruptcy. As the taking over by the court of the bankrupt's property in this case had the effect of avoiding impending loss, and the restraints resulted

in actual gain, none of the costs and expenses incident to such receivership should be charged against the applicant for such receiver. However, the costs and expenses that, in a sense, may be said to have been occasioned by the seizing and detaining of the property, are but a small part of the whole expense incident to this protracted litigation. Outside of the receiver's fees and his petty disbursements, all the expenses incurred and almost all of the services rendered by counsel were in consequence of the contest over the question of adjudication; and as counsel of all the parties, in their arguments and briefs, have dealt with the recoverability of such expenses and fees generally, I will so treat them, regardless of the fact that the general guardians' prayer is limited to such as are recoverable under section 3e, and permit them to amend their petition in that particular.

[6] Under general order 34, the guardians can recover only such costs as "are allowed to a party recovering in a suit in equity." And by section 2, cl. 18, of the Bankruptcy Act, the court has a discretionary power to impose the costs "allowed by law" upon one or the other of the parties, or part against each and part against the estate. The eighth clause of United States equity rule 67 (29 Sup. Ct. xxxiv), concerning the taking of testimony, provides:

"The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them."

And rule 82 (29 Sup. Ct. xxxvi) provides:

"The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such parties in the cause as the court shall direct."

Bankruptcy rule 16 of this district, "Allowance to Special Master," is to like effect, providing:

"In case the petition in an involuntary proceeding be dismissed with costs such sum *may* be taxed against the petitioning creditors."

Ward, by his guardians, having successfully defended against the charge of bankruptcy, what in equity and good conscience should he recover in the way of costs from the unsuccessful parties? As already observed, the court found that Ward was insane when he committed the act which was made the basis of the charge of bankruptcy. It was an act, however, which rightfully challenged the attention of his creditors, and one which, in the absence of knowledge of his mental irresponsibility, would justify their characterizing it as an act of bankruptcy.

In such a situation, it cannot be justly said that all the costs and expenses incident to this litigation are due to the petitioning and intervening creditors' unwarranted charges. Ward's insanity was of such a character that to the ordinary person, including creditors, he would often appear to be normal. In *re Ward*, 194 Fed. 89, 114 C. C. A. 167; *Id.* (D. C.) 194 Fed. 174. Therefore a division between the parties of the costs and expenses is equitable. The Bankruptcy Act (except under

section 3e, supra), or the general orders, or the United States equity rules, make no provision for subjecting the unsuccessful parties to the payment of counsel fees. In *re Morris* (D. C.) 115 Fed. 591; In *re Williams* (D. C.) 120 Fed. 34; In *re J. A. Smith*, 16 Am. Bankr. Rep. 478.

A proper balancing of the equities, however, includes a consideration of such counsel fees, even though they cannot ordinarily be included in the costs (*Oelrichs v. Spain*, 82 U. S. [15 Wall.] 211, 21 L. Ed. 43; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Fidelity Co. v. Bucki Co.*, 189 U. S. 135, 23 Sup. Ct. 582, 47 L. Ed. 744; *Jacobus v. Monongahela Nat. Bank* [C. C.] 35 Fed. 395; *Gilbert v. Am. Surety Co.*, 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; *Lindeberg v. Howard*, 146 Fed. 467, 77 C. C. A. 23, 8 Ann. Cas. 709), inasmuch as they are an expense that the litigation has entailed upon the bankrupt.

The following disposition of the costs and expenses, therefore, is deemed equitable in the circumstances: No counsel fees will be allowed to counsel for the guardians, general or ad litem, as against the creditors; and the creditors, original and intervening, are required to pay the sum of \$3,305.60, the amount paid to the special master, and the sum of \$80, incurred in the taking of testimony before the court in advance of the reference, together with the usual taxed costs in favor of both the guardian ad litem and the general guardians. The remaining expenses and disbursements, including those paid to the receiver, are to be paid out of the funds of the estate.

UNITED STATES v. GRAND TRUNK RY. CO. of CANADA.

(District Court, W. D. New York. March 8, 1913.)

RAILROADS (§ 229*)—REGULATION—SAFETY APPLIANCE ACT—"TRAIN."

Where defendant railroad company hauled certain cars from Buffalo to Bridgeburg, in Canada, a distance of about two miles over a drawbridge crossing a Barge Canal and the International Bridge across Niagara river, not in pursuance of switching operations nor in defendant's yards, but that they might be delivered to another crew at Bridgeburg and continued on their journey to destination, such cars and locomotives, though without a caboose, constituted a "train," within Safety Appliance Act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), requiring all cars to be equipped with power brakes, to be operated by the engineer, the word "train" being used in its ordinary sense as a connected line of cars or carriages on a railroad; and hence a failure to have the air brakes connected so that they could be operated from the engine constituted a violation of the act.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 743; Dec. Dig. § 229.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7056, 7057.]

Action by the United States against the Grand Trunk Railway Company of Canada. Judgment for the United States.

John Lord O'Brien, U. S. Atty., of Buffalo, N. Y.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (John W. Ryan, of Buffalo, N. Y., of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. Action to recover penalty for violation of section 2 of the Safety Appliance Act, passed March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), as amended. It is substantially provided by the said act that trains shall have their brakes, including the brakes of all power-braked cars in such train, used and operated by the engineer of the locomotive drawing the train. The statute, which is broadly phrased, does not contain any exceptions, or specifically refer to yard movements or switching movements, or to any conditions under which such power brakes are not required to be controlled by the engineer, and it is therefore important to determine whether the cars in this case come within the provisions of the act.

The undisputed facts show that the cars constituting the train were hauled from Black Rock, in Buffalo, to Bridgeburg, in Canada, a distance of approximately two miles, over a drawbridge crossing the Barge Canal and over the International Bridge across Niagara river. The cars were not engaged in the performance of a switching operation, nor were they moving in the yard of the defendant company; but the evidence as to one cause of action set forth in the complaint shows that 9 cars were coupled and loaded, and hauled by a locomotive, and, as to the other cause of action, that there were 25 coupled, loaded cars similarly hauled on the main track to Bridgeburg, from whence they were destined to other points. I think the journey was fairly initiated at Buffalo, and that the cars coupled to the locomotive constituted a train, and that the operators of the train constituted a train crew, even though orders from the train dispatcher of the defendant were not given to them at Buffalo, but were given to another crew relieving them at Bridgeburg.

In Webster's Dictionary the word "train" is defined as a "connected line of cars or carriages on a railroad." In *Detroit Street Railway v. Mills*, 85 Mich. 634, 48 N. W. 1007, it is stated that "a train is a continuous or connected line of cars or carriages on a railroad." In *Dacey v. Old Colony R. R. Co.*, 153 Mass. 112, 26 N. E. 437, and in *Carson v. B. & A. R. R. Co.*, 164 Mass. 523, 42 N. E. 112, a train is defined to be "a locomotive and one or more cars coupled together and run upon a railroad." These definitions induce the belief that Congress, in enacting the Safety Appliance Act, used the word "train" in the ordinary and not the technical sense, regardless of the varying rules and practices of carriers.

The Supreme Court of the United States in *Johnson v. Southern Pac. Ry. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, supports the view that, even though the statute was in derogation of the common law, it should not be so strictly construed as to defeat the purpose of Congress, and it was there held that locomotive engines are included in the act under the words "any car." By a parity of reasoning the words "any train" are believed to clearly include all trains having cars coupled together and locomotives drawing them, irrespective of whether a caboose is attached or markers displayed.

Upon the question of whether those in charge of the train between Buffalo, and Bridgeburg constituted a regular train crew, the decision of the Circuit Court of Appeals for the Seventh Circuit in *Atchison, Topeka & Santa Fé Ry. Co. v. U. S.*, 198 Fed. 637, may profitably be

considered. There the train, carrying cars, caboose, and markers, was coupled together by switching crews from localities on the outskirts of Chicago, and hauled from different side tracks onto the main tracks across a drawbridge at a rate of from six to eight miles an hour and proceeded a distance of six miles; the crews at the time being under the supervision of the yardmaster and not of the train dispatcher. The only material difference between that case and the one at bar is as to the distances covered by the trains. While it is true that the trains in the latter case traveled a distance of only about two miles over the land and water, there seems to be no good reason why the air hose should not have been coupled up directly after the switching operation was completed, and the cars coupled and moved.

There is no appreciable hardship to the defendant in requiring compliance with the provisions of the act, which obviously was passed to minimize dangers and risks to which brakemen and switchmen are subjected. It would probably be more convenient for the defendant to couple and uncouple the air hose at Bridgeburg, across the river, where its train dispatcher is located, and where another crew assume control of the train; but the train crew—for such I think they were—accompanying the train to Bridgeburg were entitled to the protection which the statute obviously designed they should receive as soon as the locomotive and cars, engaged in interstate commerce, were coupled together and started on the main track towards their destination.

A decree may be entered in both causes of action against the defendant for the penalty provided by the statute.

In re SELMAN HEATING & PLUMBING CO.
(District Court, N. D. Alabama, S. D. March 7, 1913.)

No. 11,975.

1. PRINCIPAL AND AGENT (§ 123*)—GENERAL OR SPECIAL AGENT—EVIDENCE.

Evidence *held* to require a finding that a sale of certain goods by petitioners to a bankrupt through an agent was made after the agent had terminated his contract as petitioners' general local representative, and while he was acting as a special agent only.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.*]

2. BANKRUPTCY (§ 140*)—PROPERTY OF BANKRUPT—SALE BY SPECIAL AGENT—VIOLATION OF AUTHORITY.

Where petitioners' special agent, authorized only to make a sale of certain goods to a bankrupt on receiving notes secured by indorsement, attempted to make the sale, receiving the bankrupt's unindorsed notes, which petitioners disapproved and caused to be returned to the bankrupt, the sale was not effective to pass title to the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. PRINCIPAL AND AGENT (§ 148*)—GENERAL AGENT—OSTENSIBLE AUTHORITY.

Petitioners' local representative having severed his connection with them to take effect March 1, 1912, they determined to close their local business, and for this purpose directed that he sell the goods belonging to petitioners in the local warehouse, accepting for any unpaid part of the price only the purchaser's notes with good personal indorsement. He

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sold the goods to bankrupts, accepting their unindorsed notes for the unpaid portion of the price, which petitioners refused to accept, and returned to the bankrupts through petitioners' attorney. *Held*, that such sale was not in the usual course of business of the agent; and hence the bankrupts were not entitled to claim that he had ostensible authority to accept the unsecured notes and complete the sale, but they were charged with notice of his instructions with reference to the particular transaction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 534-552; Dec. Dig. § 148.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Selman Heating & Plumbing Company. On petition of F. S. Hardy & Co. to reclaim certain property. Petition allowed.

Perdue & Cox, of Birmingham, Ala., for petitioner.

Max J. Winkler, M. M. Ullman, and Thompson & Thompson, all of Birmingham, Ala., for trustee in bankruptcy.

GRUBB, District Judge. This was a petition to review the order of the referee disallowing the petition of the claimants to reclaim certain goods, or the proceeds of their sale as made by the trustee under the usual stipulation, upon the ground that title remained in petitioners at the time of the filing of the petition in bankruptcy. The record shows without conflict that the property involved was originally the property of petitioners, and that in November, 1911, it was stored, at their instance, in the warehouse of the bankrupt in Birmingham, with leave to the bankrupt, upon the specific order of the petitioners' local representative in each instance, to sell portions of the stock. The stock was kept for petitioners' general use in their trade at Birmingham. In February, 1912, the local representative of the petitioners severed his connection with them, to take effect March 1st. In view of this, petitioners determined to close out their business in Birmingham, and sell out their stock. Their former representative was thereupon authorized by them, as petitioners contend, to dispose of the balance of their stock as their special agent and after he had left their general employment. The trustee contends that their local representative made the sale to the bankrupt while still their general sales representative and by virtue of his authority as such. The local representative did make a sale or attempted sale of the entire remainder of the stock to the bankrupt in February or March, 1912; some three months before bankruptcy intervened. The actual authority given their local representative by petitioners was only to sell the bankrupt, taking notes amply secured by personal indorsement. However, the local representative violated his instructions and accepted the bankrupt's unindorsed notes and sent them to petitioners, but petitioners disapproved, and caused them to be returned to the bankrupt through their attorney. The rights of the respective parties in the property involved are to be determined by the extent of the authority of the petitioners' local representative to bind the petitioners by a sale on terms, which he had no authority to propose, and which violated his instructions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is conceded that, if the sale was made after March 1st, petitioners' local representative, having previous to that time left their employment, and having only such authority as was conferred upon him by petitioners to conduct the particular transaction, was a special rather than a general agent in the conduct of the sale, and the bankrupt would, in that event, take the risk of his actual authority to make it on the terms it was attempted to be made, and, as the agent had no actual authority to make the terms he attempted to make, the sale was not binding on petitioners, and the title did not pass out of them.

[1] The referee reached the conclusion that the sale was made before March 1st, and while the agent was acting as petitioners' general local representative. I think the letter of February 29, 1912, written petitioners by their agent, clearly shows that no sale was made by the agent to the bankrupt until after March 1st. That letter asks petitioners to submit prices to the bankrupt on part of the stock, which is inconsistent with the existence of even an executory agreement to sell it at the date the letter was written. That there was no such executed sale as would avail to pass title is made clear by the fact that no definite terms were fixed and that the notes subsequently tendered to petitioners by the bankrupt were not like those prescribed in the original agreement, and must have been the result of negotiations subsequent to March 1st. The notes which were tendered by the bankrupt and rejected by the petitioners were not submitted to them until more than two months after March 1st. Looking to the correspondence and the undisputed history of the transaction, I think the fair inference to be drawn is that there was no binding agreement to sell, and certainly no sale that would pass title from the petitioners to the bankrupt prior to March 1, 1912.

[2] If so, then the petitioners' local representative had only such authority as had been actually conferred upon him by his principals, the petitioners, which was to sell only upon indorsed notes with approved security, which he failed to do, and the unauthorized agreement made by him, in that event, would not be binding upon petitioners.

[3] Even if the sale had been made prior to March 1, 1912, and while petitioners' local representative was still acting as their general sales agent at Birmingham, in view of the conceded fact that it was made in direct violation of the petitioners' repeated instructions not to sell the bankrupt except on approved personal security, the sale would not bind petitioners, unless its terms were within the apparent authority of the agent. A general sales agent has the undoubted authority to bind his principal to sales in the ordinary course of business and by extensions of credit usual in such course of business. This would be true, though the agent acted in violation of secret instructions of his principal to the contrary. The sale contended for, however, was not in the usual course of business of the agent as petitioners' sales agent, nor was it made on the usual terms of credit. It was not a sale to a customer from stock in the ordinary course of business, but a sale to a dealer or competitor of the entire stock of the principal to close out their business at the local point. The buyer was aware of this situation when he purchased. The terms of credit were not those usually extended to a customer, but unusual, and resembled rather those ex-

tended to the purchaser of a business or an entire stock. By accepting such unusual terms, the purchaser was charged with notice that it was an unusual transaction, and one not within the general scope of the agent's authority as a salesman. The bankrupt, being notified by the peculiar circumstances of the transaction that it was a particular and unusual transaction and not one of ordinary sale to a customer, cannot claim that it was made within the apparent, though beyond the actual, authority of the agent, since the apparent authority of the agent extended only to transactions within the general scope of his business for his principal and not to particular transactions which he conducted for his principal, not by virtue of his general agency, but only by virtue of a special delegation in that particular instance and no other. This being true, the bankrupt dealt with the agent at its peril as to the extent of his authority, and it being conceded that he had actual authority to sell to the bankrupt only by taking indorsed notes, which he failed to do, the attempted sale, even if made prior to March 1st, would not bind the petitioners.

The petition for review is granted, and the petition is referred to the referee to proceed in conformity with this opinion and the stipulation on file with reference to the disposition of the proceeds of the sale of the property involved.

CARBERRY v. ACME TRANSIT CO.

(District Court, W. D. New York. January 29, 1913.)

1. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMED FACTS.

Where plaintiff, with other workmen, was engaged in hauling a cable on a steamer, and plaintiff's fingers were crushed in the cogs of the wheel of the winch by the sudden slackening of the cable, instructions in relation to plaintiff's inexperience and ignorance of the possible result of a sudden slackening of the cable were not erroneous, in assuming that he did not know that, while he was pulling on the wheel of the winch, other workmen were engaged in hauling the cable, since, if plaintiff was ignorant of the possible results of such slackening, it was immaterial whether he saw the other workmen hauling on the cable or not.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

2. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO OBJECT.

Where the court in its instructions misstates the testimony on a point prejudicial to defendant, it is the duty of defendant's counsel to call the court's attention thereto at the close of the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

3. NEW TRIAL (§ 76*)—AMOUNT OF DAMAGES—PERSONAL INJURIES—DISCRETION OF JURY.

In an action for personal injuries, the amount of damages to be awarded is entirely within the province of the jury, with which the court will not interfere, unless the amount awarded is so excessive as to show that the jury acted from passion or prejudice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by John F. Carberry against the Acme Transit Company. Verdict for plaintiff. On defendant's motion for new trial. Denied.

Hamilton Ward, of Buffalo, N. Y., for plaintiff.

Thomas C. Burke, of Buffalo, N. Y. (Thomas H. Garry, of Cleveland, Ohio, of counsel), for defendant.

HAZEL, District Judge. [1] The principal objection to the instructions given the jury is that the court assumed that the plaintiff did not know that, while he was pulling on the wheel of the winch and winding it up, other workmen were engaged in hauling the cable, which suddenly slackened and crushed his fingers in the cog of the wheel, when it was practically admitted by him that he knew that the witness Harrington, who was in charge of the steamer and the other workmen, was engaged in hauling on the steel cable just before the plaintiff sustained injuries. The instructions of the court on this subject had relation to plaintiff's inexperience and ignorance of the possible results of a sudden slackening of the cable, and of the method of operating the winch, and of the momentum of the wheel; and if the plaintiff was ignorant thereof, as was manifestly the opinion of the jury, it makes no difference whether he saw the men hauling on the cable or not.

[2] The question of his asserted inexperience was submitted to the jury. If the court misstated the testimony on this point, and such misstatement was thought to be prejudicial, the court's attention should have been called thereto by counsel for defendant at the close of the charge to the jury. Any mistaken assumption as to the testimony embodied in the instructions is not sufficient ground for setting aside the verdict.

[3] It was my impression that the verdict was excessive, or at least larger than was required by the extent of the injuries to compensate the plaintiff, and I have given the question of excessive damages careful consideration, but think I must decline to hold that the jury erred in making such award. It is not improbable that I should have awarded a somewhat smaller amount if I were to have determined the case, but at this stage my views on this subject ought not to control. The cases cited by plaintiff all hold that the matter of assessing damages in actions for injuries sustained by reason of the negligence of a defendant is entirely within the province of the jury, and that there should be no interference by the court, unless the amount is so excessive as to show that it resulted from passion or prejudice on the part of the jury.

In *Van Sickel v. Ilsley*, 75 Hun, 537, 27 N. Y. Supp. 1113, the plaintiff sustained injuries similar to those of the plaintiff in suit. The jury rendered a verdict of \$3,300, and the Appellate Division for the Fourth Department did not think the verdict excessive. In *Eldridge v. Atlas Steamship Co.*, 58 Hun, 96, 11 N. Y. Supp. 468, three fingers were lost by the plaintiff while operating a steam winch on a steamboat, and the verdict of \$3,700 was sustained. In *Borgeson v. U. S. Projectile Co.*, 2 App. Div. 57, 37 N. Y. Supp. 458, there was a loss

of the middle finger and the impairment of the first and third, and the court reduced the verdict from \$8,000 to \$5,000. In *Teeft v. Buffalo Dry Dock Co.*, 147 App. Div. 918, 131 N. Y. Supp. 1146, the injuries were a broken right thumb on the hand of a carpenter, and the appellate court was of opinion that \$3,500 was not excessive.

These decisions are persuasive of the reasonableness of the verdict at bar, and lead to a denial of the motion.

KRAVER v. ABRAHAMS.

(District Court, E. D. Pennsylvania. March 1, 1913.)

No. 2,178.

1. BANKRUPTCY (§ 302*)—ACTION BY TRUSTEE—PLEADING.

Under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee with the rights of a judgment creditor holding an execution duly returned unsatisfied as to property not in possession of the court, it is not necessary for a trustee, in an action to recover property alleged to have been preferentially or fraudulently transferred, to allege that the assets are not sufficient to pay creditors in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

2. PLEADING (§ 64*)—DUPLICITY—ACTION BY TRUSTEE IN BANKRUPTCY.

A statement of claim in an action by a trustee in bankruptcy to recover property transferred by the bankrupt is not multifarious, because it seeks to recover on the alternative grounds that the transfer was either fraudulent or preferential.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

3. BANKRUPTCY (§ 293*)—ACTION BY TRUSTEE—JURISDICTION.

Under Bankr. Act July 1, 1898, c. 541, §§ 60b, 67e, 30 Stat. 562, 564 (U. S. Comp. St. 1901, pp. 3445, 3449), as amended by Act Feb. 5, 1903, c. 487, §§ 13, 16, 32 Stat. 799, 800 (U. S. Comp. St. Supp. 1911, pp. 1506, 1509), which vests courts of bankruptcy with jurisdiction of suits by trustees to recover property transferred either preferentially or fraudulently, a District Court of the United States, which is a court of bankruptcy under the act, has jurisdiction of such a suit, although it is brought as an action at law, since it is not in any case a proceeding in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

At Law. Action by one Kraver, trustee in bankruptcy, against one Abrahams. On demurrer to statement of claim. Overruled.

D. H. Solis-Cohen and A. L. Moise, both of Philadelphia, Pa., for plaintiff.

H. L. Barroway and B. D. Oliensis, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff, as trustee in bankruptcy, sues in assumpsit to recover from the defendant the sum of \$3,500 upon a transaction consisting of the payment of money by the bankrupts to the defendant within one month of the filing of the petition in bankruptcy against them, which payment was averred to have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been made when the bankrupts were insolvent, and under circumstances alleged to amount either to an unlawful preference under section 60b or to a fraudulent transfer under section 67e of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]).

[1] The defendant demurs, upon the ground that the statement contains no averment that the trustee, the plaintiff, has not sufficient assets on hand to pay all the bankrupts' creditors in full, relying upon the cases of *Mueller v. Bruss*, 8 Am. Bankr. Rep. 442, 112 Wis. 406, 88 N. W. 229, and *Prescott v. Galluccio* (D. C.) 21 Am. Bankr. Rep. 229, 164 Fed. 618, in which it was held that, in a suit to set aside a transfer of property by the bankrupt upon the ground that it was fraudulent as to creditors, the trustee must aver and prove that the property of the bankrupt is not sufficient to pay his creditors in full. The rule laid down in the cases cited was based upon the ground that the trustee has no rights superior to the creditors whom he represents, and that, even if the transfer is fraudulent, there is no right to avoid it unless it appears that the assets of the bankrupt estate are insufficient to pay the creditors in full. The necessity, if it existed, to aver and prove a deficiency of assets, appears, however, to have been removed by the amendment of 1910 to section 47a (2) of the Bankruptcy Act (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), by which it is provided that as to all property not in the custody of the bankruptcy court the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied. In other words, under the amendment, where a transfer is alleged to have been fraudulent as to creditors, and insolvency is alleged to have existed at the time, the trustee is in the position of a creditor who has proved by an execution returned unsatisfied that a deficiency of assets exists. There is, therefore, no necessity for its averment in the statement of claim.

[2] The defendant further demurs that the statement of claim is multifarious and inconsistent, in that the plaintiff seeks to recover upon the grounds of an unlawful preference under section 60b, and a transfer for the purpose of hindering, delaying, and defrauding creditors under section 67e. As was said by Judge Holt in *Wright v. Skinner* (D. C.) 14 Am. Bankr. Rep. 500, 136 Fed. 694:

"It is not necessarily impossible that the payment may have been at the same time a preference, and a payment made with intent to hinder, delay, and defraud creditors; and, if it is either, it seems to me that the bill may be drawn so as to meet the alternative. There is alleged in these bills one transaction, consisting of a payment of money. The plaintiff alleges that it amounted to either a preference or a fraudulent payment, and that in either case he is entitled to its return. I cannot see in such an allegation any such inherent inconsistency as there is in those cases in which it has been held to be not permissible to unite two absolutely inconsistent causes for equitable relief."

See, also, to the same effect, *Bryan v. Madden*, 11 Am. Bankr. Rep. 763, 38 Misc. Rep. 638, 78 N. Y. Supp. 220.

[3] The remaining ground of demurrer is to the jurisdiction of the court. The contention of counsel is that the suit was brought in the United States District Court sitting as such, and not as a bankruptcy

court, and in support thereof section 23b of the Bankruptcy Act, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1911, p. 1499), is cited, which reads as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60b, section 67e, and section 70e."

After the decision of the Supreme Court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the three sections covered by the exception in section 23b were amended in 1903, by adding:

"And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 1 of the act provides that courts of bankruptcy shall include the District Courts of the United States, and section 2 provides that the courts of bankruptcy as hereinbefore defined, among others, the District Courts of the United States, are thereby made courts of bankruptcy, and are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.

A proceeding instituted by a bankrupt's trustee to set aside fraudulent conveyances or illegal preferences is not a proceeding in bankruptcy, but is ancillary to such a proceeding, and authorized by the Bankruptcy Act to be instituted in either the federal District Court or in a state court of competent jurisdiction. It must be governed, so far as pleading and practice are concerned, by the laws and rules of the court wherein it is instituted. *Westall et al v. Avery*, 171 Fed. 626, 96 C. C. A. 428; *Pond v. New York National Exch. Bank* (D. C.) 124 Fed. 992.

In the latter case Judge Holt said:

"Such a suit is not a bankruptcy case, within the meaning of the provision in the amended act."

In *Westall v. Avery* it was held that the procedure in a bill in equity brought by a trustee in a federal court is governed by the equity practice and principles of the federal courts.

In the present case, the trustee, having a remedy at law, chose to proceed by an action at law, rather than in equity, and in actions at law the practice in the federal courts is governed by section 914, Rev. St. (U. S. Comp. St. 1901, p. 684), which provides for a conformity in practice and pleadings in civil suits at law with the practice and pleadings in the courts of record in the state within which the District Court is situated. The action in this case was brought in the District Court, which is invested with jurisdiction as a court of bankruptcy, and all of the jurisdictional facts necessary to sustain the action in this court are set out; but, being an action at law, the process and pleadings and procedure properly conformed to those applying to other actions at law.

The demurrer is overruled.

WESTERN UNION TELEGRAPH CO. et al. v. AMERICAN BELL TELEPHONE CO.

AMERICAN BELL TELEPHONE CO. v. WESTERN UNION TELEGRAPH CO. et al.

(Circuit Court of Appeals, First Circuit. March 18, 1913.)

Nos. 938, 939.

1. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACTS BETWEEN COMPANIES—STOCK DIVISION—ACCOUNTING—APPORTIONMENT.

Complainant transferred to defendant all its telephone business and patents in consideration of a payment by defendant of 20 per cent. of all rentals or royalties received from licenses or leases for telephones. Defendant granted perpetual licenses to local companies and exchanges, receiving therefor a proportion of the stock of each local company, and also rentals for instruments used by it. *Held*, that such stock so received having been held to be rentals or royalties within the contract, and defendant having so confused its receipt thereof that there was no practical basis on which an apportionment could be worked out on the theory that the contract only ran for 17 years during the life of the patent, while the licenses were unlimited, a decree refusing apportionment was proper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.*]

2. APPEAL AND ERROR (§ 1071*)—REVIEW—PREJUDICE—EVIDENCE—REFUSAL OF MASTER TO REPORT.

Refusal of a master to take down all the evidence which defendant proposed to introduce and report the same to the court was not ground for reversal of a decree entered on the master's report, where the matter so eliminated proved to be immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

3. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACT BETWEEN COMPANIES—ACCOUNTING.

Where defendant telephone company agreed to pay complainant telegraph company 20 per cent. of all rentals and royalties received from licenses or leases for telephones in consideration of a transfer of complainant's telephone business, defendant was not relieved from liability to account for 20 per cent. of such receipts by reason of the fact that the licenses and receipts also included the receipts from private lines, long-distance telephoning, etc., only to the extent of the qualified use, and not including any exclusive territorial rights for exchanges or long-distance telephoning.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.*]

4. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACT BETWEEN COMPANIES—ACCOUNTING.

Where defendant agreed to pay complainant 20 per cent. of its receipts from licenses to use telephones in consideration of a transfer of complainant's telephone business, and defendant received stock in local telephone companies in consideration of licenses to use complainant's phones, the fact that the licenses stipulated that additional payments might be made for use of call bells and other incidental matters in which complainant had no interest did not affect complainant's interest in the stocks so received; defendant never having exacted any additional royalties on account of such incidentals.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. § 16.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—50

5. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACT BETWEEN COMPANIES—ACCOUNTING—EXTRATERRITORIAL OR PRIVATE-LINE SERVICE.

A contract, by which defendant agreed to pay complainant 20 per cent. of the amount received from telephone licenses, provided that the right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation, were to remain exclusively with the defendant. *Held* that, where there was no evidence that defendant, in good faith, ever made any specific grant of the use of a specific number of telephones on lines between telephone exchanges known as extraterritorial lines, independent of any licenses for telephones, it was not entitled to any deduction in its accounting for extraterritorial or private-line telephoning.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 10; Dec. Dig. § 16.*]

6. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACTS BETWEEN COMPANIES—ACCOUNTING—EXPENDITURES.

Where defendant held stock in certain telephone corporations, a percentage of which belonged to complainant under a contract, voluntary expenditures made by defendant in order to increase the value of such stock, for which no obligation was assumed in any way by complainant, could not be considered in determining the amount complainant was entitled to receive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 10; Dec. Dig. § 16.*]

7. TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACTS BETWEEN COMPANIES—CONSTRUCTION—DIVISION OF RENTALS.

As there was only one equity which the Western Union is entitled to the benefit of, the stocks to be accounted for were subject to the commission of 30 per cent. nominated in the contract.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 10; Dec. Dig. § 16.*]

Appeals from the Circuit Court of the United States for the District of Massachusetts; Le Baron B. Colt, Judge.

Suit in equity by the Western Union Telegraph Company and others against the American Bell Telephone Company. From a decree (187 Fed. 425) confirming a master's report, both parties appeal. Affirmed.

Josiah H. Benton, of Boston, Mass., and Rush Taggart, of New York City, for Western Union Telegraph Co.

Frederick P. Fish, John C. Gray, and Roland W. Boyden, all of Boston, Mass. (Charles H. Swan, of Boston, Mass., on the brief), for American Bell Telephone Co.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. These are cross-appeals from a judgment entered in the Circuit Court for the District of Massachusetts on February 20, 1911. This bill was brought originally by the Western Union Telegraph Company against the American Bell Telephone Company, and, after various proceedings in the Circuit Court, came to this court on appeal by the Western Union Telegraph Company and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its coproponents against a decree in the Circuit Court in favor of the respondent there, the American Bell Telephone Company. On October 6, 1903, we entered a judgment as follows:

"The decree of the Circuit Court is reversed; the case is remanded to that court to enter a decree for the complainants for an accounting and for further proceedings in accordance with our opinion; and the appellants recover their costs of appeal."

Pursuant to this judgment a mandate duly issued to the Circuit Court for the District of Massachusetts, which latter court referred the case to a master, which master duly made his report to the Circuit Court in favor of the complainants; and thereupon such proceedings occurred that the Circuit Court passed down its opinion on February 20, 1911 (187 Fed. 425, and sequence), and entered a final decree in favor of the complainant, the Western Union Telegraph Company, on April 4, 1911, as follows:

"Colt, J. This case came on to be heard before me upon the master's report, the plaintiffs' exceptions thereto, filed September 28, 1909, the defendant's exceptions thereto, filed October 15, 1909, respectively, and upon the motion of the plaintiffs, filed October 28, 1909, as to confirmation of the master's report.

"The case was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed that the exceptions to the master's report are overruled and the report confirmed.

"And it appearing that the Bell Telephone Company of Buffalo, the Central New York Telephone & Telegraph Company, the Empire State Telephone & Telegraph Company, the Hudson River Telephone Company, and the New York & Pennsylvania Telephone & Telegraph Company have since April 1, 1909, been consolidated with other companies and are no longer in existence, and that in connection with such consolidation the defendant received for its shares in said Bell Telephone Company of Buffalo on September 30, 1909, the sum of \$93.50 per share, for its shares in the Central New York Telephone & Telegraph Company on April 30, 1909, the sum of \$65 per share, for its shares in the Empire State Telephone & Telegraph Company on April 27, 1909, the sum of \$40 per share, for its shares in the Hudson River Telephone Company on April 27, 1909, the sum of \$66 $\frac{2}{3}$ per share, and for its shares in the New York & Pennsylvania Telephone & Telegraph Company on April 27, 1909, the sum of \$50 per share, and it appearing further that the name of the City & Suburban Telephone Association has been changed to the Cincinnati & Suburban Bell Telephone Company, it is further ordered, adjudged, and decreed that the defendant assign, transfer, and deliver to the plaintiffs within 60 days—

- 168 shares of the capital stock of the Bell Telephone Company of Missouri;
- 1,281.46669 shares of the capital stock of the Bell Telephone Company of Pennsylvania;
- 698.775 shares of the capital stock of the Central District & Printing Telegraph Company;
- 1,700.0844 shares of the capital stock of the Central Union Telephone Company;
- 2,116.8 shares of the capital stock of the Cincinnati & Suburban Bell Telephone Company;
- 392 shares of the capital stock of the Cleveland Telephone Company;
- 1,292.256 shares of the capital stock of the Colorado Telephone Company;
- 1,581.06578 shares of the capital stock of the Cumberland Telephone & Telegraph Company;
- 154.56 shares of the capital stock of the Michigan Telephone Company;
- 616.9156 shares of the capital stock of the Missouri & Kansas Telephone Company;

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| 560.69419 | shares of the capital stock of the Nebraska Telephone Company; |
| 3,360.42 | shares of the capital stock of the New England Telephone & Telegraph Company; |
| 779.94 | shares of the capital stock of the Northwestern Telephone Exchange Company; |
| 322.98 | shares of the capital stock of the Providence Telephone Company; |
| 273 | shares of the capital stock of the Rocky Mountain Bell Telephone Company; |
| 490 | shares of the capital stock of the Southern Bell Telephone & Telegraph Company; |
| 735 | shares of the capital stock of the Southern New England Telephone Company; |
| 840 | shares of the capital stock of the Southwestern Telegraph & Telephone Company; |
| 428.68 | shares of the capital stock of the Wisconsin Telephone Company. |

"And it is further ordered and decreed that the defendant pay to the plaintiffs the sum of \$1,645,765.49, being the principal sum found to be due by the master as of April 1, 1909, together with \$934,149.15, the amount of interest found to be due by the master as of April 1, 1909, together with \$194,748.92, being interest upon the aforesaid principal sum from April 1, 1909, to March 20, 1911, together with \$172,023.77, being the cash dividends received on stocks enumerated by the master between April 1, 1909, and March 20, 1911, and \$10,888.51, being interest on said dividends from the dates when they were respectively received to March 20, 1911, together with \$162,028.53, being the payments received by the defendant for the shares of stock in the Bell Telephone Company of Buffalo, the Central New York Telephone & Telegraph Company, the Empire State Telephone & Telegraph Company, the Hudson River Telephone Company, and the New York & Pennsylvania Telephone & Telegraph Company, to which, under the terms of the master's report, the plaintiffs are entitled, together with \$17,035.94, being the interest upon said payments from the times when they were respectively received to March 20, 1911.

"And it also appearing that on September 15, 1909, the defendant received a stock dividend of 2 per cent. on the shares held by it in the Cumberland Telephone & Telegraph Company, which was paid to it in stock of the American Telephone & Telegraph Company at par, of which stock 31,6213 shares should be transferred to the plaintiffs, and that on October 15, 1909, the defendant received a dividend on said shares thus due to the plaintiffs of \$63.24, and that on November 19, 1909, it sold said shares at \$141.12 per share, amounting to \$4,462.40, it is further—

"Ordered and decreed that the defendant pay to the plaintiffs said dividend, and the amount received for said shares, being together \$4,525.64, and interest thereon from the time when said dividend and the price of said shares were respectively received to March 20, 1911, amounting to \$363.16, being a total of \$4,888.80. The total amount thus ordered and decreed to be paid by the defendant to the plaintiffs, with interest thereon from March 20, 1911 (to which date interest has been computed in making this decree), until paid, is three million, one hundred forty-one thousand, five hundred twenty-nine dollars and eleven cents (\$3,141,529.11)."

From this final decree the complainants and the American Bell Telephone Company each entered an appeal to us, which are the appeals now under consideration.

It is convenient throughout this opinion to use the expression "Western Union" as denoting all the original complainants, and the expression "American Telephone" as designating the original respondent.

We perceive it necessary to observe that we do not find in the briefs any concise statement presenting succinctly the questions involved in

the manner in which they are raised, or any setting out separately and particularly of each error asserted and intended to be urged, all as required by our rules, and all in such manner that we are sure we completely apprehend all and fully what is intended by the parties to be brought to our attention in the manner so intended. If, therefore, we have overlooked any considerations, it must be attributed, at least in part, to this deficiency, and not be regarded wholly as our own inexcusable failure.

It is not necessary to set out specifically the errors assigned, as there is no claim that the Circuit Court omitted to rule upon any of the matters to which they relate. Therefore, the substance of all of them will be found by turning to the opinion of the Circuit Court, reported, as already stated, in 187 Fed. 425. There were opinions rendered in both the Circuit Court and the Circuit Court of Appeals prior to those which we have already cited; but it is not necessary to recur to them. Moreover, the opinions already referred to of this court of October 6, 1903 (125 Fed. 342, 60 C. C. A. 220), and of the Circuit Court of February 20, 1911 (187 Fed. 425), so fully state the facts herein involved and the conclusions of law heretofore reached that it would be a mere tedious waste of time to undertake to set them out anew. Also, the Circuit Court in its opinion of February 20, 1911, so closely followed the opinion of this court of October 6, 1903, and its mandate issued in pursuance thereof, that it is not necessary to reiterate the conclusions of law now involved, except as to specific matters which we will especially consider herein.

The issues involved are so important, the facts to which they relate are so extensive, and the propositions of counsel pro and con were discussed, as they properly should have been, at such length and with such ability that necessarily our review of the conclusions of the Circuit Court, as shown by its opinion of February 20, 1911, has occupied much time, and has even delayed the case on account of our desire to revise from time to time the impressions which we had received. In this connection we must observe that counsel have, directly and indirectly, challenged with considerable detail the conclusions we reached and embodied in our interlocutory decree; and yet we have been unable to justify ourselves in changing the views which were therein given effect. Consequently, we confine this opinion to those matters of detail which were not brought to our attention before the interlocutory decree was entered, and which naturally did not arise until the report of the master came in. Fortunately, while these matters are of much consequence, and required much attention from the parties, the Circuit Court, and ourselves, the conclusions we have finally reached can be put in comparatively simple form.

[1] We will first consider what may be called the question of apportionment. This was a matter of detail, which, of course, was never in order for discussion by us until now.

The brief for the Telephone Company says as follows:

"This means simply this: The Western Union cannot possibly be entitled to share in all the stock. If entitled to share in stock at all, it is fairly entitled to share only in a part, and the smaller part, of each stock payment.

Considering the question broadly, and without resort to mathematics, it is plain that more than half of the stock must be eliminated from the accounting, because more than half of each stock payment represents a commutation or advance payment of additional rentals which, if received at all, would have been received after November 1, 1896, when the right of the Western Union to share in rentals ceased."

This proposition was met by the learned judge of the Circuit Court in the following language:

"I find nothing in the opinion of the Circuit Court of Appeals to warrant an apportionment of either dividends or stock, as claimed by the defendant. The telephone patents were combined in the hands of the defendant under the contract of November 10, 1879. The contract ran for 17 years, and patents are granted for 17 years. This, therefore, was the period of the monopoly secured by the patents, and hence the period during which these patents would be by far the most valuable. Under these conditions it would seem quite impossible to apply any equitable or satisfactory method of apportionment to this stock.

"Again, so far as the Court of Appeals has in any way referred to this subject, what it said is against the defendant's claim. In the first place, it treats this stock as the equivalent of money. Further, in the course of its opinion, the court observes:

"If, for example, in lieu of the 'ten dollars per annum,' named in paragraph 2 of article 1, the telephone company received, either in shares of stock or money, \$100 for a 10 years' license, which seems to have been commonly granted, or \$170 for a perpetual license, which would mean the entire 17 years for which the contract ran, either hypothesis readily computes an annual rental of \$10; and, if received in advance, it must likewise be accounted for in advance."

"The court here appears to treat the period of 17 years, as applied to the contract of November 10, 1879, as the equivalent of a perpetuity, although it cannot be said that this language of the court is a conclusive finding on this question."

The Circuit Court also quoted quite at length from the findings and rulings of the master. It was of the opinion that it was somewhat guided by what had been already said by the Court of Appeals; but this question was not considered by the Court of Appeals, as already said. We, however, accept the proposition of the learned judge of the Circuit Court to the effect that the conditions were such that "it would seem quite impossible to apply any equitable or satisfactory method of apportionment to the stock" to which the learned judge particularly referred.

We, however, dispose of all questions of apportionment as follows: On the whole, we conclude that, while there might be some equity for apportionment, we are compelled to accept broadly the conclusion on this topic of the learned judge of the Circuit Court, because there is no practical basis on which apportionment could be worked out. This is on the ground that the substance of what was conveyed by the telephone company to its licensees and grantees of all kinds was the use of the telephones during the life of the patents which it controlled, and which were coterminous, for the most part, with the contract on which this suit is based; and because, also, everything for the period which might follow the expiration of the contract was of an evanescent and disappearing character, which could not possibly be estimated, and which, in the light of the subject-matter of the contract, involved nothing for which any party, any licensee or any grantee,

yielded any consideration within the four corners of these proceedings. This condition, and these consequences thereof, arise out of the fact that the telephone company voluntarily accepted, in lump, single undivided considerations, and this during the currency of the contract on which this suit is based; and though in certain instances and certain aspects the considerations might have been of a continuing character, the fact that they were indivisible in their nature was caused by the voluntary action of the telephone company. While not particularly illuminating so far as this case is concerned, yet for one who desires to know how far reaching, under equitable rules, is the doctrine of confusion of goods, we refer to the latest application thereof by the Supreme Court in *Westinghouse Co. v. Wagner Co.*, 225 U. S. 604, 614, 615, 618, 621, 622, 32 Sup. Ct. 691, 56 L. Ed. 1222.

A question is raised with reference to the refusal on the part of the master to admit certain evidence offered by the telephone company. We are unable to find this stated in a form in which we can comprehend it with certainty, except as given in the opinion of the learned judge of the Circuit Court, as follows:

"Stated more fully, the defendant contended that under the decision of the Circuit Court of Appeals the recovery by the plaintiffs under article 1 of the contract of November 10, 1879, was limited to such portion of this stock as may be attributed to the right or license to use telephones, and that the defendant was entitled to show various other considerations for this stock, both within and outside the terms of the license contracts. Among these other considerations the defendant claimed the following:

- "1. Value of connection with the Bell system.
- "2. Value of right to use subsidiary apparatus.
- "3. Value of right to carry on extraterritorial business.
- "4. Value of surrender of options.

"The master limited his inquiry into this subject of consideration to the license contracts themselves, and excluded the defendant's testimony as to the value of considerations outside these contracts; that is, the value of considerations involved in the licensee's connection 'with the great Bell organization, protection against patent suits and infringements, financial assistance, the services of its great engineering and electrical talent, the connection with its extraterritorial lines, and the whole extraterritorial business.'"

This is apparently, in part at least, what was referred to in the arguments before us by the telephone company when it urged with fullness that the telephone offered only the possibility of profit which would never have come into being without other machinery just as essential as the telephone itself; that the profits could not have been obtained without the control of the essential additional apparatus; that the Bell Company could not utilize its opportunities, unless it could devise and control an efficient organization and system of carrying on its business; that the Bell Company controlled the telephone after the most arduous struggle; that it developed, bought, and controlled the other essential apparatus and the patents upon it; that, in this and other ways explained by it, it developed the possibility of profits into reality, and brought these profits into the Bell treasury; and that these and other incidental features became of the utmost importance. All this was a matter of course, unless it was assumed that the owner of the telephone patents was to be absolutely supine, and wait for an

overruling Providence to give it the profits which might possibly ensue. In other words, all this was bargained for in the contract of 1879, on which this litigation rests. It was covered in advance by the agreements contained in that contract for the apportioning of the financial results.

[2] The telephone company, however, claims that, under the rule in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, the master was bound to take down seriatim, and perhaps verbatim, all the evidence which the telephone company proposed to introduce, and report it to the court. As the evidence offered was so far outside the case, we cannot conceive that the telephone company can complain to us effectively on that account. The master, moreover, did, in an exhibit attached to his report, give an outline of the evidence offered and which he excluded, stating that he gave its subject-matter and general purport. We are not prepared to admit that *Blease v. Garlington* requires in any view more than this, or especially that it requires us, as the final court of appeal, to reverse the judgment of the Circuit Court on account of any matter which would prove to be immaterial; and we will await further instructions from the Supreme Court before acceding to such propositions.

[3] So far as the "value of the surrender of options" is concerned, the topic has been treated by the learned judge of the Circuit Court in precisely the manner pointed out by us. As for the rest, so far as anything here involved is concerned, the licenses were all expressed to be mainly for the use of telephones. So far as they related to private lines and long-distance telephoning, they gave only a qualified use, which was even less than the full use which might have been given; so that, as a part cannot be more than the whole, the conclusions of the learned judge of the Circuit Court on this topic will be found to have been right. It might have been otherwise if the several licenses had expressly included exclusive territorial rights for exchanges or long-distance telephoning.

[4] Coming to the proposition in the opinion of the learned judge of the Circuit Court, to the effect that the telephone company claims that the stocks received by it were not to be attributed solely to the licenses to use telephones, but to various other considerations, both within and without the terms of the license contracts, it is said that, while the licenses stipulated that additional payments might be made for the use of call bells and other incidental matters, yet in fact no such payments were made; the proposition being that the lessees, from the beginning, used all this incidental apparatus by virtue of the provisions in the licenses, and that the telephone company never did exact additional royalties on that account. Whether it be so or not becomes immaterial in this case, because, if the telephone company had exacted them, the complainant would not have been entitled to anything additional on that account. If it did not exact them, it was for considerations, of course, of its own, as to which, so far as this record is concerned, the Western Union had no part and no concern.

[5] A more serious difficulty arises from the following provision of article 13 of the contract in suit here, as follows:

"(1) The right to connect telephonic district or exchange systems for the purpose of personal conversation between persons at the instruments, and the right to use telephones on all lines not forming a part of a telephonic district or exchange system for such personal conversation (except so far as licenses for private lines are to be granted to the party of the first part under article 14) are to remain exclusively with the party of the second part, and those licensed by it for the purpose."

There are some qualifying sentences following, which are not necessary to be repeated here. It is plain that, if peculiar rights to connect, or other specific rights for what are called here extraterritorial or private-line telephoning, could have been and had been granted by the telephone company as essential subject-matters, and, as it were, independently of any licenses for telephones, what might have been in good faith received therefor could not have come into this accounting; but there is no proposition here of anything of that nature, and there is no evidence of a tangible character that the telephone company ever received anything for such grants. Turning, for example, to the sample contract for extraterritorial connecting lines, we find that it starts with a grant of the use of a specific number of telephones upon lines between telephone exchanges, which is what is covered by the expression "extraterritorial lines." The telephones, however, were limited by the licenses to these specific uses. The contracts, of course, provided that each licensee might "avail itself of, and enjoy, the right of connecting with the exchange systems established within said territory"; that is, the territory within which, according to what preceded, the licensed telephones might be used. This additional privilege contained certain modifications and restrictions, which we need not recite.

The learned judge of the Circuit Court quoted extensively from the report of the master, showing the grounds upon which he made no allowance to the telephone company on this account, and affirmed the master's position. We reaffirm the conclusions of the learned circuit judge by also quoting from the master. We apply what we quote alike to extraterritorial lines and private lines, noting, however, that in this the master laid aside from his consideration "subscriptions and tolls" being moneys received for rights to erect connecting lines between different exchanges and to connect them with such exchanges, and possibly something else. He then stated as follows:

"I ruled that the extraterritorial licenses, for which stock was in part taken, granted more than the right to use and rent telephones on extraterritorial lines, to wit, the right to construct such lines, connect them with exchanges, and carry on a connecting line business with them; and that the latter right rested upon a different consideration than the right to use and rent telephones; and also that the stock issued under the agreements for such licenses was attributable to the licenses as a whole, and not to any separable part or feature of them. But I ruled that, as in the case of exchange licenses, the main grant was of the right to use telephones, as shown by the express declaration of the licenses themselves that the 'right and license hereby granted is the right and license to use said telephones' to carry on personal communications between different exchange districts over extraterritorial lines, etc. (O. R. p. 453); and that the right to build, connect, and operate connecting lines, etc., while important and essential to these particular licensees, as the right to use call bells and other subsidiary apparatus was important and essential to all licensees, was nevertheless incidental to the main grant.

"The evidence which I considered material furnished no means of ascertain-

ing the values of the different licenses or their respective values in comparison with each other, except that the extraterritorial licenses were regarded as less valuable than exchange licenses (D. E. 994) and more valuable than private-line licenses (D. E. 995). And if the two parts or grants or extraterritorial licenses above referred to should properly be regarded as distinct and severable, and the stocks issued for such licenses (if ascertainable) apportionable between the two, the evidence furnished no tangible rule or method by which any definite finding of such relative values could be made. Defendant asserted in its final brief that the license contracts themselves did not indicate or suggest any method of determining the comparative values of the different licenses for which the stock was issued. Nor did the extraterritorial licenses indicate or suggest any method of determining the comparative values of the different rights granted by them. I therefore declined to make any deduction from the stocks to be accounted for, on the ground that they were received in the case of extraterritorial licenses in part for something other than the mere right to use and rent telephones."

As to private-line business, whatever is said in reference to the extraterritorial lines covers it fully. On the whole, there stands the essential fact that the licenses for the two classes of lines granted only qualified uses of telephones, less than the full uses which might have been given. As licenses for telephones limited to extraterritorial uses or private-line uses would not be available, except with the right to use those lines, that right might well have been assumed as incidental, even though not granted in terms; and this so far that without that right these limited telephone licenses would have been incomplete and ineffectual.

For this reason no independent grants relative to private lines and extraterritorial lines were called for, and therefore none were given.

Much has been said before us about the definitions of "rentals" and "gross rentals," and distinctions have been undertaken with reference thereto; but this was all disposed of by us in 1903, and needs no further consideration.

What we have said about apportionment, exchanges, and long-distance telephones disposes for this case of all the propositions made by the respondent, to the effect that the permanent rights granted in exchange for the stocks to which this case largely relates were of the greatest importance and value. This is only another aspect of the same topics.

[6] The claims made by the respondent for reimbursements, or quasi reimbursements, considered in the opinion of the learned judge of the Circuit Court, were correctly disposed of. The expenditures made were of a purely voluntary character, for which no obligation was assumed in any way by the complainants; so that they could not be made the basis for any claim of compensation, either at law or in equity.

The observations in reference to the question of reimbursement cover completely the claim that the accounting heretofore accomplished between the corporations should be reopened and readjusted. It is only another aspect of the same thing; and for that reason, and also for the reasons stated by the learned judge of the Circuit Court, none of the propositions of the respondent in reference to this topic can be maintained.

In behalf of the Western Union, it is maintained that the rulings of the learned judge of the Circuit Court with reference to four specified exchanges, at Philadelphia and elsewhere, so far as favorable to the telephone company, were erroneous; but the obstruction which stands in the path of the Western Union as to these exchanges is that, while it derives its remedy in this case wholly from the application of the most far-reaching rules of equity as applied to the relations of trustee and cestui que trust, whether technically or only substantially such, it overlooks the corresponding ability of equity in behalf of the telephone company to trace through the whole of a series of transactions in order to determine the rights of the parties in view thereof, even though in the courts of the common law some links might be missing, and the original motive power have ceased to operate. Having in view all that both parties are entitled to in the light of fundamental equitable rules, it is clear that the learned judge of the Circuit Court was also right in his conclusions as to this topic. For those who desire to follow through all the series of events, either plainly connected with each other or only obscurely so, we refer them to the histories of these four exchanges told by the master, because it is only the general principle which we state which would be of any importance in any subsequent litigation. No future litigation can possibly reproduce the special states of facts which we are dealing with; and therefore nothing would be gained by dwelling on them.

[7] The Circuit Court ruled that the stocks to be accounted for by the telephone company were subject to the commission of 30 per cent. reserved in the contract under consideration. As there was only one equity to which the Western Union is entitled to the benefit of, it must, of course, take that equity with all analogies relating to what was specifically nominated in the contract; therefore this ruling was plainly correct.

Both parties having appealed, and each appeal failing, on each appeal the judgment is:

The decree of the Circuit Court appealed from is affirmed, without interest, and without costs to either party.

LIBERTY BELL GOLD MINING CO. v. SMUGGLER-UNION MINING CO.†

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,852.

1. MINES AND MINERALS (§ 51*)—CONVERSION OF ORE FROM MINE—MEASURE OF DAMAGES—"RECKLESS" TRESPASS.

In an action to recover damages for a willful and intentional trespass to mining property by removing and converting ore therefrom, it was not error for the court to instruct that the higher measure of damages should be allowed if the jury found that the ore was "recklessly" taken, since if defendant, with the means of ascertaining that it was the property of plaintiff, refused to use such means, and in reckless disregard

* For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 15, 1913.

of the rights of the true owner appropriated it, the law will presume that it was done intentionally and willfully.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5999-6001; vol. 8, p. 7781.]

2. TRIAL (§ 145*)—TAKING QUESTIONS FROM JURY—AUTHORITY OF COURT.

To justify a court in withdrawing an issue from the jury, it must appear that, giving the evidence the strongest probative force against the party asking for the withdrawal, there was no substantial evidence which would warrant a jury in finding that issue against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.*]

3. MINES AND MINERALS (§ 51*)—ACTION FOR CONVERSION OF ORE FROM MINE—QUESTIONS FOR JURY.

Evidence considered, in an action for trespass by removing and converting ore from a mine, and *held* to justify the court in submitting to the jury the question whether the taking of the ore was through mistake and in good faith, or intentional and willful.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

4. MINES AND MINERALS (§ 51*)—ACTION FOR CONVERSION OF ORE FROM MINE—BURDEN OF PROOF AS TO INTENTION OF TRESPASSER.

In an action of trespass for the removal and conversion of ore from a mine, where the taking is admitted or proved, it is presumed that the trespass was willful and intentional, and the burden of proof rests on the defendant to establish the contrary by a preponderance of the evidence; and this rule applies, although the ore was taken from a vein of precious metal under a mining claim, where extralateral rights may exist in owners of other claims.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

5. MINES AND MINERALS (§ 51*)—INTENTIONAL CONVERSION OF ORE FROM MINE—MEASURE OF DAMAGES.

In case of a willful and intentional trespass by the removal and conversion of ore from a mine, where it was milled and treated by defendant before being sold, the measure of damages recoverable is not the value of the ore at the mouth of the mine, but the value of the finished product as sold.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

6. TRIAL (§ 261*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

When a request for an instruction contains two or more propositions of law, if one of them is unsound, although the others may be good, it is not error to refuse the entire instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

7. TRIAL (§ 62*)—EVIDENCE IN REBUTTAL.

Where a mining company, in an action against it for trespass by converting ore taken from plaintiff's claim, contended that when the trespass was committed it believed there was a gap of a certain width between the claims of the parties, and its engineer and manager so testified, it was not error to admit in rebuttal a plat made by defendant before the trespass, showing that the gap was not of such width, with evidence that the witness knew of such plat.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

S. MINES AND MINERALS (§ 51*)—CONVERSION OF ORE—ADMISSION OF EVIDENCE.

Assignments of error, based on the admission and exclusion of evidence on the trial of an action of trespass for the conversion of ore from a mine, considered, and *held* not well taken.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141; Dec. Dig. § 51.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by the Smuggler-Union Mining Company against the Liberty Bell Gold Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For convenience the defendant in error, who was the plaintiff in the court below, will be referred to herein as the plaintiff, and the plaintiff in error as the defendant. This action is to recover damages for a willful and intentional trespass of mining property. The taking is admitted by the defendant, but it denies that it was committed secretly, unlawfully, fraudulently, or willfully, or with knowledge that it was committing any trespass, but that it acted in good faith, believing that the ore was from a vein apexing in claims owned by it, and passing from the dips on plaintiff's Waters claim, and to which vein it believed at the time it was lawfully entitled. There was trial to a jury, and a verdict in favor of the plaintiff.

Henry F. May, of Denver, Colo. (John S. Macbeth, of Denver, Colo., on the brief), for plaintiff in error.

Henry McAllister, Jr., of Denver, Colo. (Jacob Fillius, of Denver, Colo., E. B. Adams, of Telluride, Colo., and Joel F. Vaile and William N. Vaile, both of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). While there are a large number of errors assigned, counsel for plaintiff in error grouped them in six specifications, which cover all the issues involved, and are the errors upon which a reversal of the judgment in the court below is asked. These specifications, in the language of the counsel, are:

"(1) The court erred in charging the jury that the higher measure of damages should be allowed in case of either a willful, intentional, or reckless trespass."

"(2) The stating to the jury of cases of timber cutting and coal mining as illustrations of the rule in trespass cases, without calling to their attention the important distinction between such cases and metalliferous mining cases, where the right to go beyond the boundaries under certain conditions is a distinct part of the grant."

"(3) The refusal of the court to instruct that there was no sufficient evidence to warrant a finding of willfulness, except as to about 1,230 tons taken subsequently to July, 1910."

"(4) The instruction that the burden of proof is upon the defendant to show that its trespass was not a willful or intentional one."

"(5) The instruction as to the measure of damages in case of willful trespass, permitting the recovery of the gross assay value in the ground, without any deduction whatever either for treatment, freight, marketing expense,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or even that part of the value of the ore which cannot be recovered in treatment."

"(6) The admission and exclusion of certain evidence."

[1] 1. The charge given by the court on this point was:

"If you find that the ore was either recklessly, willfully, or intentionally taken by the defendant company, then the measure of the plaintiff's damages is the enhanced value of the ore when and where it was finally converted to the use of the defendant, which in this case would be the full amount recovered and realized therefrom by the defendant."

This is the part of the charge to which exception was taken, and is assigned as error in assignment of error No. 21. But in determining whether the court committed any error it is not permissible to pick out any one part of the charge, but the entire charge, or at least all of the charge which bears upon that proposition of law, must be considered by the appellate court.

The court, immediately after stating the law as set out above, proceeded:

"But if you should find that the defendant took and converted the ore from plaintiff's property through inadvertence or mistake, or in the honest belief that it was acting within its legal right, then the measure of damage is the value of the ore as it was in the ground before it was disturbed by the defendant; that is, the amount recovered and realized by defendant in its mill, less the actual cost of mining, transporting, and treating such ore."

The most serious objection made to this part of the charge by counsel for defendant is the use by the court in its charge of the word "recklessly." The charge of the court is practically the language used by this court in so many cases involving this question that it can no longer be considered as an open question in this court. *Durant Mining Company v. Percy Consolidated Mining Co.*, 93 Fed. 166, 35 C. C. A. 252, *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 129 Fed. 668, 679, 64 C. C. A. 180, 191, and *Central Coal & Coke Co. v. Penny*, 173 Fed. 340, 344, 97 C. C. A. 600, 605, are a few of the cases in point decided by this court. The same rule has been applied by this court in cases other than trespasses on mines. *Times Publishing Company v. Carlisle*, 94 Fed. 762, 36 C. C. A. 475, which was an action for libel; *Guild v. Andrews*, 137 Fed. 369, 70 C. C. A. 49, where the decision of an engineer who, under the contract, was made a final arbiter, was attacked.

It would perhaps have been better for the court to have explained to the jury in more concrete form, applicable to the facts established by the evidence in the case, what is meant by "recklessly"; but no specific objection was made to the charge upon the ground that it was not specific enough, nor did the defendant ask for a specific instruction on that question.

The special instructions asked on behalf of the defendant as to what constitutes a willful trespass, which would justify the recovery of the higher damages, apply practically the same test that would be applied to a charge of larceny, and for this reason were properly refused. Thus, in instruction No. 9, asked by the defendant, the court was requested to charge:

"It is not enough to warrant a finding of willful or intentional trespass that the defendant might have known, or had facts in its possession, a full consideration of which might have led it to believe that the ore in question belonged to the plaintiff, unless it willfully shut its eyes to the situation in order that it might obtain property that was not its own; in other words, no honest mistake or negligent omission will justify a finding of willfulness. There must have been a dishonest purpose to take the ore in spite of knowledge that it belonged to another, or a deliberate omission to avail itself of knowledge at hand amounting to an intent to take what did not belong to it, to warrant such a finding."

And in instruction No. 5, asked by the defendant, the court was requested to charge the jury:

"Unless there is substantial evidence that the defendant knew that the ore which it appropriated belonged to the plaintiff, or that it intended to appropriate the property of plaintiff to its own use, you are not warranted in returning a verdict for the higher measure of damages."

Intent, being a state of the mind, can but seldom be proven by direct evidence. For this reason the law presumes that a party intended the natural consequence of his acts, and if a person has the means of ascertaining facts, but refuses to use these means, and, reckless of the rights of the true owner, appropriates his property to his own use, the law will presume that he did it intentionally and willfully. The court below committed no error in charging the jury on that point as it did, and in refusing to give the instructions asked by the defendant.

2. It is claimed that the court erred in its illustrations of the rule in trespass cases for timber cutting and coal mining. The court, after stating to the jury the issues raised by the pleadings, told them:

"Before asking you to give your attention directly to the facts and issues involved in this case, it may be helpful to you, in considering those issues, to first illustrate by a simple example the principles of law applicable here which must guide you in reaching a verdict, and I give you for that purpose this illustration: We will assume that A. enters upon the land of B., and cuts and removes from B.'s land a standing tree which he manufactures into lumber; thereupon B. sues A. for damages, claiming that the tree cut and removed contained 1,000 feet, board measure, of lumber, of the value of \$10. The fact alone that A. entered upon the land of B., and cut and removed a tree therefrom, constituted A. a trespasser, and rendered him liable to B. A., in his answer to the suit of B. for the \$10 claimed as the value of the 1,000 feet of lumber in the tree, set up that he took the tree innocently or inadvertently, believing that it was on his own land, and for that purpose he might show that his land and B.'s land adjoined, and the tree was taken from near the line. If the jury believed that he took it under the honest and mistaken belief that it was his own tree, then B. would not be entitled to recover the value of the board measure in the tree, to wit, \$10, but he would only be entitled to recover the value of the tree as it stood; and for that purpose that value might be ascertained by deducting all that it had cost to cut and remove and manufacture that tree into lumber. If that cost amounted to \$9, and the lumber was worth \$10, it would necessarily follow that the tree as it stood was worth the difference between \$9 and \$10, to wit, \$1, which would be all that B. could recover. If, upon the other hand, the jury should believe that A. did not make an honest mistake, but that he willfully went across the line, knowing that he was across the line, and cut and removed B.'s tree, or if he was reckless and indifferent about where he was cutting, and did not care or think as to whether it was his land or some other man's land on which the tree stood, then under those facts, or either of such facts, A. would be what is called an intentional, willful trespasser, and he would not be entitled to have the \$9 deducted; but being such willful

trespasser, having taken the property of B. under those circumstances, the law lays down a higher measure of damages, gives him no credit for the labor and cost expended on the raw material, but charges him with the whole value of it in its manufactured state. Now, that is aside, of course, gentlemen of the jury, from the facts in this particular case, but it is by way of illustration, for the purpose of conveying to your minds the legal principles that we have to do with, and it is given because the testimony in this case is of a great mass, going into great detail, dealing with a subject with which few of you are likely not at all familiar.

"This same rule to which I have called your attention has also been applied in the taking of coal; and in the taking of coal by one to whom it does not belong, the rule is that if the taking is the result of an honest mistake as to the true ownership of the mine, and the taking is not a willful trespass, then the measure of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine, if the trespass be an innocent one. If it be a willful one, then the measure of damages is the value of the coal at the mouth of the mine, without any allowance made for the expense and cost of getting it out."

We can conceive of nothing in these illustrations which could possibly prove prejudicial to the defendant.

[2] 3. Did the court err in refusing to instruct peremptorily against the higher damages for a willful trespass, except as to the 1,230 tons taken subsequently to July, 1910? To justify a court in withdrawing an issue from the jury, it must appear that, giving the evidence the strongest probative force against the party asking for the withdrawal, there was no substantial evidence which would warrant a jury in finding that issue against him. It is only when all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the evidence on that issue, that it is the duty of the court to withdraw it from the jury. *Railroad Company v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Grand Trunk R. R. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pacific R. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *St. Louis, etc., R. R. Co. v. Leftwich*, 117 Fed. 127, 129, 54 C. C. A. 1, 3; *Chicago, etc., Ry. Co. v. Roddy*, 131 Fed. 712, 717, 65 C. C. A. 470, 475; *Insurance Company v. Hoover Distilling Co.*, 182 Fed. 590, 598, 105 C. C. A. 128, 136, 31 L. R. A. (N. S.) 873.

[3] Applying this rule, an examination of the evidence, which is very voluminous, shows that the court did not err in submitting that issue to the jury.

The claim of the defendant was that it acted in good faith, believing that the vein discovered was the apex of one of the veins belonging to its mine. The apex was supposed to be north of the Waters claim head line in a gap between the Waters and Caruthers claims, which, it was claimed by the defendant, was between 27 and 28 feet wide, and that it was in ignorance of the trespass complained of until July, 1910; that after the discovery of this vein the defendant located a claim to what is called the Winner claim; the original location certificate being filed November 20, 1907. On November 11, 1908, an amended location certificate was filed for this claim. The first certificate of location was, according to the testimony of Mr. Chase, the consulting engineer and manager of the Liberty Bell mine, 125 feet beyond the line it ought to be, and into the territory of the Waters

claim, while the amended location certificate goes much farther into the territory of the Waters claim. In July, 1908, more than four months before the amended location certificate was filed and executed, the defendant invaded the Waters territory and removed ore therefrom, and more than 100 feet into the Waters claim had been opened up by the defendant before the first location certificate was filed. The vein was discovered between 1,300 and 1,400 feet below the surface, but no effort was made by the defendant to locate the lines and ascertain whether it was a part of the Waters claim, except by estimates made below the surface.

In November, 1909, more than a year after the defendant had invaded the Waters territory and had been taking ore therefrom, Mr. Chase approached Mr. Adams, the plaintiff's attorney, and proposed an exchange of other property owned by the defendant for that part of the Waters claim invaded by it. Mr. Adams testified that Mr. Chase at that time told him that the defendant was not mining on the Waters claim, pointing out to him on a map of his mines the place they had reached, which was west of the Waters claim. At that time none of the officers of the plaintiff knew that the defendant was then, and had been for more than a year, taking ore from their Waters claim, and not until almost a year later did they for the first time learn of the trespass. In September, 1910, Mr. Holland, a mining engineer in the employ of the plaintiff, visited the defendant's mine for the purpose of making an examination in relation to the proposed exchange of claims. He was accompanied through the mine by Mr. Staver, the defendant's superintendent, who showed him a stope map of the defendant's property, which did not indicate the lines of the Waters lode, nor did Mr. Staver mention to him the fact that his company was then, and had been for over two years, mining under the surface of the Waters claim, although at the trial it was admitted that in July, 1910, the defendant knew that it was trespassing on the Waters claim, and was liable as a willful trespasser for the ore removed in July, 1910, and thereafter, amounting to 1,231 tons. Before that time Mr. Chase had told Mr. Holland that they were near the Waters line, which statement Mr. Chase admitted he had made. In a letter dated November 7, 1909, Mr. Chase proposed to Mr. Wells, the president of the plaintiff company, an exchange of territory, but did not intimate that his company was then extracting ore from the territory of the Waters claim, which it wanted to obtain by the exchange. The gap between the Waters and Caruthers claims, which Mr. Chase had testified was between 26 and 28 feet wide, he admitted was, according to actual measurement, only about half that width. He also admitted that, without informing plaintiff of their intention, they had entered the Waters claim, and ran an upraise up into the strip, and terminated it beyond the strip. In his annual reports to the directors of the defendant, made during the time these trespasses were committed, Mr. Chase submitted maps showing the operations of the mine; but these maps, it was testified by Mr. Hills, an experienced mining engineer, who had examined them carefully, failed to show that the defendant was operating on the Waters claim, and were misleading in that respect, there being no indication

on these maps that any work was done by the defendant except in the Liberty Bell vein.

There was a great mass of evidence introduced, which we have carefully analyzed, and which it would serve no useful purpose to set out in this opinion. Assuming that Mr. Chase's testimony tended to establish the fact that he did not know that he was taking ore from the Waters claim, it also appears from his testimony that no efforts whatever were made by him to ascertain that fact, although he must have known that he was removing ore from the plaintiff's claim, or was working so closely along the line dividing the claims of plaintiff and defendant that he should, in the exercise of reasonable diligence, have investigated the matter, and, had he done so, would have discovered that he was trespassing on plaintiff's claim. These facts, taken in connection with the apparent evasions and misrepresentations claimed to have been made by this and other officers of the defendant to the plaintiff's attorney and officers, are sufficient to justify the submission to the jury the question whether the trespass was willful and intentional, or so reckless as to justify the jury in finding that it was willful and intentional, within the rule of law established by the authorities hereinbefore cited. It would be unreasonable for us to hold that the evidence in this case is of such a nature that all reasonable men, in the exercise of a fair and impartial judgment, would draw the conclusion that the trespass by the defendant was unintentional. The verdict of the jury negatives this contention.

[4] 4. Did the court err in its charge that the burden of proof is upon the defendant to show that the trespass was not willful or intentional? The court charged the jury upon this point as follows:

"The mere taking and converting to one's own use of the property of another constitutes, as already said, a trespass, and raises a legal presumption that the taker intended to do what he did do, and is thereby an intentional trespasser. In that event, and in the absence of any further evidence, the owner of the property taken would be entitled to a verdict fixed in amount by the higher measure of damages based upon said legal presumption. The law, therefore, places the trespasser under the burden of overthrowing, by proof, this presumption; that is, that the trespass was not willful and intentional. If the evidence introduced by the defendant in this case for that purpose creates a belief in your minds of the defendant's innocence and good faith in taking and converting the ores, then you should not find a verdict against the defendant based on the higher measure of damages, unless the persuasive force of that evidence showing such innocence and good faith is overcome by other substantial proof, facts or circumstances in the case, convincing you either that the defendant took the ores knowing at the time they were the property of the plaintiff, or at the time it took them acted in so doing in willful and reckless disregard as to whether they were its ores or the property of another."

The court refused to give the following instruction asked by the defendant:

"The burden of proof, which is under certain circumstances thrown upon a trespasser to show that his trespass was not willful and intentional, must not be confused with the question of the preponderance of evidence. If to sustain his burden he introduces evidence tending to show that his trespass was not willful or intentional, it then rests upon the owner to satisfy you by a preponderance of the evidence that it was willful or intentional."

It will be noticed that the instruction asked by the defendant recognizes the rule that, the trespass having been proven, the burden of proof is upon the trespasser to show that his trespass was not willful and intentional, but it proceeds:

"If to sustain his burden he introduces evidence tending to show that his trespass was not willful or intentional, it then rests upon the owner to satisfy you by a preponderance of the evidence that it was willful or intentional."

While this is the correct rule of law in criminal cases, it does not apply to civil actions of this nature. In every civil cause the burden of proof is upon the party who holds the affirmative, or, as it is sometimes stated, upon the party against whom judgment must go if no evidence is introduced in his behalf. The party upon whom the burden of proof rests must establish it by a preponderance of the evidence, regardless of the fact whether it is the basis of the cause of action set out in the complaint, or set up as a defense in the answer. *Simonton v. Winter*, 5 Pet. 141, 8 L. Ed. 75; *Clements v. Nicholson*, 6 Wall. 299, 18 L. Ed. 786; *Selma, etc., R. R. Co. v. United States*, 139 U. S. 560, 567, 11 Sup. Ct. 638, 35 L. Ed. 266. Upon this ground it is uniformly held that in an action for damages for a personal injury, if contributory negligence is pleaded as a defense, the burden of proof is upon the defendant, and he must establish it by a preponderance of the evidence. *Texas & Pacific R. R. Co. v. Volk*, 151 U. S. 73, 78, 14 Sup. Ct. 239, 38 L. Ed. 78; *Inland & Seaboard Co. v. Tolson*, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270; *Missouri, K. & T. Ry. Co. v. Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 401, 404; *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204; *Western Real Estate Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 658.

In *Lesser Cotton Company v. St. Louis, etc., Ry. Co.*, 114 Fed. 133, 139, 52 C. C. A. 95, 101, which was an action for a loss sustained by fire alleged to have been negligently caused by sparks from defendant's locomotive, the trial court charged the jury:

"If you determine that the fire which destroyed the cotton of the Lesser Cotton Company was caused from sparks and cinders communicated from the defendant's engine, then the burden of proof is shifted upon the defendant, and it must overcome the presumption of negligence arising from this fire. * * * In other words, it must prove by a preponderance of the evidence that there was no negligence within the definition of the term as I have described it to you."

This charge was approved by this court.

In *Rutherford v. Foster*, 125 Fed. 187, 194, 60 C. C. A. 129, 136, which was an action to recover damages for a wrongful killing by the defendant, the trial judge charged the jury that the presumption of law from the admitted killing was that it was wrongful, and the burden is upon the defendant to show by a fair preponderance of the evidence facts and circumstances constituting a justification of the act. This charge was approved by this court, quoting from the opinion of Chief Justice Shaw in *Powers v. Russell*, 13 Pick. 69, 77.

As to the shifting of the burden of proof, the same rule has been applied in timber trespass cases. *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 366, 377, 16 Sup. Ct. 831, 40 L. Ed. 1002; *United States v. Denver & R. G. R. R. Co.*, 191 U. S. 84, 92, 24 Sup. Ct. 33, 48 L. Ed.

106; *Ghost v. United States*, 168 Fed. 841, 848, 94 C. C. A. 253, 260. In *United States v. Ute Coal & Coke Company*, 158 Fed. 20, 23, 85 C. C. A. 302, which was an action for trespass in taking coal from public lands, Judge Sanborn, speaking for this court, said:

"There is a legal presumption that one who takes and converts to his own use the property of another, intends so to do, and a jury may lawfully infer from such taking and conversion and the wrongdoer's reckless disregard of the owner's right and title that he had knowledge of that right and title, and intended to appropriate his property to his own use, in the absence of persuasive evidence of his innocence and good faith."

Nor do the authorities sustain the contention of counsel for defendant that this rule does not apply to a trespass of metalliferous ores. In *Keely v. Ophir, etc., Mining Co.*, 169 Fed. 601, 603, 95 C. C. A. 101, the same rule was applied to a trespass of a mine containing precious metals, and that case is cited with approval and followed in *Backer v. Penn Lubricating Co.*, 162 Fed. 627, 631, 89 C. C. A. 419, 423.

It is true, as claimed by counsel for defendant, that there are some cases in which it has been held that prima facie presumptions do not always shift the burden of proof to the extent that a preponderance of the evidence is required to remove it; but a careful analysis of the cases cited in their brief will show that they apply only to cases where the prima facie case rested solely upon artificial presumptions. Thus, without any evidence, the law presumes sanity, regularity of official acts, innocence, honesty, natural love and affection between parent and child and husband and wife, love of life and avoidance of known danger, death after an unexplained disappearance for more than seven years, and many others which it is unnecessary to mention. This is not the case here. A trespass on the property of another, in the absence of any other proof, is naturally presumed to be willful and intentional as a fact, and the proof that it is not so is generally, and clearly in this case, solely in the possession of the trespasser, as he alone knows the reasons and intent which induced him to commit the trespass. The rule as stated in *United States v. Denver & R. G. R. R. Co.*, supra, controls this court. It is:

"It is a general rule of evidence, noticed by the elementary writers upon that subject (1 Greenleaf on Evidence, § 79), 'that where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' When a negative is averred in pleading, or the plaintiff's case depends upon the establishment of a negative, and the means of proving a fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case itself, be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it, or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

In *Home Benefit Association v. Sargent*, 142 U. S. 691, 700, 12 Sup. Ct. 332, 336 (35 L. Ed. 1160), it was held:

"The defendant having alleged in its answer that Hall's death was due to one of the causes excepted from the operation of the policy, it was not error

for the court to charge the jury that the defendant was bound to establish such defense by evidence outweighing that of plaintiff."

In Banbury Peerage Case, 1 Sim. & St. 153, 2 Salk, 512, 2 Ld. Raym. 1247, Chief Justice Mansfield informed the House of Lords:

"That in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question."

Counsel for defendant overlook the distinction between presumptions of law, founded on reasons of public policy or social convenience, and a presumption of fact, which enlightened common sense and experience may draw from the acts of the parties as established by the evidence, and the natural result flowing therefrom. In the latter case, as shown by the authorities hereinbefore cited, the burden of proof, or the burden of evidence, as it would perhaps be more proper to designate it, is shifted to the party upon whom the burden to remove the presumption arising from the evidence rests, and it must be by a preponderance of the evidence. These latter presumptions most frequently arise when, owing to the peculiar circumstances of the case, the complaining party has neither the means at his command, nor the means of obtaining them, to prove by direct evidence a certain fact, while the adversary has them. Therefore, for the furtherance of right and justice, the law permits an inference of an existing fact, arising from the facts established by the evidence. An action for a willful and intentional trespass is clearly such a case, in so far as it is necessary to establish the willful and wrongful intent.

It is also claimed that the court erred in refusing to give instruction No. 7, asked by the defendant. This instruction is as follows:

"In a case where extralateral rights to ore exist, or may exist, as here, and where the situation is such that the ore taken may with reasonable probability be found to be from a vein apexing on the territory of the taker, and it is impossible or a matter of great difficulty and expense to determine in advance of its taking the exact facts, then, unless you are satisfied by a preponderance of evidence that as a matter of fact the taker did intend to take what was not his, you must find that the taking was not willful."

But the court in its charge fully explained to the jury the law on that subject. It said:

"The law has established a presumption that all ore found under the surface of a mining claim belongs to the owner of that claim, and unless the person who may have taken the ore from under the claim of another can show to the satisfaction of the jury that the ore was a part of a vein having its top or apex in his claim, and so situated that he is entitled in law to follow such vein on its dip, he is a trespasser, and is accountable to the owner of the surface for the ore taken. By the term 'top' or 'apex' of a vein is meant the highest part of a vein along its course."

This sufficiently explained to the jury the extralateral rights of the parties. It told them in plain words that, while there was a presumption that all the ore within the side and end lines of the Waters claim belonged to the plaintiff, yet if the apex of a vein was outside the Waters claim, and within the boundaries of defendant's claim, that the defendant had a right to follow such vein and remove the ore therefrom, notwithstanding such vein should extend within the bound-

aries of the Waters claim, but that the burden of proof was upon the defendant to establish that the apex of the vein was within the boundaries of defendant's claim.

[5] 5. Did the court err in its charge relating to the measure of damages in case of willful trespass? The parts of the charge excepted to by the defendant in its assignments of error are:

"A large amount of testimony has been introduced relative to the cost of mining, transporting, and treating the ores taken from the trespassed workings. Should you find that the defendant was a willful, intentional, or reckless trespasser as herein defined, and therefore is answerable for the higher measure of damages referred to in these instructions, then all of such testimony as to cost becomes immaterial, because in that event the plaintiff is entitled to recover the full amount realized by defendant from the conversion of the ores to its own use, regardless of the expenditures incurred by it in so doing.

"In the event you are called upon to determine such cost, you must consider solely the cost to defendant of mining, transporting, treating, and converting into money the particular ores in question. The defendant is not entitled to deduct any portion of a general expense incurred by it in its mine operations, not attributable to the particular ores in question, and which it would have incurred, had it not mined any of these ores, but had confined itself to the mining, transporting and treatment of the remaining ores extracted from its own territory during the period in controversy. For example, all fixed charges, salaries of officers and employes, expenses of constructing, developing, or maintaining any portion of defendant's mine, mill, or plant, not incurred in or by reason of the extraction or treatment of the ores in controversy, are not to be considered, even though you may believe that by reason of the expense so incurred the cost of producing the particular ores in question may have been reduced. And in considering any testimony introduced at the trial, oral or documentary, relative to such costs, you must eliminate all items of the character above indicated, and you must also consider the reliability and accuracy of the data or records upon which such testimony is based."

The special instructions, asked by the defendant, and refused by the court, were:

"In case of trespass and conversion of ore, as it is called, the law recognizes two methods of measuring the damage to the owner. The first is in case of unintentional or inadvertent trespass, in which case the damages are compensatory merely, the measure being the value of the ore unbroken in the mine; in other words, after ascertaining the gross value of the ore, there is deducted from it all the costs of mining, hoisting, transportation, treatment, etc., so as to arrive at the net value realized. The second measure of damages is in case of a willful or an intentional trespass under such circumstances as to show an intentional taking of the property of another, or such a willful or reckless disregard of the rights of another as to warrant the inference of such intent; in which case the damages are punitive, the measure being the value of the ore, not unbroken in the ground, but at the mouth of the pit or shaft or tunnel, without allowance to the trespasser for the cost incurred in mining and getting it to that point. In other words, the value which the ore might have had unbroken in the mine to the owner or trespasser is enhanced by the cost of mining and raising it, at the expense of the trespasser and for the benefit of the owner."

These assignments of error raise the question whether, in case of a willful trespass, when the raw material converted has been enhanced in value by the labor of the willful trespasser, the measure of damages is the value of the material before it was changed into the finished article or after it has been manufactured.

In *Woodenware Company v. United States*, 106 U. S. 432, 434, 1 Sup. Ct. 398, 27 L. Ed. 230, the English rule that in such a case no allowance whatever in respect to what the willful trespasser has done or expended will be allowed was adopted, and has been followed ever since by all the national courts, and especially this court. *Pine River Logging Co. v. United States*, 186 U. S. 279, 294, 22 Sup. Ct. 920, 46 L. Ed. 1164; *United States v. St. Anthony R. R. Co.*, 192 U. S. 524, 542, 24 Sup. Ct. 333, 48 L. Ed. 548; *Durant Mining Co. v. Percy Consolidated Mining Co.*, *supra*; *United States v. Ute C. & C. Co.*, *supra*; *United States v. Homestake Mining Co.*, 117 Fed. 481, 54 C. C. A. 303; *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, *supra*; *Central Coal & Coke Co. v. Penny*, *supra*; *St. Louis Stave & Lbr. Co. v. United States*, 177 Fed. 178, 181, 100 C. C. A. 640, 643.

In *United States v. Waters-Pierce Oil Co.*, 196 Fed. 767, 116 C. C. A. 391, the government sought to recover the value of turpentine and resin, the product of the sap of long-leaf yellow pine trees growing on the public lands in Alabama. The trespasser had tapped certain trees and taken therefrom the crude gum and sold it to a turpentine distiller. The distiller, after distilling and rectifying the gum, sold it to the defendant, and it was held by this court that the action for the value of the distilled product would lie against the Oil Company, reversing the lower court, which had held (180 Fed. 309, 312) that, the gum having been converted into turpentine and resin when the Oil Company purchased it, it was not liable.

In *Parish v. United States*, 184 Fed. 590, 106 C. C. A. 570, the government, as in the *Waters-Pierce Oil Company Case*, sued the trespasser and his vendees for the value of the distilled turpentine and resin into which the gum, taken unlawfully by a homesteader from trees on the public lands, had been converted, and the following charge of the trial court was on error approved by the Circuit Court of Appeals for the Fifth Circuit:

"That Wyatt S. Parish was in law a willful trespasser in extracting gum from his homestead, and for that reason the defendants are liable for the value of the spirits of turpentine and resin manufactured from the gum, and not merely for the value of the crude gum; that the jury should find for the plaintiff the value of the spirits of turpentine and resin manufactured by defendant W. L. Parish from the gum purchased by him from Wyatt S. Parish, who extracted it from trees upon his homestead."

The owner in a case of an intentional trespass is not confined merely to recovering the value of the property, but may pursue and reclaim the property wherever he can find and identify it. *Stephenson v. Little*, 10 Mich. 433; 2 Schouler's *Personal Prop.* p. 21. As stated by Judge Thayer, delivering the opinion of this court in *United States v. Price Trading Co.*, 109 Fed. 239, 244, 48 C. C. A. 331, 335.

"The cutting, removal, and sale of the timber, if wrongful, did not divest the government of its title, but, at most, merely changed what had before been realty into personalty, without affecting the owner's title to the property in any respect."

In that case the timber had been converted into fence posts, and the action was for the recovery of the value of these posts. If the prop-

erty can be found, no matter how it has been changed, provided it can be identified, replevin will lie. *Schulenberg v. Harriman*, 21 Wall. 44, 64, 22 L. Ed. 551; *Bly v. United States*, 4 Dill. 464, Fed. Cas. No. 1,581; *Stotts v. Brookfield*, 55 Ark. 307, 310, 18 S. W. 179.

[6] Whether the court committed error in failing to charge the jury to make allowance for the tailings lost or percentage not recovered in treatment is not properly before us. The court's attention was not called to this omission by any exception, nor were there any correct special instructions asked by the defendant on that point. *Texas & Pacific Ry. Co. v. Humble*, 181 U. S. 57, 67, 21 Sup. Ct. 526, 45 L. Ed. 747; *Southern Pacific Ry. Co. v. Maloney*, 136 Fed. 171, 69 C. C. A. 83; *United States Smelting Co. v. Parry*, 166 Fed. 407, 416, 92 C. C. A. 159, 167.

The only instructions in which this point was raised by the defendant are in its requests marked Nos. 12 and 13. No. 12 was expressly limited to a nonintentional trespass. That instruction reads:

"After first finding the tonnage and gross assay value of the ore in place and unbroken in the mine, taken by defendant which belonged to the plaintiff, you will, unless you find the trespass to have been willful and intentional, deduct from the value of each ton of ore so taken the cost of mining, transporting, milling, and marketing said ore, and make allowance for the tailings lost or percentage not recovered in treatment. * * *

Instruction No. 13 requested the court to instruct the jury, if they found the taking was willful and intentional, to allow only the value of the ore at the mouth of the mine and deduct "from that time on the cost of tramping to the mill, marketing, and tailings lost." But to have given this instruction the court would have also limited the damages, in case of a willful trespass, to the value of the ore at the mouth of the mine, which we hold is not the law. It is well settled that when a request for an instruction contains two or more propositions of law, if one of them is unsound, and the others are good (which we do not decide in this case), it is not error to refuse the entire instruction. *United States v. Hough*, 103 U. S. 71, 73, 26 L. Ed. 305; *Union Ins. Co. v. Smith*, 124 U. S. 405, 424, 8 Sup. Ct. 534, 31 L. Ed. 497; *Texas & Pacific Ry. Co. v. Humble*, 181 U. S. 57, 67, 21 Sup. Ct. 526, 45 L. Ed. 747; *Chicago, etc., R. R. Co. v. Roddy*, 131 Fed. 712, 718, 65 C. C. A. 470, 476; *Armour & Co. v. Kollmeyer*, 161 Fed. 78, 84, 88 C. C. A. 244, 248, 16 L. R. A. (N. S.) 1110.

6. Alleged errors in admission and exclusion of evidence.

[7] There were quite a number of exceptions taken during the trial to the admission and rejection of evidence, which are now assigned as error. It is claimed that it was error to admit in evidence a patent plat of the *Esparanza* and *Eldorado* lodes. This plat had been made by the defendant in 1906, before it had trespassed on plaintiff's claim. It shows the lines of the *Waters* and *Caruthers* claims owned by the plaintiff, with which the *Esparanza* conflicted. The defendant having contended that when the trespass was committed it believed the gap between those claims to be 27 or 28 feet wide, and Mr. Chase having testified to that effect, the court committed no error in admitting, in rebuttal, the patent plat prepared by the defendant, which showed that the gap was only half that width, and that Mr. Chase knew of this

plat and had posted it himself some time before the trespass began. It was not only some evidence from which the jury might infer that Mr. Chase knew that he was trespassing upon plaintiff's claim, but it also had a tendency to affect his credibility.

[8] The admission of the plat, Plaintiff's Exhibit N, showing the relative positions of the Waters and Caruthers claims and defendant's Winner claim, was also objected to. This map was admitted by Mr. Chase to be correct. It tended to explain to the jury the location of these claims, and threw some light on the question whether the defendant proceeded in reckless disregard of the rights of the plaintiff. In cases of this nature, where the question of intent is of great importance, the courts are much more liberal in the admission of evidence.

The exclusion by the court of statements offered by the defendant showing the average value per ton of all ore taken from the Liberty Bell mine prior to, during, and after the trespass, was proper. These statements were prepared from the annual reports of the directors and stockholders of the defendant company. The object of this proof, as stated by counsel, at the time it was offered in the lower court, was to show that the average value of the ore during the period of the trespass was lower than before or after the trespass, and therefore the ore taken from the plaintiff must have been of an inferior grade. In response to the question by the court whence the ore was taken before, counsel for defendant replied: "The main Liberty Bell vein." After some testimony had been introduced in an attempt to lay the foundation for the introduction of these statements, and the fact had been established that different veins in the same mine carry different values, and that ores taken from the same mine, but at different times, vary materially in value, the court excluded the statements offered upon the following grounds:

"Now, with your concession, and we all know, I take it, that that is true, that different chutes in the same mine may be greatly different in their average value. When you enter upon that inquiry, it seems to me that you necessarily open up as a collateral question the further inquiry as to the apparent value on the different chutes in the Liberty Bell vein, those that were being mined prior to the taking of any ore at all from this Winner vein. Those that had been mined before the Winner vein was reached may have been high in value, higher than the average of those mined after the Winner vein was reached, or they may have been greatly lower; and it seems to me that we cannot possibly determine this inquiry which you put to this witness now, without necessarily introducing into the case the collateral inquiry in going all over the question of value of these chutes in the Liberty Bell vein mined prior to the Winner vein entry, in order to determine whether or not the conclusions of the witness are properly founded, and on that the plaintiff may not be prepared, if it is wholly collateral, so much so that they could not anticipate, and were not charged with anticipating, that you would introduce that collateral fact."

For the reasons stated by the learned trial judge, there was no error in excluding these statements.

There are some other exceptions, which have been carefully examined and found unobjectionable.

In view of the large verdict in this case, and the very able and earnest argument of counsel, we have given this case our most careful con-

sideration. We have considered every one of the numerous assignments of error, examined carefully the many authorities which the industry of learned counsel for both parties enabled them to cite, and have also examined others not found in the briefs of counsel, and find no prejudicial error in the record. Considering the length of time it took to try this case in the court below, the many objections made by the very able counsel who appeared for the parties, and the important questions of law involved, the record is as free from error as any record of this magnitude can be. The evidence was conflicting as to whether the trespass was willful and intentional or inadvertent, and while a finding in favor of the defendant on that issue might have been made by the jury, which we would not have disturbed, there was ample evidence to justify the findings made. When there is substantial evidence to warrant a verdict either way, the finding of the jury is conclusive in the appellate court.

The judgment is affirmed.

BANK OF BRUNSON v. ÆTNA INS. CO. OF HARTFORD, CONN.

(Circuit Court of Appeals, Fourth Circuit. March 6, 1913.)

No. 1,137.

1. INSURANCE (§ 375*)—INSURANCE AGENTS—AUTHORITY—QUESTION FOR JURY.

Under the South Carolina statute (Civ. Code 1902, § 1810), which provides that one shall be held to be the agent of a foreign insurance company in soliciting insurance, delivering policies, adjusting losses, etc., it can be found that local agents, through whom a policy was issued, and who countersigned it and consented to its assignment for the insurance company, were authorized to waive proof of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948-951, 956-965; Dec. Dig. § 375.*]

2. INSURANCE (§ 668*)—PROOF OF LOSS—WAIVER—JURY QUESTION.

In an action on a fire policy, whether insurer waived proof of loss *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

In Error to the District Court of the United States for the District of South Carolina, at Charleston; Henry A. M. Smith, Judge.

Action by the Bank of Brunson against the Ætna Insurance Company of Hartford, Conn. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

George H. Moffett, of Charleston, S. C., and W. B. De Loach, of Camden, S. C., for plaintiff in error.

Ernest L. Visanska, of Charleston, S. C. (Smythe, Frost & Visanska, of Charleston, S. C., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

BOYD, District Judge. The facts will be stated in the course of this opinion. This suit, which was originally brought in a state court

of South Carolina, and removed for trial upon the petition of the defendant to the United States court, is an action at law upon a policy of insurance issued by the Ætna Insurance Company, the defendant in error, to one J. C. Langford, on the 7th of July, 1905; the date of expiration being July 7, 1910. The policy was for \$2,500 on a dwelling house described therein, including heating, lighting apparatus, etc., and \$500 on furniture. The value of the building was stated to be \$3,500, but the insurer and the holder of the policy, by the terms of the contract, fixed the amount of insurance to be carried on the house at \$2,500 as before stated. This policy was duly assigned by Langford to the Bank of Brunson, the present plaintiff in error, which assignment was consented to by the insurance company whilst the policy was in force. W. H. Dowling & Son, of Hampton, S. C., a partnership composed of the said W. H. Dowling and J. T. Dowling, were the local agents of the defendant company, through whom the contract was entered into and the policy issued. Some time about the 27th of October, 1908, the building insured was totally destroyed by fire, and thereupon the Bank of Brunson, through its cashier, sent the following letter, which bore date October 28, 1908:

"Bank of Brunson, Brunson, S. C., October 28th, 1908.

"Messrs. W. H. Dowling & Son, Agts. for Ætna Insurance Company, Hampton, S. C.—Gentlemen: Policy #2007, issued by you to J. C. Langford for \$3,000 on his dwelling and furniture, and assigned by J. C. Langford to Bank of Brunson, October 5, 1908. The aforesaid dwelling and furniture was totally destroyed by fire last night. This is to notify you.

"Very truly yours,

S. A. Agnew, Cashier."

The receipt of this letter by Dowling & Son in due course is admitted. Hampton, the residence of the agents of the defendant, is some six miles from Brunson, where the Bank of Brunson is located. Soon after the posting of this letter, Agnew, the cashier, called W. H. Dowling, the agent, over the phone, and had with him a conversation, which is set out in the record as follows:

"I told Mr. Dowling that I wished that he would come up and look at the fire, to be satisfied that it was a total loss, so that he could make his report to the company."

He said:

"That there was no use for him to come, that he knew, that he had heard about it, and that he was satisfied that it was a total loss, and that there was no use for him to come; that he would go ahead and make arrangements with the company." "Yes; said he had received my letter, and I asked him to come up and examine the property, and he said that he was satisfied that it was a total loss."

The case was tried in the District Court of the United States, at Charleston, S. C., on the 5th of June, 1912, before the judge of said court, and a jury. The letter before set out, the conversation as before stated between Agnew and Dowling, with the policy, constituted plaintiff's evidence. There was, in addition, also the testimony of D. F. Moore, president of the plaintiff bank, relative to a conversation which he had had with the junior member of the firm of Dowling & Son; but what was said was not of a definite character, and would therefore

have little bearing upon the case. At the conclusion of plaintiff's case, based as it was upon the policy, letter, and the conversation, the defendant's counsel moved the court to instruct the jury to return a verdict in behalf of the defendant. This instruction was given, and verdict returned for the defendant, to which plaintiff excepted, and the questions of law involved in this exception are before this court.

[1, 2] In the course of the discussion of the points involved, the plaintiff in error, the Bank of Brunson, will be referred to as the plaintiff, and the Ætna Insurance Company, the defendant in error, will be referred to as the defendant. The policy of insurance contains the following provision:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and, within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon, all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies, and changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire, and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged, and shall also, if required, furnish a certificate of a magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured), living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The statement required by this provision of the contract, and which in insurance parlance is called the proof of loss, was not rendered to the defendant company by the policy holder, and this omission is chiefly relied on by counsel as a ground to sustain the action of the trial court in directing a verdict for the defendant. Thereupon the question at once presents itself as to whether the defendant waived the proof of loss provided for in the policy; and the solution of this question depends upon the scope of authority of Dowling & Son as agents of the defendant, and to what extent the latter is concluded by their action.

This case was before the court here at November term, 1911, but the point presented for decision at that time was confined more particularly to the question of the admissibility of the contents of the letter from Agnew to Dowling. The letter was not produced, nor had the defendant been served with notice to produce it, and thereupon this court held that the plaintiff was not entitled to give its contents; but that question is not involved now, for in the last trial the letter was not only produced, but it was admitted by the defendant that the same had been received by Dowling. In that decision the court expressly declined to pass on the question of waiver. See *Ætna Insurance Co. v. Bank of Brunson*, 194 Fed. 385, 114 C. C. A. 303. It is therefore

for us, since the letter of Agnew to Dowling has been introduced, and its contents, together with what passed between these two in the conversation over the phone, are before the court, to determine the question before stated, as to whether the proofs of loss provided for in the policy were waived by the defendant. In this connection it is necessary to consider the South Carolina statute, which provides:

"Any person who solicits insurance in behalf of any insurance company not organized under or incorporated by the laws of the state, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine and inspect any risk, or receive, collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or the consummating of any contract of insurance for or with any such company, other than for himself, or who shall examine into and adjust, or aid in adjusting, any loss for or in behalf of any such insurance company, whether any such acts shall be done at the instance or request or in the employment of such insurance company, shall be held to be acting as the agent of the company for which this act is done or the risk is taken."

If Dowling & Son were only soliciting agents of the defendant, which is admitted to be a foreign corporation doing an insurance business in the state of South Carolina, then we would not, even in view of the South Carolina statute, feel warranted in holding that they could waive specific requirements of the policy; however, it appears that the powers conferred upon these agents were much more extensive. It is one of the provisions of the contract that this policy shall not be valid until it is countersigned by the duly authorized manager or agent of the company at Hampton, S. C., and upon the policy we find an indorsement as follows:

"Countersigned by W. H. Dowling, Agent."

There is a further indorsement on the policy in these words:

"The Ætna Insurance Company hereby consents that the interest of J. C. Langford, as owner of the property covered by this policy, be assigned to Bank of Brunson, Brunson, S. C. W. H. Dowling & Son, Agt.

"Dated Hampton, S. C., Oct. 5, 1908."

It is evident, therefore, that these agents were clothed with authority far beyond that of a mere solicitor. Upon their action depended the validity of the contract, for by their indorsement they put life into what may be termed merely a memorandum of agreement, which was inoperative until countersigned by them, and, further, in consenting to the assignment of Langford's interest in the policy to the Bank of Brunson, these agents did an act which the company recognized and accepted as valid and binding. The learned trial judge upon the point under consideration, in directing the verdict for the defendant, expressed his opinion as follows:

"With regard to the waiver on the part of the company of the furnishing of any further proofs of loss, I hold that the testimony in the case would not constitute sufficient evidence to go to the jury upon that point."

Being an agent of the character indicated by us, the representative of the defendant, with whom the entire transaction so far as the as-

sured was concerned had been conducted, and the contract consummated, it was but natural, when the loss occurred, that the holder of the policy should notify Dowling, and rely upon him to either provide the details, or instruct the policy holder as to what, if anything more, was required of him to secure the payment of the amount of loss. When Dowling was notified of the loss, and was requested by the holder of the policy to go and make an examination for the purpose of ascertaining the extent to which the property had burned, the reply of the former was in substance that there was no use for him to make an investigation, that he had heard all about it, that he was satisfied that it was a total loss, and that he would go ahead and make arrangements with the company. Now, what did this mean to the policy holder? Certainly it did not lead him to the conclusion that there was anything further for him to do in order to satisfy the defendant that there was an entire loss. Dowling, the agent, said that "he knew that the loss was total; he was satisfied of the fact." What more, then, would the proofs of loss have established, so far as the destruction of the property was concerned? It is true some other things are required to be included in the proofs of loss provided for in the policy; but when notice of the loss was given by the letter to Dowling, and the conversation had over the phone, it would have been a simple thing for him to advise the holder of the policy that, although he was satisfied the loss was a total one, yet this other information should be furnished to the defendant company. It would not be, in our opinion, fair dealing for an agent, sustaining the relation to the defendant company which Dowling did, and placed in the attitude which the defendant had by its own action presented him to the policy holder, to lull the assured to sleep, to awake only to find that by the action of the agent he had been deprived of the right to recover an admitted loss.

The Supreme Court of the state of South Carolina has been called upon to construe the statute concerning agency, which we have before incorporated in this opinion. In the case of *Norris v. Insurance Co.*, 57 S. C. 363, 35 S. E. 574, the court deals with this subject, and says:

"Was the said Smith only a soliciting agent for insurance for the defendant company? It certainly was in evidence that Smith, although he took applications for insurance, did not countersign policies. This was done by Edgerton, in Atlanta, Ga. But it was also in evidence that Smith, as said agent for the defendant, did receive the premiums for said defendant from the plaintiff, and did deliver his policy, which fact tended to enlarge his powers of agency. It was also in proof that he notified the insurance company of the destruction of the insured building by fire about the 26th of September, 1896, and that also, when the adjuster came to Cokesbury, Smith was with such adjuster when he inspected the ruins. * * * We cannot agree with the appellant that Smith was only a soliciting agent for his insurance company, touching its contract with Mrs. Norris. While it is true he had delivered the policy to Mrs. Norris, the defendant insurance company admits that he was still its agent during the existence of the contract of the insurance company with the plaintiff. It only contends that Smith was not its agent as far as Mrs. Norris is concerned. But we are not prepared to take such subtle view of the matter of agency. These corporations act through agents. There is nothing in the policy issued by this company which names any agent, as such, who can bind the company. This insurance company must remember that its contracts made within our state limits, under our statute, are taken with section 1481, hereinbefore quoted, as a part of such contracts, and that this section 1481 does not in its use of the word 'agent' place any

limitations upon his powers, so as to deprive any one who deals with such agent with respect to a contract of insurance made by such an one with the agent's insurance company as to the principle of the right to impute knowledge."

And we find in the case of *Madden & Co. v. Insurance Co.*, 70 S. C. 301, 49 S. E. 857, another decision of the South Carolina court under the said statute from which we quote the following:

"When a person does any of the acts enumerated in section 1810 of the Code of Laws, the presumption is that he was the agent of the insurance company; but such presumption is subject to rebuttal. This principle does not infringe upon the doctrine announced in *Young v. Insurance Co.*, 68 S. C. 387 [47 S. E. 681]. Our conclusion is that the acts and declarations of the agents, J. W. Spence and F. M. Butt, were prima facie binding upon the defendant, and that they furnished evidence of waiver on the part of the defendant to insist upon its right to require compliance with the terms of the policy as to proofs of loss, especially when F. M. Butt refused to assist in the preparation of the proofs of loss, and declared that the policy was null, and void from the time it was issued. These facts tended to show a denial of liability on the part of the defendant, and that it was intended to rely upon the fact of forfeiture of the policy by the plaintiffs as a ground for refusing payment."

Adopting the interpretation placed upon this statute by the Supreme Court of South Carolina, we find that it has been substantially declared by the court that an agent of an insurance company, who issues policies, collects premiums, and assists in adjusting losses, is such an agent of the company in that state that notice to him of facts constituting forfeiture is notice to the company, for which he is agent, and in the *Norris Case* it is held, as will be seen, that it was proper to leave this question as to the character of the agent upon whom notice of loss was served to the jury. This statute, with the construction and interpretation given it by the court in South Carolina, was a law of the state at the time the policy under consideration was issued, and it became a part of the contract. It is a well-settled principle that the federal courts will, with some well-defined exceptions, adopt the construction placed upon state statutes by the highest court of the state in which such statutes are enacted. The case here does not fall within any of the exceptions.

The Supreme Court of the United States, in the case of *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, treats of the question of waiver of specific stipulation in a policy of insurance, and what is said in that case has an important bearing upon the question which we are now considering. The policy in that case contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeitures. The litigation in the case arose over the fact that a certain agent of the insurance company had accepted notes, instead of cash, in payment of premiums, and had from time to time extended the period in which such notes were to be paid. Speaking of this practice, the Supreme Court said:

"That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident, from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence of 90 days; after that, of 60; then of 30, days. It is in vain to contend that it gave them no authority to do this,

when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments."

In the course of the opinion in the case, it is declared by the court that a party always has the option to waive a condition or stipulation made in his own favor, and, speaking of the forfeiture in regard to the powers of its agent, the court says:

"A waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it; and whether it did exercise such an option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing."

Further, the court says that:

"Forfeitures are not favored in the law, are often the means of great oppression and injustice, and, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made."

And following the rule laid down in *Statham's Case*, 93 U. S. 24, 23 L. Ed. 789, it is held that, although in insurance the time of payment of a premium is material, and cannot be extended by the courts against the assent of the company, yet, where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

Returning to our case, the contention of the defendant is that the right to recover on the policy has been forfeited, not by any act of the holder in violation of the contract before the property was destroyed by fire, but because that, after the loss had taken place, a particular stipulation in the policy, requiring the insured to furnish in a certain form a proof of loss, has not been complied with. In view of the facts and circumstances of the case, and bearing in mind the South Carolina statute, and the decision of the highest court of the state construing it, as well as the principles of law declared by the Supreme Court of the United States, it is our opinion that it was competent for the plaintiff, if he could, to prove that the requirement for formal proof of loss had been waived by an authorized agent of the defendant; and we also think that there was sufficient evidence to go to a jury on the question of waiver, and that upon the undisputed facts the jury would have been warranted in finding that by the action of the agent the defendant had waived compliance with the requirement of the policy with regard to the proof of loss.

Without going further into a discussion of the case, and without intending to deprive the defendant of the benefit of any other defenses it may have to plaintiff's claim, we hold that it was error in the trial judge to direct a verdict for the defendant in the face of the evidence, relative to waiver of proof of loss; and for this reason we think the judgment of the District Court should be reversed, and the case remanded, to the end that a new trial may be had.

Reversed.

DR. J. L. STEPHENS CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 13, 1913.)

No 2,283.

1. DRUGGISTS (§ 12*)—DRUGS—MISBRANDING—"PACKAGE"—"ORIGINAL UNBROKEN PACKAGE."

Where defendant was accused of shipping misbranded medicines in interstate commerce, in violation of the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), it was not necessary that the information allege that the boxes of packages containing the bottles of medicine were misbranded, it being sufficient that it charge that each of the bottles contained in the packages was misbranded; the word "package" as used in the act, having reference to the package which passes into the possession of the public, or the real consumer, and the words "original unbroken package" to the package in the form in which it is received by the vendee or consignee.

[Ed. Note.—for other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 6, pp. 5059-5063, 5154.]

2. DRUGGISTS (§ 12*)—DRUGS—MISBRANDING—PRESCRIPTION.

Where defendant company operating a sanatorium where persons addicted to the drug and liquor habits were treated shipped boxes of misbranded medicines in interstate commerce to a patient, it was no defense to a prosecution for violating the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]) that the sending of the medicine was a mere incident of defendant's employment, the primary object of which was the diagnosis of the patient's ailment and the preparation of a prescription for the needs of his particular case.

[Ed. Note.—for other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. § 12.*

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; J. E. Sater, Judge.

The Dr. J. L. Stephens Company was convicted of violating the Pure Food and Drugs Act, and it brings error. Affirmed.

Bruce & Bruce, of Cincinnati, Ohio, and Eltzroth & Maple, of Lebanon, Ohio, for plaintiff in error.

Sherman T. McPherson and Wm. M. Coffin, both of Cincinnati, Ohio, for the United States.

Before WARRINGTON and DENISON, Circuit Judges, and COCHRAN, District Judge.

PER CURIAM. This is a proceeding on writ of error to set aside a judgment rendered and sentence pronounced upon an information. The information contained two counts, and was based on the Pure Food and Drugs Act of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]). The plaintiff in error, hereafter called defendant, is an Ohio corporation doing busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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ness and having its principal office at Lebanon, Ohio. It there maintains a sanatorium, where persons addicted to the drug and liquor habits are treated; and patients are also treated away from the institution through correspondence. According to an agreed statement of facts, the defendant shipped two boxes of medicine by railway from Lebanon, Ohio, to Washington, D. C.; one shipment was made December 19, 1908, and the other, October 22, 1909; each box contained 18 bottles of the medicine, and all the bottles contained alcohol as one of the ingredients, and some contained as another ingredient morphine in varying and diminishing quantities. The bottles were labeled,

"Maplewood Sanatorium. Ledger M. 45. 3,609. Directions: Take half a tablespoon four times a day and as directed."

The president of defendant, who was also its medical director, has charge of the patients at the sanatorium, and also of those who are treated at a distance through correspondence. He is a graduate of Columbia University, and has had a long and varied professional experience. He is a specialist in the treatment of patients addicted to drug and liquor habits. In the agreed statement of facts this appears:

"It is a recognized fact by the medical profession generally that in the treatment of diseases, especially the drug habit, it is an important, and in most cases a vital factor, that the patient should not know the composition of the medicines given in such treatment."

This agreed fact is offered as a defense to the charge that the medicine in question was mislabeled and misbranded, because correct labeling and branding would defeat the object of the treatment. The defendant has no proprietary medicines, and does not offer or sell any medicines to the general public. In every case where a patient applies for treatment, either at the sanatorium or at the patient's home, a history of the case is obtained from the patient, a diagnosis in each instance is made, and a prescription prepared by the medical director to meet the needs of the particular case.

The cause was submitted upon the agreed statement of facts alluded to, and each party asked for a directed verdict. The case was fully considered by the trial judge, who directed a verdict in favor of the government and sentenced the defendant to a fine of \$50 and costs of prosecution.

[1] Among the questions determined was whether it was necessary to allege that the two boxes or packages containing the bottles of medicine were misbranded, the information having simply charged that each of the bottles contained in such packages was misbranded. The court held that the word "package," as used in the act, "means the package which passes into the possession of the public, of the real consumer; and that the words, 'original unbroken package,' relate * * * to the package in the form in which it is received by the vendee or consignee."

[2] Another question determined was:

"* * * Whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the

medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce."

Upon this question the court held:

"As was said in the *Hipolite Egg Co. Case*, 220 U. S. 45 [31 Sup. Ct. 364, 55 L. Ed. 364], the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the act."

Still another question was determined:

"Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the state and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package inclosing the medicine so prescribed and to be taken by the patient not being so labeled as to show the presence of the drug?"

We do not find it necessary to pass upon the last question stated. The medical director did not in his individual capacity prescribe or furnish the medicine for the persons served in this case. His acts were performed for the corporation, and in legal contemplation by it. *State v. Laylin*, 73 Ohio St. 90, 100, 76 N. E. 567. We agree with Judge Sater in his conclusions upon the other two questions, and so must affirm the judgment.

NOTE.—The charge of Sater, District Judge, in the District Court, referred to above, is as follows:

This case is submitted upon an agreed statement of facts. Each party asks for a directed verdict.

The defendant's first contention is that the information is defective and insufficient, because it alleges that each of the bottles shipped to the vendee was misbranded, whereas, it should have been alleged that the larger package, of which each bottle was a part, was misbranded.

A number of bottles of the article in question were shipped together as a single shipment. They went forward through the channels of interstate commerce as a single bundle or package, surrounded by some sort of a cover. The information charges that each individual bottle was mislabeled and misbranded, and not that the inclosing cover of all of the bottles was mislabeled or misbranded.

The first sentence of the second section of the Pure Food and Drugs Act provides: "That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited." The paragraph then recites that "any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to a foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act" shall be punished as is thereafter set forth. For the purposes of this case, the other portions of the section need not be noticed.

This section prohibits the introduction into interstate commerce of any article of food or drugs which is adulterated or misbranded within the meaning of the act. It also penalizes the shipment or delivery for shipment from any state or territory or the District of Columbia, of any such article so adulterated or misbranded within the meaning of the act. The verbs "ship" and "deliver" are both transitive, and call for an object. The object is found in the words, "any such article so adulterated or misbranded within the meaning of this act." The antecedent of "such" and "so" is found in the first sentence of the section, in the words, "any article of food or drugs which is adulterated or misbranded within the meaning of this act." If I should be wrong in this, and if the object of the transitive verbs "ship" and "deliver" should be found further along in the section, in the words, "any such adulterated or misbranded food or drugs," the meaning would not be changed. I do not think, however, that I am mistaken as to the grammatical construction.

The section also imposes a penalty on the vendee or consignee who, having received, delivers in original unbroken packages for pay or otherwise, or offers to deliver to any other person, any article adulterated or misbranded within the meaning of the act. The law contemplates the punishment of two classes of persons. This construction accords with that put upon the section by the Supreme Court in *Hipolite Egg Co. v. United States*, decided March 13, 1911. In that case an adulterated article was involved. The court said: "Section 2 of the Food and Drugs Act prohibits the introduction into any state or territory from any other state or territory of any article of food or drugs which is adulterated, and makes it a misdemeanor for any person to ship or deliver for shipment such adulterated article, or who shall receive such shipment, or, having received it, shall deliver it in original unbroken packages for pay or otherwise."

It was also said in that case: "The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported, or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale."

It will furthermore be noted that the statute declares that it is one "for preventing * * * the transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein." The words, "package" and "original unbroken package," are both used in the act. The word "package" is not used in the same sense as "original unbroken package." The framers of the act manifestly had in mind the definition heretofore given by the courts to the term "original package," and in the second, third, and tenth sections have used that expression, or its equivalent. It is used in those sections with reference to the situations which arise where the article transmitted has reached the vendee or consignee, but has not yet become a part of the general property of the state in which the vendee or consignee lives. The package, still being unbroken, and not having become a part of the property of the state, remains subject to federal control. The article, if thus found, is subject to seizure, and may thereby be prevented from reaching the ultimate consumer. The word "package" is repeatedly used in this act without any modifying adjective or other qualifying term. It is in such instances to be taken in its broad sense. The word "package," as thus used, means the package made up by the manufacturer for sale to the ultimate consumer, which goes into the possession of the person who will use the article of food or drugs.

In the portion of section 7, which deals with drugs, the statute recites in the proviso: "That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia, or National Formulary." What does that language import, if it does not mean the particular receptacle of drugs which the person intending to use the

drug buys along with the drug, as its container? It means the bottle, or box, or other container, whatever it may be.

How can a person who wishes to buy a drug determine what the actual composition or character of the drug is, unless there be upon the bottle, or box, or paper, paste-board, or other container—i. e., on the package—of whatever material it may be, the information which the law says he shall have? The bottle, box, container, or package, whatever may be its form, may have reached the druggist incased in a great wooden box, for instance, along with a great number of other bottles, boxes, containers, or packages. The ultimate consumer may never see, and in fact rarely does see, the large box incasing the individual packages. The label or inscription put upon the large box—the box inclosing the bottles, boxes, or containers sold by the retailer—will afford no protection to the purchaser. He must look to the bottle, or box, or container that he buys for the thing that he buys.

The same section provides that food shall be considered adulterated: "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption." This language recognizes that a food may, for its preservation in shipment, be packed in a preservative which may be removed so as to leave no deleterious or poisonous effects behind. If the shipper puts upon the covering or the package directions for the removal of the preservative, which enable the person who receives the article for use to bring it to a wholesome condition, the shipper does not become amenable to the law. The lawmakers, in the use of this language, had in mind the ultimate consumer, rather than the person who prepares the food for use for him.

The eighth section relates to misbranding. It recites: "That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substance contained therein which shall be false or misleading in any particular," etc.

It is common knowledge that there are many articles of food and drugs found in the hands of grocers or druggists, which the individual buys for use by himself or his family. It is from the package he buys, from the label upon such package, that he learns what the article is. If the label or brand upon it is misleading, an offense is committed. The package may have been shipped along with many other packages of the same kind in a large inclosing box or case. It is not such inclosing box or case to which the consumer looks, or about which he inquires for information.

The same section, in referring to drugs, provides that they shall be deemed to be misbranded: "If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium * * * or any derivative or preparation of any such substances contained therein."

To what package does the statute allude? Manifestly, the package that the consumer buys, the package which goes into his possession, the package originally put up for sale and use. Under the provisions relating to the misbranding of foods, the same section (section 8) recites that an article of food shall be deemed to be misbranded: "If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, * * * contained therein."

The word "purchaser," it will be noted, is used without limitation or qualifying terms. The language quoted does not say the wholesale, retail, or in-

dividual purchasers. It does not say the purchaser who buys in order to utilize the article in some process of further manufacture or to sell to retailers. If it be broad enough—and I do not say that it is not so—to include wholesale and retail purchasers, it is also broad enough to include the ultimate consumer as a purchaser, and the labeling or branding of the particular package, box, bottle, or other container inclosing the article which he buys must be such as not to deceive or mislead him. It will not do to say that this law was framed to protect wholesalers and retailers and not the common people. Its primary purpose is the protection of the ultimate consumer.

The same section further provides that an article of food shall be deemed adulterated:

“Third. If in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

“Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

“First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

“Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word ‘compound,’ ‘imitation,’ or ‘blend,’ as the case may be, is plainly stated on the package in which it is offered for sale; provided,” etc.

The law does not mean that when a number of bottles or boxes are put into the channels of commerce as a single shipment, incased together in a wooden box, for instance, that the aggregate weight of all the inclosed bottles or boxes, or of each individual inclosed bottle or box shall be placed upon the inclosing wooden box and need not be placed on the individual inclosed bottles or boxes.

In whose favor does the prohibition run against any false or misleading statement, design, or device on the package or its label, regarding the ingredients or the substances contained therein? For whose benefit is the provision for labeling, branding, or tagging of articles so as to indicate that they are compounds, imitations, or blends, made? The answer to these questions, to my mind, is clear. It is the purchasing public, the ultimate consumer, whom the provisions of the statute are primarily intended to protect. Without enlarging further, I am convinced that the word “package,” as used in it, means the package which passes into the possession of the public, of the real consumer; and that the words, “original unbroken package,” relate, as heretofore stated, to the package in the form in which it is received by the vendee or consignee. The objection to the information thus far considered is not well taken.

The remaining question is this: Is a reputable, regularly licensed, practicing physician, residing in Ohio, who prescribes for a person beyond the limits of the state and transmits to such person through the channels of interstate commerce the medicine prescribed, subject to the penalties of the law, if the medicine so prescribed and so passing through the channels of interstate commerce, contains morphine—the bottle, box, container, or package inclosing the medicine so prescribed and to be taken by the patient, not being so labeled as to show the presence of that drug? The defendant is engaged in the business of treating persons enslaved by the morphine, cocaine, and other drug habits.

In the course of the argument reference was made to the debates in the House of Representatives when the Pure Food and Drugs Act was under con-

sideration and when amendments were offered and voted down to exempt from the provisions of the act the prescriptions of regularly licensed and practicing physicians. The statute, like a written instrument, is to be construed by its express terms, from its four corners, as it is frequently expressed. It is said in 26 Am. & Eng. Ency. of Law, 638, 639, that the opinions of individual legislators as to the object and effect of a statute are of little or no weight on questions of construction, and are generally inadmissible; and that, while it is unquestionably a general rule that what may be called the legislative history of an act is not admissible to explain its meaning, yet in cases of doubt and ambiguity the journals of the Legislature may be examined for the intent of the lawmakers to ascertain facts of which such journals are evidence. In view of the principle announced in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414, 29 Sup. Ct. 527, 53 L. Ed. 836, the fact that Congress refused to incorporate in the Pure Food and Drugs Act a provision permitting regularly licensed and practicing physicians to send their medicines containing morphine, cocaine, and like drugs, through the channels of interstate commerce without so labeling them as to show the presence of such drugs, is practically conclusive that it was the intention of Congress that physicians should not enjoy such a privilege.

The act under consideration, however, is not so obscure as not to be susceptible of interpretation without recourse to the journals of Congress. It makes no exemption in favor of regularly licensed practicing physicians. The purpose of the law is to prevent deceit and false pretenses in the sale of foods and drugs, and to protect the public. It is aimed at imitations, shams, frauds, and pretenses of every character as regards articles of food and drugs. Its purpose is to apprise people who buy and use drugs as to what they buy and use, and to check the use of drugs which lead to destructive habits.

In the case at bar the prescription was given to correct the morphine habit. The agreed statement of facts recites that the best way to cure such a habit is by administering, without the knowledge of the patient, morphine in steadily diminishing quantities until finally none at all is given. It is urged that, if a physician may not thus prescribe, he may be thwarted in his treatment of his patient, and that thus the law will operate to the detriment of the morphine victim. The court is therefore asked so to temper the law, so to construe it, as to permit a physician of the character above and in the agreed statement of facts named to prescribe for his patients and transmit to them medicine through the instrumentalities of interstate commerce, without apprising the patients of their use of morphine, cocaine, and other drugs named in the act.

This, however, is asking the court to read into the law a provision not therein contained. If the requested construction be placed upon it, then in every case the question will arise: Is the physician who prescribes regularly licensed, practicing, and reputable? The effect of the construction asked would be so to open the door as to permit disreputable physicians, "quacks," and the manufacturers and vendors of proprietary medicines, to place their prescriptions in the possession of the people, and thus to continue the growth of the very drug habits which the law is designed to check. In the absence of any provision which exempts a regularly licensed, practicing and reputable physician from sending his medicines or prescriptions through the channels of interstate commerce to his patients without labeling or branding them so as to show precisely what their contents are, I am of the opinion that such physicians are not exempt from the provisions of the act, and that a failure on the part of the defendant so to label its medicines or prescriptions as to show that one of the ingredients is morphine, constitutes an offense. If the law as it stands operates injuriously, relief should be sought from Congress, and not from the courts.

One of the reasons for requiring the labeling or branding to show the presence of morphine, cocaine, and articles of like nature is that people may not become addicted to the use of such drugs without knowingly acquiring the habit of using them. Medicines or prescriptions might otherwise be taken by them, without knowledge of their real contents and ultimately the users have

fixed upon them a habit which destroys both health and life. The law is far-reaching, but it was intended to be so.

Another question presented is whether the Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. It is urged that the medicine or prescription is a mere incident of the services rendered, and that it is not therefore to be treated as an article of commerce. There are some sections of the act, as the third, which use the words "sale, or offered for sale." If a master employs a servant, he buys the servant's labor and the servant sells it. If a client employs a lawyer, he buys the lawyer's services. The lawyer sells his services, his learning, his skill. The client buys what the lawyer offers to sell. A physician holds himself out as ready to serve others for a consideration. In a sense he sells his services to his patient. It is common knowledge that a physician rendering services to a patient also furnishes a considerable part, and sometimes all of the medicine taken by the patient. The medicine is furnished along with, under, and as part of the contract of employment. In cities the physician may write a prescription to be filled at a drug store, and yet it is within the knowledge of all that physicians in calling upon patients ordinarily carry with them some medicine at least for administration. There are instances, especially in cities, in which there is a separation of the drugs furnished from the employment. The patient then pays for the drugs in addition to the services rendered by the physician. But I do not understand from the agreed statement of facts that such a situation is presented in this case. The employment which a physician accepts is contractual in its nature and is sufficiently of the nature of bargain and sale to avoid the argument which is made. Moreover, the statute (section 2) prohibits the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipments to any foreign country, of any article of food or drugs which is adulterated or misbranded within the meaning of the act.

As was said in the *Hipolite Egg Co. Case*, the object of the law is to keep adulterated and misbranded articles out of the channels of interstate commerce, and it is immaterial whether the medicine or prescription which was furnished by the defendant company was the mere incident of the employment, or its primary object. It is enough to know that the medicine or prescription was sent through the channels of interstate commerce, and misbranded, within the terms of the act. The information is sufficient.

On the facts submitted, the defendant violated the law, and it is therefore my duty, gentlemen of the jury, to direct you to return a verdict in favor of the government.

BRESE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1913.)

No. 973.

1. GRAND JURY (§ 5*)—JURORS—QUALIFICATIONS—TAXPAYERS.

Code N. C. § 1722, provides that the commissioners for the several counties, at their regular meeting on the first Monday of June in each year, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which the commissioners shall select the names of such persons only as have paid tax for the preceding year and are of good moral character and of sufficient intelligence to act as jurors. *Held*, that the absence from the list of taxpayers of the name of a grand juror, and the consequent nonpayment of taxes, did not, of itself, disqualify the juror, if it did not appear that his name should have been on the list.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8-13, 15; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. GRAND JURY (§ 5*)—QUALIFICATION OF JURORS—TAXPAYER—EVIDENCE—FINDINGS.

On an issue as to whether the name of a grand juror should have been on the tax list, evidence *held* to warrant a finding that he had no property subject to taxation in the preceding year.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8-13, 15; Dec. Dig. § 5.*]

3. CRIMINAL LAW (§ 1158*)—APPEAL—FINDINGS—REVIEW.

A finding of fact by the trial judge will not be reversed on appeal, unless it is plainly wrong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

4. INDICTMENT AND INFORMATION (§ 10*)—DRAWING GRAND JURY—VENIRE FACIAS—ISSUANCE.

Rev. St. § 810 (U. S. Comp. St. 1901, p. 627), providing that no grand jury shall be summoned unless the judge orders a venire to issue therefor, was intended only to prevent the expense of having a grand jury unnecessarily summoned; and hence, where an order is entered requiring the clerk and jury commissioner to draw jurors for service at the succeeding term, an indictment found by a grand jury at such succeeding term was not defective because there was no order of the court in terms directing that a writ of venire facias issue therefor.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50-61; Dec. Dig. § 10.*]

5. INDICTMENT AND INFORMATION (§ 11*)—RETURN—ENTRY.

An entry of the return of an indictment properly entitled, and reciting that an indictment for conspiracy to embezzle was returned at the October, 1897, term, and indorsed "A true bill," with the name of the foreman of the grand jury, and that the cause was ordered transferred to another city, to be tried at the next term of court to be held on the first Monday of November next, etc., while incomplete and informal, the defect was one of form only, and the indictment was therefore not fatally defective on the ground that no record entry was made of its return.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 62-75; Dec. Dig. § 11.*]

6. CRIMINAL LAW (§ 673*)—EVIDENCE—OTHER OFFENSES—LIMITATION—REQUEST.

Where alleged evidence of an offense other than that charged in the indictment in part related directly to and tended to support the offense charged, defendants were, at most, entitled to the granting of an instruction, if requested, limiting the effect of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

7. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—INTENT.

In a prosecution of defendants for conspiracy to embezzle and misapply the funds and credits of a national bank, evidence that defendant D., who was treasurer of a church, procured two notes, for \$5,000 each, of a series representing a loan secured by a deed of trust (which in fact had not been made), and after placing the notes in the possession of the bank used them as collateral for a discount for the benefit of the bank, was admissible to show fraudulent intent, though it was separate and apart from the offense charged in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

8. CRIMINAL LAW (§ 150*)—LIMITATIONS—OVERT ACTS—CONSPIRACY.

Where a conspiracy was formed to embezzle and misapply the funds and credits of a national bank more than three years prior to the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dictment, but the offense charged involved overt acts committed within the three-year period, the offense was not barred by limitations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*]

9. CONSPIRACY (§ 43*)—PERSONS LIABLE—CONVICTION OF LESS THAN ALL.

Where three persons were charged with conspiracy to embezzle and misapply the funds and credits of a national bank, and the proof was sufficient to convict two of them, but not the third, the charge against him would be treated as surplusage, and the conviction of the others sustained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; William T. Newman, Judge.

William E. Breese and another were convicted of conspiracy to embezzle and misapply the funds and credits of the First National Bank of Asheville, N. C., and they bring error. Affirmed.

See, also, 172 Fed. 761; 173 Fed. 402; 192 Fed. 1022.

Chas. A. Moore, John S. Adams, Thos. S. Rollins, and Locke Craig, all of Asheville, N. C. (Moore & Rollins and Adams & Adams, all of Asheville, N. C., on the brief), for plaintiffs in error.

A. E. Holton, U. S. Atty., of Winston-Salem, N. C. (A. L. Coble, Asst. U. S. Atty., of Statesville, N. C., on the brief), for the United States.

Before GOFF, Circuit Judge, and McDOWELL and ROSE, District Judges.

McDOWELL, District Judge. On October 5, 1897, an indictment was found charging Wm. E. Breese, Joseph E. Dickerson, and Wm. H. Penland (who was not tried) with conspiracy to embezzle, abstract, and willfully misapply the funds and credits of the First National Bank of Asheville, N. C. Sections 5209 and 5440, Rev. Stats. U. S. (U. S. Comp. St. 1901, pp. 3497, 3676). Having saved to themselves by force of an agreed order the right to plead not guilty, without thereby waiving the right to subsequently raise objections to the indictment, the defendants on the date last mentioned pleaded not guilty. Nothing having been done in the interval, the three defendants on May 28, 1908, filed a verified motion to quash the indictment on the ground that some of the grand jurors were not qualified. Subsequently this motion was abandoned, except as to one grand juror—N. W. Blackburn. This motion was overruled, and at the next calling of the case, on June 21, 1909, the defendants filed another motion to quash the indictment, which was also overruled. The result of the trial was a verdict of guilty as to Breese and Dickerson, and judgment in accordance with the verdict. For the opinion of the trial court, see *U. S. v. Breese et al.* (D. C.) 172 Fed. 761; *Id.*, 172 Fed. 765. So far as seems necessary, the numerous assignments of error will be discussed, but not necessarily in the order in which they were presented.

[1] We shall first consider the objection to the qualification of the grand juror Blackburn. The ground of objection to Blackburn was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that although, as is alleged, he owned over \$200 worth of property in 1896, he was not assessed for taxes for that year, his name was not on the list of taxpayers, and he had not paid any taxes for the year 1896. The North Carolina statute in force at that time reads:

"The commissioners for the several counties, at their regular meeting on the first Monday of June, in each year, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid tax for the preceding year and are of good moral character and of sufficient intelligence." Section 1722, Code of N. C.

In *Breese v. U. S.*, 143 Fed. 250, 74 C. C. A. 388, this court was called upon to construe this statute only in respect to the failure of a grand juror to pay a part of the taxes actually assessed against him. The question now presented is quite different. *State v. Perry*, 122 N. C. 1018, 1022, 29 S. E. 384 is, we think, conclusive on the proposition that the absence from the list of taxpayers of the name of a grand juror (and the consequent nonpayment of taxes) does not of itself disqualify such juror, if it does not appear that his name should have been on the list.

[2] Recognizing the force of the government's contention that mere poverty does not disqualify, the defendants attempted, on the hearing of their motion to quash, to prove that Blackburn owned over \$200 worth of property in 1896 and that he should have been on the assessment list. The evidence submitted on behalf of the defendant consisted almost entirely of *ex parte* affidavits, which were all in the handwriting of one of the defendants. In opposition to these affidavits, the government introduced several witnesses who testified *viva voce*. J. T. Boyer, one of the persons who had made an affidavit relied upon by the defendants, was introduced as a witness by the government. By him it was shown that he had never verified his so-called affidavit, and that the only statement in the paper of any moment was concerning a matter of which he had no personal knowledge. From the testimony of J. H. Tesh, introduced by the government, it appeared that Blackburn disposed of his cow, wagon, and horse in 1890, or shortly thereafter, and that he retained only a small supply of old household furniture, which the witness did not consider worth over \$25 (the amount allowed to be held exempt from taxation). The defendants went to trial of the motion on affidavits, without the right to plead poverty as the reason for failing to introduce their witnesses and subject them to cross-examination. Under section 878, Rev. Stats. (U. S. Comp. St. 1901, p. 668), the defendants, if without means, could have had these affiants summoned to court at the expense of the government.

[3] The result of putting one of the affiants on the witness stand was so disastrous, and threw such strong suspicion on the remaining affidavits, that we are led to the conclusion that the trial judge properly decided on the evidence before him that Blackburn had no property in 1896 subject to taxation. And it is to be borne in mind that on review of a ruling of such character the appellate court cannot reverse, except that it find that the trial court was plainly wrong. *Reynolds v. U. S.*, 98 U. S. 145, 156, 25 L. Ed. 244. In so far as Blackburn's alleged disqualification is concerned, the case at bar falls under the ruling in *State*

v. Perry, *supra*, and we must hold that the motion to quash made in 1908 was properly overruled.

The motion to quash made in 1909 next demands consideration. The grounds of this motion were: (1) That the court had not made an order directing the issue of venire facias; (2) that the indictment was returned by the foreman of the grand jury alone; (3) that no record entry was made of the return of the indictment.

[4] Of the first ground of objection it is to be said that, while there was no order of court directing in express terms that writ of venire facias issue, an order was made and entered of record at the April, 1897, term requiring the clerk and jury commissioner to draw the jurors for service at the October, 1897, term. Section 810, Rev. Stats. (U. S. Comp. St. 1901, p. 627), reads:

"No grand jury shall be summoned * * * unless * * * the judge * * * orders a venire to issue therefor."

But, without reference to any question of waiver, we are of opinion that in enacting this statute Congress had no intent to legislate as to the validity of indictments. The purpose was merely to prevent the expense of having a grand jury unnecessarily summoned. The order of the April term above mentioned so clearly indicated an intent on the part of the judge to have venire issue that we find no merit in the objection. In *U. S. v. Reed*, 2 Blatchf. 435, 27 Fed. Cas. 727, 733, Mr. Justice Nelson held that a verbal order from the judge to the clerk to issue venire facias for a grand jury was sufficient. In *Fries Case*, Whart. St. Tr. 458, 3 Dall. 515, 9 Fed. Cas. 826, 923, Mr. Justice Iredell observed that a venire issued with the sanction of the court has the same effect as though the express order of the court had been annexed.

The second ground of objection raised certain questions which this court certified to the Supreme Court of the United States. The answer of that court has disposed of this ground of objection adversely to the plaintiffs in error. See *Breese et al. v. U. S.*, 226 U. S. 1, 33 Sup. Ct. 1, 57 L. Ed. —.

[5] The third ground, also, seems to us entirely without merit. It is not true that the clerk made no entry of the return of the indictment. He did make an entry reading as follows:

"United States v. W. E. Breese, W. H. Penland, and J. E. Dickerson.

"Indet.: Conspiracy and Embezzlement, Octo. Term, 1897. 'A true bill. J. M. Allen, Foreman.' In the above-entitled cause it is ordered by the court, upon motion of the district attorney, that the said cause, together with all the papers therein, be transferred to Asheville, to be there tried at the next term of said court to be held on the 1st Monday in November next.

"It is further ordered that a capias issue forthwith from this court, returnable to the next term of the said Asheville court, and that a justified bond in the sum of thirty thousand dollars, to be approved by the clerk of the federal court at Asheville, be required of each of the defendants above named."

While this entry is incomplete and informal, the defect here is properly to be classed as a defect of form. See section 1025, Rev. Stats. (U. S. Comp. St. 1901, p. 720).

[6] The next assignment we shall consider relates to the admission

of certain evidence. In March, 1894, in anticipation of obtaining a loan of \$25,000 from an insurance company, the trustees of the First Baptist Church of Asheville executed five promissory notes, each for \$5,000, payable respectively in one, two, three, four, and five years, to the order of J. E. Dickerson and G. W. Purefoy, which were secured by a mortgage or deed of trust covering the church property, executed by the church trustees to one Murphy, trustee. For some reason the proposed arrangement failed, and a loan of \$15,000 from a building and loan association was subsequently obtained by the church. On December 21, 1894, in the handwriting of the defendant Dickerson, there was entered on the margin of the record of the deed of trust to Murphy a recital that the notes had been fully satisfied and the deed of trust was released of record over the signature of Murphy, trustee. Dickerson was the treasurer of the church, and two of the \$5,000 notes, purporting to be secured by mortgage, were not canceled, and were by him put into the possession of the First National Bank of Asheville. These same notes were subsequently attached as collateral to a note for \$10,000 executed by the First National Bank to, and discounted with, the South Carolina Savings Bank. The defendants objected to the admission of this evidence, and subsequently moved that it be stricken out. They did not at any time ask for an instruction limiting the effect to be given to the evidence. The only ground assigned for the objection is that the evidence related to an offense other than that charged in the indictment. In part the evidence objected to related directly to, and tended strongly to support, the charge made in the indictment. At the most, therefore, the defendants could only have been entitled to an instruction limiting the effect of the evidence, for which they did not ask.

[7] But, even in so far as the evidence tended to show the commission of an offense not charged in the indictment, it seems to fall under the doctrine that in cases of fraud evidence of offenses not charged may be admitted, if tending to show fraudulent intent. *Wood v. U. S.*, 16 Pet. 342, 360, 10 L. Ed. 987; *Castle v. Bullard*, 23 How. 172, 187, 16 L. Ed. 424; *Butler v. Watkins*, 13 Wall. 456, 464, 20 L. Ed. 629; *Moore v. U. S.*, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; *Allis v. U. S.*, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91; *Bacon v. U. S.*, 97 Fed. 35, 42, 38 C. C. A. 37; *Dorsey v. U. S.*, 101 Fed. 746, 756, 41 C. C. A. 652.

[8] The next assignment to be discussed relates to a claim of limitation. It is contended on behalf of the defendants that the evidence showed that the offense charged in the indictment was committed more than three years before the finding of the indictment (October 5, 1897), and that the prosecution was therefore barred by the three year statute of limitations. R. S. § 1044, 2 Fed. Stats. Ann. 358 (U. S. Comp. St. 1901, p. 725). The argument is that the conspiracy, if any, was formed more than three years prior to the indictment, and that acts in pursuance of and to effect the object of the conspiracy (R. S. § 5440, 2 Fed. Stats. Ann. 247¹) were committed more than three years prior to the indictment. But it was also in evidence that acts to effect the object of and in pursuance of the conspiracy were committed

¹ U. S. Comp. St. 1901, p. 3676.

within less than three years from the finding of the indictment. It must, we think, be admitted that where a conspiracy is formed more than three years prior to indictment, but where the first overt act is committed within the three years, the prosecution is not barred; and this simply because the offense has not been committed until the doing of the overt act. To say, in this connection, that the making of the corrupt agreement is the crime, is a perversion of the meaning of the Supreme Court in *U. S. v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. See *Hyde v. U. S.*, 225 U. S. 347, 359, 32 Sup. Ct. 793, 56 L. Ed. 1114. Where, however, the conspiracy was formed more than three years prior to the indictment, and acts in pursuance thereof are done both prior to and within the three years, there has arisen a difference of opinion. *U. S. v. Owen* (D. C.) 32 Fed. 534, *U. S. v. McCord* (D. C.) 72 Fed. 159, *Ex parte Black* (D. C.) 147 Fed. 832, 841, and *U. S. v. Biggs* (D. C.) 157 Fed. 264, 273, support the theory that in such case the limitation bars the prosecution. The weight of authority, in our opinion, is to the contrary. See *Wilson v. U. S.*, 190 Fed. 427, 435, 111 C. C. A. 231; *Hedderly v. U. S.*, 193 Fed. 561, 569, 114 C. C. A. 227; *Jones v. U. S.*, 162 Fed. 417, 426, 89 C. C. A. 303; *Lonabaugh v. U. S.*, 179 Fed. 476, 478, 103 C. C. A. 56; *U. S. v. Bradford* (C. C.) 148 Fed. 413, 419; *U. S. v. Brace* (D. C.) 149 Fed. 874, 877; *Ware v. U. S.*, 154 Fed. 577, 579, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233; *U. S. v. Greene* (D. C.) 115 Fed. 347; *U. S. v. Greene* (D. C.) 146 Fed. 803, 889; *Lorenz v. U. S.*, 24 App. D. C. 337, 387; *Com. v. Wishart*, 8 Leg. Gaz. (Pa.) 137; *People v. Willis*, 52 N. Y. Supp. 808; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406; *Amer. Ins. Co. v. State*, 75 Miss. 24, 35, 22 South. 99, 102; *Ochs v. People*, 25 Ill. App. 379, 414; 6 Am. & Eng. Ency. (2d Ed.) 844; 1 Bishop's New Cr. Proc. § 61; 2 Bishop's New Cr. Proc. § 206; 29 Am. & Eng. Ency. (2d Ed.) 165. That a conspiracy may be a continuing offense, and that prosecution for a conspiracy formed more than three years prior to the indictment is not barred, if it be alleged and proved that the conspiracy continued in force and operation within the period of limitation, is settled by *U. S. v. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, reversing *U. S. v. Kissel* (C. C.) 173 Fed. 823.

The doing of an act by one conspirator, with the knowledge and consent of the others, in pursuance of an agreement made long previously, and to carry out the purpose of such agreement, necessarily implies at least a tacit renewal of the conspiracy. A conspiracy such as is charged here continues until its purpose has been fully effected or until it has been abandoned. The offense consists, not in the mere agreement, but in the existence of the conspiracy, and the doing of an act to effect the object of the conspiracy. The making of the unlawful agreement and the doing of the overt act more than three years prior to indictment undoubtedly completes an offense, but not necessarily the offense charged in the indictment. The offense charged is a conspiracy, formed by tacitly or expressly agreeing to continue in force a conspiracy originally entered into more than three years prior to the indictment, and the commission of overt acts within the three

years. The indictment in the case at bar charged that the conspiracy was formed July 1, 1897, and that the overt act was committed on that date. As time is not of the essence of such a charge, it was permissible to allege one time and prove another. Evidence of a conspiracy formed more than three years prior to the indictment, and of acts done within three years by the different defendants, with the knowledge and consent of the others, in pursuance of and to carry out the purpose of the original conspiracy, clearly support such an indictment, notwithstanding evidence of similar overt acts committed more than three years prior to the finding of the indictment. See *Hyde v. U. S.*, 225 U. S. 347, 369, 32 Sup. Ct. 793, 56 L. Ed. 1114; *Heike v. U. S.*, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. —. The instructions asked by the defendant on this point are all based on an erroneous theory, and it was not error to refuse to give them. The charge given by the learned trial judge in respect to this feature of the case is not open to any exception taken to it.

[9] Another ground of objection is based on a theory stated in the charge. To abbreviate as far as possible, we quote merely enough of the charge to illustrate the point:

"If Breese and Dickerson conspired with each other, whether Penland was or was not a party to the conspiracy, if acts were done in furtherance of the conspiracy, and to effect the object of the conspiracy, then you would convict both Breese and Dickerson on this trial."

The indictment charged that Breese, Penland, and Dickerson conspired, and only Breese and Dickerson were on trial. In 4 Elliott on Evidence, § 2935, it is said:

"Where more than two persons are charged as conspirators, it has been held sufficient if the proof show that two of them were guilty, and that the charge as to others was surplusage. It was held not essential that the proof show that all were guilty."

See, also, *Woodworth v. State*, 20 Tex. App. 375; 13 Ency. Ev. 719; *Looney v. People*, 81 Ill. App. 370; *Olson v. U. S.*, 133 Fed. 849, 855, 67 C. C. A. 21; *U. S. v. Sacia* (D. C.) 2 Fed. 754, 758, 759; *Browne v. U. S.*, 145 Fed. 1, 13, 76 C. C. A. 31; *U. S. v. Richards* (D. C.) 149 Fed. 445, 453, 457; *State v. Wadsworth*, 30 Conn. 55, 57; *Livermore v. Herschell*, 20 Mass. (3 Pick.) 33.

Much the greater number of exceptions taken by the defendants do not justify detailed mention. The majority of the remaining assignments are based on the refusal of the court to give special instructions asked for by the defendants. We have examined each of them carefully. Many of the instructions asked for are clearly improper. Some are not open to objection, but every sound instruction asked for was in effect given the jury in the judge's charge.

On review of the entire case, we find no reversible error, and the judgment below must be affirmed.

WESTERN UNION TELEGRAPH CO. v. LEWIS.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1913. Rehearing Denied

April 12, 1913.)

No. 2,312.

1. TELEGRAPHS AND TELEPHONES (§ 67*)—SPECULATIVE DAMAGES—TELEGRAM—FAILURE TO DELIVER.

Where defendant's failure to deliver a telegram containing an offer by plaintiff to purchase a large tract of land probably resulted in plaintiff's failure to get the land, which he intended to buy merely as a speculation in the hope that he could sell it thereafter at an advance, the damages sustained by him in failing to obtain it were purely speculative, and therefore not recoverable against the telegraph company in an action for its default.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

2. FAILURE TO DELIVER TELEGRAMS—MEASURE OF DAMAGES.

Where defendant telegraph company failed to deliver a telegram sent by plaintiff, offering to purchase a tract of land for much less than it was worth, which offer, had the message been delivered, would have been accepted, the measure of plaintiff's damages was the difference between the price offered and the value of the land. Per Shelby, Circuit Judge, dissenting.

3. FAILURE TO DELIVER TELEGRAMS—SPECULATIVE DAMAGES.

Under the rule that a telegraph company is liable for damages which are the natural and proximate result of its negligence in failing to seasonably deliver a message received for transmission, such damages were neither remote nor speculative. Per Shelby, Circuit Judge, dissenting.

4. REMOTE OR SPECULATIVE DAMAGES—RIGHT TO NOMINAL DAMAGES.

In an action against a telegraph company for nondelivery of a telegram, by which plaintiff failed to obtain a favorable contract for the purchase of real property, plaintiff was at least entitled to recover nominal damages to the extent of the sum paid for the transmission of the message, and hence it was not error to refuse to direct a verdict for defendant on the ground that plaintiff's damages for loss of his contract were remote or speculative. Per Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by W. J. Lewis against the Western Union Telegraph Company. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

George H. Fearons, of New York City, John W. Veale, of Amarillo, Tex., and M. A. Spoonts, George Thompson, and J. H. Barwise, Jr., all of Ft. Worth, Tex., for plaintiff in error.

S. H. Madden, W. H. Kimbrough, and F. M. Ryburn, all of Amarillo, Tex., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FOSTER, District Judge. In this case the facts appear to be as follows:

Sam Davidson was the owner of a tract of land in Hall and Donnelly counties, Tex., known as the "Diamond Tail Pasture Lands," consisting of about 16,000 acres. About the beginning of 1906 Davidson authorized J. F. Hall, of Amarillo, Tex., and other brokers, to sell the land at \$3.25 an acre. Hall was unable to sell at this price. About the 1st of July, 1906, Davidson raised the price to \$3.50 per acre, and Hall continued to try to sell it, but got no definite offers except from Lewis, defendant in error. On the 13th of November, 1906, Hall sent the following telegram from Amarillo to Davidson, at Ft. Worth, Tex., by the Western Union Telegraph Company:

"Lewis offers three dollars per acre, and also over this assumes debt to State, of about sixty-five hundred, for Diamond Tail Pasture. Will pay ten or fifteen thousand cash. Reply."

This offer amounted to about \$3.25 per acre. The message was never delivered to Davidson, and he shortly thereafter sold the property for \$3.50 per acre. Lewis brought suit against the Western Union Telegraph Company in the district court of Potter county, Tex., to recover \$32,000 as damages for the nondelivery of the telegram. The case was removed to the United States Circuit Court for the Northern District of Texas, and went to trial. At the close of the evidence the Telegraph Company moved the court to direct a verdict in its favor. The motion was overruled, and the case went to the jury, and resulted in a verdict against the defendant in the sum of \$1,129. The overruling of the motion to direct is one of the errors assigned.

The defendant in error in his petition sets up that he was engaged generally in buying and selling range property for profit, including lands and cattle. His *ad damnum* is as follows:

"That said ranch and lands aggregated 16,000 acres, and would have cost plaintiff \$54,500, while they would have been worth to him, and were and are of a reasonable market value, and of value for use to plaintiff in his business, of [\$86,500], or \$2 per acre more than said land would have cost him, making a difference of \$32,000, in which said sum, with interest from said date, plaintiff has been damaged as the direct result of defendant's negligence and failure to perform its said contract and obligations."

Lewis, as a witness in his own behalf, testified as follows:

"My name is W. J. Lewis, and I live at Clarendon. I am in the cattle business, speculating a little, buying and selling land and cattle. I only buy and sell for myself. I have been engaged in this kind of business 15 or 20 years. * * * I was not able to purchase this property upon the offer I authorized Mr. Hall to make, but, if Mr. Davidson had accepted the offer, I was in a position to carry it out. * * * At the time I made this offer I was familiar with land values in that section of the country, being in that business and buying everything I thought was cheap. I think that the reasonable and fair cash market value of the land I made the offer for on the 13th of September, 1906, was \$4.50 an acre. * * * As to the value of the land, the figures I have stated are what I thought I would have been able to get out of it. I was figuring on the matter as a speculative proposition—that was my object in buying the land. I thought it was worth \$4.50 an acre, and that is what I figured I would get as a speculative proposition. I didn't expect to buy on the 13th and sell on the 14th. A proposition like that would probably take a month to work out. I might have sold on the

basis of some cash, some notes, and some trade. When figuring on a piece of property like this, I don't always expect to pay all cash or sell for all cash, but in this particular case I didn't think about the terms I would sell on."

It appears from the above that Lewis intended to buy the land purely as a speculation, and it is not shown he had any particular purchaser in view. On the contrary, he expected to hold the land some time before finding a purchaser at a satisfactory price. He did not buy any other land in place of it, and nowhere in the pleadings or proof is there anything indicating that Lewis had any use for the property except to sell it, or that he was damaged in any other way by his failure to buy it than by the loss of the anticipated profits. He did not even pay for the telegram which was sent by Hall.

[1] Conceding, for the sake of argument, that Hall was acting as Lewis' agent, that the telegram charged the company with notice of that fact, and that Davidson would have accepted Lewis' offer, none of which is free from doubt, on the undisputed evidence there was nothing for the jury, as the anticipated profits were too uncertain and remote to form the basis of a claim for damages. *Howard v. Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479.

Entertaining these views, it is unnecessary to consider the other questions presented by the record.

The judgment is reversed, and the case remanded for a new trial.

SHELBY, Circuit Judge (dissenting). I find myself unable to concur in the decision that the trial court erred in refusing to direct a verdict for the defendant.

Lewis caused a telegram to be sent to Davidson offering \$3.25 per acre for 16,000 acres of land. The telegraph company received the message, and received the customary fee, \$1.13, for sending it, but never delivered the message. The evidence tended to show that Davidson would have accepted the offer if the message had been received. There was evidence tending to show that the land was fairly worth much more than the offer, and it was, in fact, proved that Davidson sold it a few days later for \$3.50 per acre. The evidence was amply sufficient to sustain a finding by the jury that the negligence of the company caused Lewis to fail to secure the land at the price he offered. The charge of the trial court, which is copied in a note, correctly submitted the case to the jury, and it also shows substantially what the evidence tended to prove.

[2] If the land was fairly worth more to him than Lewis offered for it, and he lost the purchase by the failure to deliver the message, he was damaged to the extent of the difference between the price offered and the value of the land. There are cases that by analogy fully sustain this view. *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Wallingford & Son v. Western Union Telegraph Co.*, 53 S. C. 410, 31 S. E. 275; *Western Union Telegraph Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949, 3 Ann. Cas. 712; *Western Union Telegraph Co. v. Cook*, 54 Neb.

109, 74 N. W. 395; Box v. Postal Telegraph-Cable Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566; 2 Joyce on Electric Law, § 961.

No decision of the Supreme Court has been found based on facts like those in this case.

A case has arisen in Mississippi exactly in point. An owner of real estate offered it for \$3,000, and would have taken that sum for it. The plaintiff sent a telegram directing its purchase at that price, but the telegram was not duly delivered, and another bought the lot. The lot was worth \$5,000. Plaintiff sued for \$2,000, less \$50, the cost of the transfer, which plaintiff would have paid. The court held the declaration good, and approved the measure of damages sued for. The court condemned the proposition:

"That a man sustains no loss or injury cognizable by law when he is offered property for \$3,000, worth \$5,000 in the market, and which he is ready and anxious to buy, but is prevented from doing so, by negligence such as is disclosed in the record. * * *" *Alexander v. Western Union Telegraph Co.*, 66 Miss. 161, 5 South. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; s. c., 67 Miss. 386, 7 South. 280.

[3] It cannot be doubted that a telegraph company is liable for damages that are the natural and proximate result of its negligence in failing to seasonably deliver a message it has received for transmission. Damages are a natural result when they are such as usually follow in the ordinary course of things, and they are proximate when they result directly, and not remotely, from the negligence. Such damages are supposed to be within the contemplation of the parties. The telegram, on its face, showed that it involved a business of importance, that it was an offer to purchase real estate at a price exceeding \$15,000, and the use of the telegraph showed that promptness was important. It is true that remote or speculative damages, speculative in the sense that they are not reasonably certain, cannot be recovered. But when there was evidence that the land was worth greatly more than the amount offered for it, and that it, in fact, sold for more in a few days, can it be doubted that, if this evidence was true, it justified the jury in returning a verdict, as they did, for substantial damages?

In cases in which the special damages are remote, the plaintiff is entitled to nominal damages, at least to the extent of the sum paid for the transmission of the message. The charge directing the verdict could have been refused on that ground alone. *Western Union Telegraph Co. v. Way*, 83 Ala. 542, 557, 4 South. 844.

[4] The case of *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, cited in the majority opinion, is not in conflict with the rulings of the trial judge. It is held there that anticipated profits from the running of a mill, which are uncertain, cannot be recovered; but it is also said in the same case that anticipated profits that are not open to the objection of uncertainty may be recovered.

The case of *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479, also cited in the court's opinion, involves the delay in delivering a message directing the purchase of 10,000 bar-

rels of oil at \$1.17 per barrel on the plaintiff's account. The prices were higher the next day—\$1.35 per barrel—and plaintiff sued for the difference in price. In deciding that the plaintiff could recover only the cost of sending the delayed message, the court called attention to the fact that there was nothing in the record to show that the oil would have been sold for the plaintiff's account the next day. If the telegram had directed the purchase and the sale on the rise, a different case would have been presented. But cases of the purchase of barrels of oil, bushels of wheat, or bales of cotton are not analogous in all respects to the purchase of land. The person offering to purchase barrels of oil on the market can, if his offer is delayed, always get the barrels of oil on the market, and his subsequent purchase will frequently fix the measure of his damages. One barrel of oil or one bushel of wheat on the market is just like another. Lewis could not have bought another 16,000 acres of land just like Davidson's ranch, and sued the company for the excess of price paid. His only way to prove his damages was to show how much more the land was worth than his offer, which the company negligently failed to deliver.

It would be something to be regretted if those engaged in business, and required to use the telegraph, had no remedy for the failure to deliver messages in such cases, except to recover the mere cost of the message.

I am constrained to dissent, believing that the judgment ought to be affirmed.

NOTE.—Meek, District Judge, charged the jury as follows:

"Gentlemen of the Jury: The plaintiff, W. J. Lewis, sues the defendant, Western Union Telegraph Company, to recover damages alleged to have been sustained by him because of the failure of the defendant to promptly transmit and deliver to the addressee a certain telegram filed with the defendant at its office in Amarillo, Tex., on the 13th day of September, 1906. It is alleged that on that day J. F. Hall, acting for and on behalf and at the instance of plaintiff, filed with the defendant at its office in Amarillo, Tex., a telegram addressed to Sam Davidson, at Ft. Worth, Tex., reading substantially as follows: 'Lewis offers three dollars per acre and also over this assumes debt to State of about sixty-five hundred, for Diamond Tail pasture; will pay ten or fifteen thousand cash. Reply.' It is also alleged that said Hall paid the charges made by the defendant for transmission and delivery of the message, and that it then and there became and was the duty of the defendant and its agents to transmit and deliver the message to said Davidson with due and reasonable diligence.

"It is further alleged that the defendant, through its agents and servants, failed to promptly transmit and deliver said telegram to Davidson, the addressee, and because thereof the plaintiff failed to secure said land under the proposal contained in said telegram, that had said telegram been promptly transmitted and received by Davidson he would have accepted said offer of the plaintiff, and that plaintiff would have secured the lands on these terms.

"He alleges that he has sustained damages in an amount equal to the difference between the price he would have paid for the lands under these terms and the then market value of same.

"The defendant, for answer, denies the allegations contained in plaintiff's petition, and for special and further answer, among other things, avers that even though it be true the above described message was not promptly delivered, yet, even if it had been so promptly delivered to the addressee, Davidson, and within the time alleged by the plaintiff in his petition to have

been a reasonable time, Davidson would not have accepted the price for said lands specified in said message, and there would not have been any trade made between said Lewis and the said Davidson.

"These, gentlemen, are the issues made in this case and upon which evidence has been admitted before you, and it is from such evidence and facts and circumstances in evidence that you are to reach your verdict, being guided and governed as to the law of the case by the charge of the court.

"In the first place, the burden of proof is on the plaintiff, and, before he can recover, he must establish the allegations contained in his petition by a preponderance or greater weight of the evidence, and, unless he has done so, you will find for the defendant.

"It is in evidence and uncontroverted that on the 13th day of September, 1906, J. F. Hall filed with the Western Union Telegraph Company, at its office in Amarillo, Tex., the message signed by him and addressed to Sam Davidson, at Ft. Worth, and which is in evidence before you. It is also in evidence and uncontroverted that said Hall paid the charges demanded by the company for the transmission of said message from Amarillo, to Ft. Worth, and that the company accepted the message and charges paid by Hall for such service.

"Now, if you believe from the evidence that this message was filed with said defendant company by Hall in compliance with instructions given him by the plaintiff, and if you find that in doing so he acted in whole or in part on behalf of the plaintiff, you are instructed that the defendant owed the plaintiff the duty to exercise ordinary care to transmit and deliver said message with reasonable dispatch to Sam Davidson in Ft. Worth. If you so believe, and if you further believe from the evidence that the defendant failed to exercise such ordinary care to transmit and deliver said message with reasonable dispatch and within a reasonable time, and if you further believe from the evidence that the plaintiff was injured thereby, and, as a result of the failure on the part of the defendant to exercise such ordinary care in the transmission and delivery of said message, then you will find for the plaintiff such damages, if any, as you may find him entitled to under the next succeeding paragraph of this charge.

"If you find from the evidence that at the time the message was filed in the defendant's office at Amarillo, Tex., the plaintiff had been negotiating with Sam Davidson for the purchase of a pasture known as the Diamond Tail pasture, and if you believe that if said message had been transmitted and delivered by the defendant with reasonable care that the said Sam Davidson would have accepted the offer contained in said message, and the purchase of said Diamond Tail pasture would have been consummated by the plaintiff, and if you further believe that at the time said message was filed with the defendant, it was notified by the sender, J. F. Hall, that the same pertained to the closing of a land deal, and that the defendant had reasonable notice that, if it should fail to transmit and deliver such message with reasonable dispatch, such failure might result in the failure on the part of the plaintiff to consummate said land trade and in consequent loss to the plaintiff of profits, if any, flowing from such deal, then the measure of plaintiff's damages, if any you allow, will be the difference, if any, between the price he offered in said message to said Davidson for the property and the reasonable market value of same at said date with interest on such amount found at 6 per cent. per annum from September 13, 1906, until now, and in this connection you are further instructed that by the market value of the land mentioned in said message is meant the price which said lands would have brought if sold in due course of business either for cash or on such time and terms as were substantially equivalent to a cash transaction.

"If you believe from the facts and circumstances in evidence before you that Davidson, even though he had promptly received the telegram sent him by J. F. Hall, would not have thereupon accepted the offer made therein and wired an acceptance of it to the sender, Hall, then and in this event your verdict will be for the defendant.

"Again, if you believe from the evidence that the fair and reasonable cash market value of the land in question on September 13, 1906, was not more

than the price which Lewis offered, then and in that event you should find for the defendant.

"There are two main controverted issues of fact which are submitted to you for your determination under the evidence and facts and circumstances in evidence. The first issue is whether Davidson, had he promptly received the telegram containing the proposition, if the plaintiff, Lewis, would have accepted same. You have listened to much evidence on this issue. This issue involves what an individual would have done under a given condition. Davidson testified that he would have accepted the offer contained in the telegram. But this is not all the evidence on the point, nor is it necessarily controlling of the issue. You have before you in the testimony evidence of his movements and acts during the time these matters were pending. You have evidence as to what information, if any, he had from other sources concerning the proposition. You have the circumstances of his going to Amarillo, of the occasion for his going, the time of his going, and what he did on this trip and the time at which he did these things and the circumstances under which he did them. In determining this issue and arriving at the truth of the matter, you should take all these facts and circumstances into consideration."

ROSENBAUM et al. v. DUTTON.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,845.

1. BANKRUPTCY (§ 339*)—CLAIMS—ALLOWANCE—RIGHT TO CONTEST—"PARTIES IN INTEREST."

Bankr. Act July 1, 1898, c. 541, §§ 57d, 57k, 30 Stat. 560, 561 (U. S. Comp. St. 1901, p. 3443), provides for the allowance of claims unless objected to by "parties in interest," and declares that allowed claims may be reconsidered before the estate has been closed. *Held*, that "parties in interest," as used in section 57d, include all persons who have an interest in the res which is to be administered, and hence include stockholders of the bankrupt, who were the only persons that would be injuriously affected by the allowance of a claim to which they objected, and which, if allowed, would necessitate an assessment on stockholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.*]

2. BANKRUPTCY (§ 339*)—CLAIMS—OBJECTIONS—REHEARING—LACHES.

The affairs of a bankrupt corporation being in process of administration in Missouri, and a motion to expunge a claim having been sustained July 15, 1909, the claimant on July 27th filed a motion for rehearing, which was granted November 15th, and the cause set for hearing on December 17th following. On that day, after the referee had intimated that he would hold against the claim, a conference was had between the attorney for the trustee and the attorney for certain creditors, after which it was agreed that the claim should be allowed by consent. These proceedings were had without notice to the objectors, who were residents of Pennsylvania and stockholders of the bankrupt, and the only persons adversely interested in the allowance of the claim. They, on June 13, 1910, immediately after learning of the referee's action in allowing the claim, filed a motion to set it aside. *Held*, that objectors were not barred from such relief by laches.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.*]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of bankruptcy proceedings of the Pittsburg Lead & Zinc Company, Consolidated. From a decree sustaining a referee's order overruling a motion and petition of H. S. Rosenbaum and another to expunge the claim of F. R. Dutton, petitioners appeal. Reversed and remanded, with directions.

See, also, 198 Fed. 316.

According to the statement of the referee: "The Pittsburg Lead & Zinc Company, Consolidated, was adjudged a bankrupt on the 14th day of September, 1908, upon an involuntary petition filed August 28, 1908. The first meeting of creditors was held on the 13th of October, 1908, at which meeting a claim in favor of F. R. Dutton was proved and allowed in the sum of \$7,352.69. Mr. S. A. Will was present at the meeting, and in answer to his inquiry was advised by the referee that he would be given time, and that, if he saw proper, he might file a motion to expunge the allowance. On October 18, 1908, claims were proved and allowed in favor of Rosenbaum and Will, respectively. On the 1st day of April, 1909, the trustee filed motions to expunge the allowance so made in favor of Will and Rosenbaum, respectively, and such proceedings were had thereon that on the 26th of April, 1909, the allowances of these claims were expunged. On the same day, April 1, 1909, the trustee filed a motion to expunge the claim allowed in favor of F. R. Dutton. Issues were made upon this motion, evidence heard, and a finding and judgment entered by the referee on the 15th day of July, 1909, sustaining the motion and expunging the allowance in favor of F. R. Dutton. On the 27th of July, 1909, Dutton filed a motion for a rehearing, which was granted on the 15th of November, 1909, and the cause set down for hearing on the 17th of December, 1909. On that day by consent of the parties a judgment was entered overruling the motion to expunge and permitting the claim to stand as allowed. On the 5th day of May, 1910, the trustee filed a motion for an assessment and call upon the unpaid stock of the stockholders of the bankrupt corporation to meet its unpaid debts, and notice was given to the stockholders thereof, and among others to Rosenbaum and Will, as such stockholders. On June 13, 1910, Rosenbaum and Will filed the motion now under consideration. This pleading, which is herein termed a 'motion,' is called a 'petition' by the pleader. It is, in effect, a motion to set aside the allowance of the claim, and also a motion to expunge the claim, as the pleading embraces both matters and the evidence is upon both points. The cause was submitted to the court upon both questions at the same time. The trustee also filed a paper, in which he stated he unites in the motion to set aside the order allowing the claim of Mr. Dutton and to expunge the same, but expressly refuses to adopt the pleading, so far as any improper act was done in the entering of the judgment sought to be set aside."

It appears from the evidence that a large number of the items included in Mr. Dutton's account are very questionable; but we do not desire to express any opinion as to this on this appeal. No notice was given to the appellants, who were the objecting creditors to the allowance of Dutton's claim, that his motion for rehearing had been granted by the referee and the cause set down for hearing on November 17, 1909. Appellants reside in the city of Pittsburgh, Pa., and knew nothing of the motion for rehearing having been granted, nor of the date when it was set down. The petitions of appellants set forth that Rosenbaum is a creditor of the bankrupt corporation in the sum of \$700 by reason of having been compelled to pay a note of the bankrupt on which he was an indorser, and the petition of Will alleges that he is a creditor of the bankrupt in the sum of \$1,800 by reason of being compelled to pay a note of the bankrupt on which he was one of the indorsers. They further state that, in the petition of the trustee for an order of the court to assess the stockholders of the bankrupt corporation, it was alleged that there remained unpaid indebtedness of the bankrupt estate about \$8,000; that in this statement of indebtedness of \$8,000 is included the claim of the appellee in the sum of \$7,352.69, which claim had been allowed by the referee; that afterwards the trustee filed a motion to set aside and expunge the allowance of the said

Dutton on several grounds, and that upon the hearing of said motion the said Dutton was duly represented by counsel, and after a full and complete investigation of the claim of the said Dutton, the referee, on the 13th day of July, 1909, set it aside and expunged the same, the referee finding that the said Dutton was indebted to the bankrupt corporation for unpaid capital stock in the sum of \$13,196, which amount was in excess of the allowance; that on the 15th day of November, 1909, the referee sustained a motion for rehearing filed by said Dutton, by consent of the parties, and the claim was allowed; that at the time said motion was made the trustee and the appellee were each represented by counsel at said hearing, and that after hearing the evidence the referee indicated that he would sustain the objections to the allowance of said Dutton, when counsel for the trustee, counsel for the creditors whose claims were undisputed, and counsel for Dutton retired from the room and entered into an agreement that Dutton should only receive \$200 of the 5 per cent. dividend then declared on his claim of \$7,352.69, and the balance of it was to be paid to the attorneys for the remaining creditors, whose claims were undisputed, and that thereupon his claim should be allowed by consent of all parties. It was also agreed between them that Dutton should collect the remainder of his claim from the appellants as stockholders of the corporation; that the referee had no information of this agreement, but was led to believe that it was an honest adjustment and final settlement, and for this reason reinstated the allowance of Dutton's claim in full; that Dutton is really indebted to the estate for the unpaid stock in the sum of \$13,196.

The evidence shows that the attorneys for the trustee, who also appeared for other creditors of the bankrupt, whose claims amounted to about \$800, were present, as well as Mr. Dutton and his attorneys; but neither the appellants nor their attorneys were present, having had no notice of the proceeding. An arrangement was then made by the attorney for the undisputed creditors, whose claims amounted to \$700 or \$800, who also acted for the trustee, and Mr. Dutton, that if he would pay them a certain part of the dividend which would be paid on his claim, everything over \$200, they would consent to have his claim allowed in full. Neither the trustee nor the referee knew of this agreement. The parties having informed the referee that a judgment by consent allowing the claim in full might be entered, he entered it accordingly without knowing of this agreement. It also appears from the evidence that the claim of Dutton can only be paid by making an assessment on appellants for the unpaid part of their subscription to the capital stock of the bankrupt corporation.

As soon as appellants were advised of the action of the referee, they filed a motion to set aside the order allowing the claim of appellee and to expunge and disallow the same. The trustee in bankruptcy united with appellants in this motion. The referee held that they were not parties in interest, and for this reason had no right to file the motion, and therefore overruled it. On a petition for review the cause came before the District Judge, and at the hearing the trustee announced that he declined to prosecute the motion to expunge the claim of Dutton any further, and withdrew from the case, and thereupon the District Court held that the appellants were not proper parties to prosecute the petition for review, and affirmed the action of the referee. From this decree an appeal has been taken to this court.

A. Leo Weil, of Pittsburgh, Pa., and Goodwin Creason, of Kansas City, Mo. (James S. Botsford and B. F. Deatherage, both of Kansas City, Mo., P. H. Sangree and John D. Bohling, both of Sedalia, Mo., and Charles M. Thorp, of Pittsburgh, Pa., on the brief), for appellants.

Roy D. Williams and W. V. Draffen, both of Boonville, Mo. (R. S. Martin, of Pittsburgh, Pa., on the brief), for appellee.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] Section 57d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560, 561 [U. S. Comp. St. 1901, p. 3443]) provides:

"Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57k provides:

"Claims which have been allowed may be reconsidered for cause and disallowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed."

The only question involved is whether, in view of the fact that these appellants are the only persons who will be affected by the allowance of the claim of appellee, they being the only stockholders upon whom an assessment has been made, are "parties in interest" within the meaning of the statute. If this large claim of appellee is allowed, it will have to be paid by appellants, while, on the other hand, if the claim is found to be fraudulent or unjust, and is disallowed or expunged, they will be relieved of paying the assessment made by the referee for the purpose of paying off this claim.

We are of the opinion that by "parties in interest" in this section of the Bankruptcy Act are included all persons who have an interest in the *res* which is to be administered. In *Re Sully*, 152 Fed. 619, 81 C. C. A. 609, it was held:

"The term 'parties in interest' applies to those who have an interest in the *res* which is to be administered and distributed in the proceeding, and does not include those who are merely debtors or alleged debtors of the bankrupt."

In the instant case the only parties who have any interest in the *res* of this bankrupt are the appellants, for they are the only persons who can be injuriously affected by the result of the determination of this claim of appellee.

It is true that it has been determined by this court in *Chatfield v. O'Dwyer*, 101 Fed. 797, 42 C. C. A. 30, that an appeal from an order of the District Court allowing a claim presented by a creditor against the estate of the bankrupt, and which was objected to and contested by another creditor, can only be taken by the trustee in bankruptcy as the representative of all the creditors, but it was further held in that case, if the trustee in such a case refuses to appeal from the allowance of the claim on the request of the objecting creditor, the latter may move the District Court to direct the trustee to take an appeal as requested, or to permit the creditor to prosecute an appeal in the name of the trustee. In that case the trustee was not a party to the petition for review, nor was there any effort made to have him become a party to or permit the appellants to take an appeal in his name, while in the case at bar the trustee had joined appellants in the petition for review, and when it came up for hearing withdrew.

In *Re Stern*, 144 Fed. 956, 959, 76 C. C. A. 10, 13, the trustee had refused to move for a re-examination of a claim which had been al-

lowed, and upon application to the referee he declined to direct the trustee to file such a motion. The matter having been certified to the District Judge, he sustained the action of the referee, holding:

"That the trustee is in a position to know or ascertain the facts, and his determination of such a matter will not be controlled or interfered with at the instance of others, who have no right to interpose such objection or plea."

Thereupon the cause was brought to this court upon petition for revision, and was reversed. Judge (now Mr. Justice) Van Devanter, delivering the opinion of the court, said:

"In passing the order, now sought to be reviewed, the learned District Judge omitted a duty of supervision which cannot be put aside, and accorded to the action of the trustee a measure of consideration to which it is not entitled. Particularly is it apparent that the trustee's action was accorded undue consideration, when it is considered that from the inception of these proceedings he was represented and presumably advised by counsel who was also representing the creditor whose claim was challenged. Of course, this ought not to have been, no matter what may have been the belief of counsel respecting its propriety."

In *Re Hudson River Electric Power Co.* (D. C.) 173 Fed. 934, 956, it was held that a receiver appointed by a Circuit Court for the property of a corporation has the right to contest proceedings in bankruptcy against such corporation, and upon appeal this case was affirmed in 183 Fed. 701, 106 C. C. A. 139, 33 L. R. A. (N. S.) 454.

In *Henry v. Jeanes*, 47 Ohio St. 116, 24 N. E. 1077, it was held that a stockholder of a corporation, where the corporation refuses to appeal from judgments affecting its interests, may appeal under a statute allowing an appeal to "a party or other person directly affected."

Under these circumstances, and especially in view of the fact that the evidence in the record shows that many of the items of appellee's claim are at least suspicious, and that the referee, after a full hearing, had expunged the entire claim as fraudulent, appellants, as the only parties affected by the allowance of the claim, ought not to be deprived of the right to be heard. This is especially true, in view of the fact that they had no notice of the motion for rehearing and the peculiar circumstances under which the consent decree allowing the claim of appellee was entered.

[2] Nor were the appellants guilty of any laches, for immediately after learning of the action of the referee allowing the claim of appellee they filed the motion to set it aside.

We do not desire to express any opinion as to the merits of Mr. Dutton's claim, but we are of the opinion that the court below erred in refusing to pass upon the merits of the case, and the cause is reversed, and remanded to the District Court, with directions to permit the appellants to proceed in the name of the trustee, to instruct the referee to permit them and the appellee to appear within a reasonable time, after at least 10 days' notice to the parties or their attorneys of record, to present evidence, and then to hear and decide the case upon its merits, and that upon such decision the court take such further proceedings as are just and equitable.

SNOW et al. v. DALTON et al.

In re EAGLE FURNITURE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1913.)

No. 1,095.

1. BANKRUPTCY (§ 440*)—PROCEEDINGS—MODE OF REVIEW—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS"—"PROCEEDINGS IN BANKRUPTCY."

The term "controversy arising in bankruptcy proceedings," within Bankr. Act July 1, 1898, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), providing for review of orders therein on appeal, is limited to cases where third parties claim not in and under the administration of the bankrupt's estate in bankruptcy, but assert some right hostile to the title of trustee, or against the right of the court to administer the particular estate in the bankruptcy case, and hence did not include an order determining the rights of creditors to participate in the proceeds of admittedly valid security, which was a "proceeding in bankruptcy," reviewable by petition to superintend and revise, under section 24b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. CORPORATIONS (§ 470*)—BONDS—ISSUANCE—DEBT SECURED.

A bankrupt corporation being largely indebted, a resolution of the directors was passed for the issuance of \$50,000 in bonds, secured by a deed of trust, to be held subject to the order of petitioners and R., who were indorsers on various notes of the corporation, and that, in case petitioners and R. at any time should have to pay any money on account of such indorsements, it was ordered that the bonds should be delivered to them to indemnify and save them harmless on such indorsements. Before the bonds were issued, R., who had been manager of the corporation, had borrowed \$28,000 from a trust company on his own indorsement, and some \$17,500 on notes given to other parties which he had similarly indorsed; he securing the joint indorsement of the petitioners to the notes given to the trust company by concealing the other indebtedness. *Held*, that the resolution providing for the issuance of the bonds limited the security thereof to the notes bearing the joint indorsement of the petitioners and R., and hence, on the bankruptcy of the corporation, R. was not entitled to share in such security for the benefit of the additional indebtedness secured only by his individual indorsement.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 470.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of North Carolina; James E. Boyd, Judge.

In the matter of bankruptcy proceedings of the Eagle Furniture Company and another. On petition by E. A. Snow and others to superintend and revise in matter of law proceedings of the District Court confirming a referee's order entitling W. H. Ragan to participate in certain securities for indebtedness of the bankrupt corporation. Reversed and remanded.

E. J. Justice, of Greensboro, N. C. (Justice & Broadhurst, of Greensboro, N. C., on the brief), for petitioners.

R. C. Strudwick, of Greensboro, N. C. (William P. Bynum, of Greensboro, N. C., on the brief), for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GOFF and PRITCHARD, Circuit Judges, and KELLER, District Judge.

KELLER, District Judge. [1] The first question to be determined arises upon a motion by respondents to dismiss the petition because:

"(1) That it appears upon the face of the said petition, and of the papers and exhibits attached thereto, that the case presented by this petition and record is not a proceeding of said District Court in bankruptcy, which this court is given power and authority to superintend and revise in matter of law, within the true intent and meaning of section 24b of the Bankruptcy Act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]).

"(2) That it appears upon the face of such petition and record that the case presented thereby is a controversy arising in a bankruptcy proceeding within the true intent and meaning of section 24a of said Bankruptcy Act of July, 1898, and is therefore one which is reviewable by this court only by appeal, and not by petition to superintend and revise."

While we have given respectful consideration to the contentions of respondents' counsel upon this point, we are not impressed with the appositeness of the citations of authorities in the brief to the facts in this case. It seems to us that the order sought to be reviewed is really nothing more than the allowance to provable debts of the right to participate in the proceeds of certain security, and these debts having been proved in the bankruptcy proceeding proper, and the proceeds of the securities being in the bankruptcy court for administration, the apportionment of this fund is strictly and properly a part of the bankruptcy proceedings, and in no proper sense can be called a "controversy arising in bankruptcy proceedings."

We think that the latter phrase, as used in the Bankruptcy Act, must be limited to cases where third parties claim not *in and under* the administration of the bankrupt's estate in bankruptcy, but, on the contrary, assert some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case. The following authorities seem directly in point:

"Where it becomes necessary as incident to a step in bankruptcy, to determine the title or interest of third parties who may be brought in for that purpose, it is not a controversy arising in bankruptcy, but continues to be a proceeding in bankruptcy proper." *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *In re McMahon*, 147 Fed. 685, 77 C. C. A. 668; *Loveland on Bankruptcy* (last Ed.) p. 1454; *Morgan v. First Nat. Bank* (C. C. A. 4th Cir.) 145 Fed. 466, 76 C. C. A. 236.

"Such is * * * where a creditor proves his claim asserting a security for his debt, or where, in determining the priority of claims, the validity of a trust deed is drawn in question, the debt not being disputed." *Loveland*, p. 1454, and cases there cited; *Coder v. Arts*, *supra*. See, also, *Remington*, vol. 3, p. 805, and cases there cited.

"An order allowing or denying priority to a security claimed has been reviewed on petition as to matter of law." *Courier-Journal Job Printing Co. v. Schaeffer-Meyer Brewing Co.* (C. C. A. 6 Cir.) 101 Fed. 699, 41 C. C. A. 614; *In re Rouse, Hazard & Co.* (C. C. A. 7 Cir.) 91 Fed. 96, 33 C. C. A. 356; *In re Richards* (C. C. A. 7 Cir.) 96 Fed. 935, 37 C. C. A. 634.

And an appeal for this purpose has been dismissed. *Gaudette v. Graham* (C. C. A. 9 Cir.) 164 Fed. 311, 90 C. C. A. 243.

In *Thompson et al. v. Mauzy*, 174 Fed. 614, 98 C. C. A. 457, this court stated the following conclusions, which we regard as correct and

as determinative of the proper classification of the order sought to be reviewed:

"There is a clear distinction between 'controversies arising in bankruptcy proceedings,' as mentioned in section 24a, and the 'proceedings in bankruptcy,' which by section 24b the Circuit Courts of Appeals are given jurisdiction to superintend and revise in matter of law; for the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors, which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps and *such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily.*"

This is the case of a dispute between parties to the bankruptcy proceedings as to their respective rights to participate in the proceeds of an admittedly valid security, and we hold belongs in the category of "proceedings in bankruptcy."

[2] Coming, now, to the case on its merits, the material facts appear to be as follows:

The Eagle Furniture Company, a corporation, and the bankrupt in this case, was organized by some gentlemen of High Point, N. C., for the manufacture of furniture, some years prior to the transactions hereinafter to be detailed, and appears to have conducted a fairly successful business up to the year 1905, when its property, or a portion thereof, was destroyed by fire. Mr. W. H. Ragan, one of the incorporators, was the active manager of the concern for a time, and was succeeded by his son, Charles Ragan, and according to the testimony in the case Mr. W. H. Ragan, after retiring from the active management, was still the adviser of the management on behalf of the directors of the company, of whom he was one. It appears that prior to the year 1907 the company had borrowed money from various sources, and notes, in the name of the company, were made for these loans, and were indorsed by W. H. Ragan individually. In the summer of 1907, according to the undisputed testimony of the petitioners, Mr. Ragan came to his fellow directors, E. A. Snow, J. E. Kirkman, and J. H. Millis, and said to them that he had borrowed a considerable amount of money from the Wachovia Loan & Trust Company, upon which he was sole indorser, and he did not think it was fair and right that he should be indorser alone on these notes, and asked the other directors to jointly indorse these notes at the bank with him. That he was asked by the other directors to give them a statement of the indebtedness of the concern, especially to the Wachovia Loan & Trust Company, which was pushing for some payments of notes, or better indorsement. That Mr. Ragan represented to the other directors that the concern owed in the neighborhood of \$28,000, and that, if it could borrow some \$5,000 additional money, he thought the concern could go on successfully. That the said directors refused to indorse these notes without some security, and thereupon the plan was suggested that the company issue \$50,000 worth of bonds, secured by deed of

trust on the concern, and put them up as collateral to secure the joint indorsement of the directors. That such deed of trust and bonds were thereupon duly authorized and executed, and the bonds were placed in the custody of the Wachovia Loan & Trust Company, under a resolution of the board of directors of the Eagle Furniture Company, passed on the 18th day of July, 1907, and which resolution and direction to the trustee are in the words and figures following:

"High Point, N. C., July 18, 1907.

"Mr. C. L. Glenn, Trustee, City—My Dear Sir: At a meeting of the board of directors of the Eagle Furniture Company, held in the office of the Snow Lumber Company on this date, a majority being present, the following resolution was introduced by R. F. Dalton and seconded by F. M. Pickett, which was unanimously carried and ordered to be recorded:

"It is ordered by the board of directors of the Eagle Furniture Company that the \$50,000 in bonds issued by the order of the stockholders on the recommendation of the board of directors, for which a deed of trust was made and recorded, be placed in the vaults of the Wachovia Loan & Trust Company, at High Point, N. C., and held subject to the order of J. H. Millis, E. A. Snow, J. E. Kirkman, and W. H. Ragan, who are indorsers on various notes of the Eagle Furniture Company; and, should the said J. H. Millis, E. A. Snow, J. E. Kirkman, and W. H. Ragan at any time have to pay any money on account of the said indorsements, we hereby order and direct that the said bonds, or a sufficient number of them, be turned over to them to indemnify and save them harmless on said indorsements. And we hereby instruct and direct the cashier of the Wachovia Loan & Trust Company, of High Point, N. C., to deliver bonds to them on their demand, in case they shall at any time be called on to pay on account of said indorsements."

"These bonds are herewith delivered to you, and are in the denomination of \$1,000 each, numbers 1 to 50, inclusive.

"Eagle Furniture Company.

"By E. A. Snow, President.

"T. H. Spencer, Secretary and Treasurer."

From the uncontradicted testimony in the record, it appears that Mr. Ragan, at the time he secured the indorsements of his fellow directors upon notes given to the Wachovia Loan & Trust Company to the amount of \$33,500 (which included \$5,000 of a new loan), did not disclose to them that there was any additional indebtedness of the company to other creditors, upon which he (Mr. Ragan) was sole indorser, and they had no such knowledge until long thereafter. These indorsers testify that their indorsement was secured by reason of the representation made by Mr. Ragan, and that they would not have indorsed this paper with the understanding that there was additional indebtedness, which was to participate in the security afforded by the lodgment of these bonds. It appears from the petition of W. H. Ragan that, at the time this joint indorsement was made, said Ragan was also indorser individually for the Eagle Furniture Company upon sundry notes held by parties other than the Wachovia Loan & Trust Company to the extent of \$17,200, and that since that time payments were made out of the assets of the company, which reduced this indebtedness to the sum of \$13,500.

The petition of Ragan was filed for the purpose of having the referee direct that he be permitted to share upon his individual indorsement in the security afforded by the bonds and mortgage, along with the joint indorsers upon the notes due the Wachovia Loan & Trust

Company. The referee sustained the petition of said Ragan, and entered an order directing the trustee, after paying the costs and expenses of the bankruptcy proceeding, and all debts which have by law priority over those secured by the deed of trust, to apply the assets remaining in his hands to the satisfaction or the discharge of the notes of the bankrupt corporation indorsed by J. H. Millis, E. A. Snow, J. E. Kirkman, and W. H. Ragan, held by the Wachovia Loan & Trust Company, together and pro rata with the notes of the Greensboro National Bank, the Wachovia National Bank, the American National Bank of Wilmington, the Bank of Lexington, and C. A. Kime, which are indorsed by W. H. Ragan alone. This order, upon petition for review, filed by the petitioners herein, was affirmed by the District Judge, by an order entered on the 6th day of January, 1912; and petitioners have had recourse to the present proceeding to revise and superintend in matter of law the said order of January 6, 1912.

Several points are insisted upon by petitioners as determinative of their right to be preferred in the distribution of the proceeds of the property conveyed by the deed of trust, the first of which is that the resolution of the board of directors of July 18, 1907, is not susceptible of any other interpretation than one which limits the security of the bonds to notes jointly indorsed by J. H. Millis, E. A. Snow, J. E. Kirkman, and W. H. Ragan. It is sufficient to say that we sustain this contention, and are entirely confident that the resolution, in its entirety, is susceptible of no other construction than that these bonds were placed in the custody of the cashier of the Wachovia Loan & Trust Company for the purpose, and the sole purpose of protecting the joint indorsement of these four gentlemen, and the provision for the delivery to them of bonds in the event of their having to pay money on account of said indorsement can also only be construed as authorizing the said cashier to make delivery of the bonds on their joint demand.

The petitioners further insist that, under the evidence in this case, W. H. Ragan is estopped from asserting a right to participate in this security, by reason of the representation made by him to his fellow directors at the time he secured their indorsement upon these notes. At that time the condition was that, with the exception of the \$5,000 of new money borrowed from the Wachovia Loan & Trust Company, W. H. Ragan by his own act was indorser on \$28,000 worth of notes, held by said Loan & Trust Company, and \$17,200 of notes held by other parties. In view of his concealment of the existence of these other notes, upon which he was indorser individually, it would seem that, were it necessary, the doctrine of estoppel might be invoked to prevent him from taking an unfair advantage of the parties who, at his solicitation, and in reliance upon facts asserted by him to be true, had placed their names as indorsers upon the paper of the company. It appears that the only reduction in the indebtedness made, after the issuance of these bonds, was made solely upon notes indorsed individually by W. H. Ragan, which fact evidenced either that he understood the resolution of July 18, 1907, to mean that the notes indorsed by him were not to participate in that security, or else that, in his con-

duct of the business of the company, he was taking an unfair advantage of his fellow directors.

However, in the view that we have taken of the true meaning and effect of the resolution of July 18, 1907, it is unnecessary to further pursue this question. We hold that said resolution provided security for the indorsers of such notes only as were jointly indorsed by the four gentlemen named in said resolution, and we accordingly hold that the order of the District Judge of January 6, 1912, was erroneous, and must be reversed, and this case is remanded to the District Court for the Western District of North Carolina for further proceedings not inconsistent with this opinion.

GOFF, Circuit Judge. I find no error in the judgment complained of, and therefore am not in accord with that part of this opinion which directs a reversal of it.

STEAMSHIP RUTHERGLEN CO., Limited, v. HOWARD HOULDER & PARTNERS, Inc.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

Nos. 130, 131.

1. SHIPPING (§ 58*)—CHARTERS—GUARANTY OF CARGO CAPACITY—DAMAGES FOR BREACH.

Where a vessel chartered for a voyage for a lump sum to carry a cargo of railroad rails proved to have less capacity than was guaranteed by the charter, the charterers, who tendered the full cargo, are entitled to recover as damages the difference between what they would have paid under the charter for the carriage of the cargo shut out and what they would have received from the cargo owner under its bill of lading, if it had been carried.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

2. SHIPPING (§ 39*)—CHARTERS—CESSER CLAUSE.

The cesser clause in a charter party, that "charterer's liability to cease on cargo being shipped and freight paid," where the freight is paid on loading, relieves the charterer from liability for the acts or omissions of others at the port of discharge, but not from liability for failure to perform his own engagements under the charter.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141-148; Dec. Dig. § 39.*]

3. SHIPPING (§ 47*)—CHARTERS—CONSTRUCTION—TIME AND PLACE FOR DISCHARGING.

Where a charter party does not provide for lay days for discharging, the charterer is required to discharge with reasonable diligence; and what constitutes such diligence depends on the circumstances of the case, among others, the character, condition, and customs of the port. Where it is not provided that the vessel shall go to a berth as ordered, the charterer has the right to name the discharging place; but, if he does not do so within a reasonable time, the master may choose one for himself.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

4. SHIPPING (§ 177*)—DEMURRAGE—CONSTRUCTION OF CHARTER.

A charter party did not provide the lay days for discharging, but that "the cargo be discharged [by the charterer] with all possible speed according to the custom of the port of discharge," and that "any time lost in * * * discharging through riots, fire, * * * or any causes beyond the personal control of the said charterers not to be computed as part of the said lay days." It further provided, "Charterers to provide lighters, if necessary, to enable steamer to go alongside any safe dock, wharf, or anchorage, as ordered, where steamer shall discharge always afloat," and also authorized the owners to use lighters at the risk of the cargo owner. At the port of discharge there were berths where the steamer with her cargo could safely lie afloat; but when she arrived all such berths were occupied, and it was several days before she could get one, when she was discharged with all due speed. *Held*, that the charterer was not bound to lighter her until she could reach one of the berths which were open, and was not liable for demurrage for the time she was delayed in reaching the berth designated.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-582, 584; Dec. Dig. § 177.*]

Demurrage, see note to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

5. SHIPPING (§ 39*)—CHARTERS—AGENCY FEES.

A provision of a charter party that the steamer should be consigned to charterers' agents at port of loading and discharge "on usual terms, say £10.10 at each port," did not bind the steamer to employ such agent, if he refused to act for the fixed charge or the usual charge; and where, in such case, he was employed and paid a larger sum than that named, the owner is entitled to recover from the charterer the excess paid over the usual charge only, the sum named being merely an estimate of such charge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141-148; Dec. Dig. § 39.*]

Appeal from the District Court of the United States for the Southern District of New York; *George C. Holt*, Judge.

Suit in admiralty by the Steamship Rutherglen Company, Limited, against Howard Houlder & Partners, Incorporated, with cross-libel. Decree for libellant, and respondent appeals. Reversed.

For opinion below, see 196 Fed. 916.

Haight, Sanford & Smith, of New York City (J. W. Griffin and C. S. Haight, both of New York City, of counsel), for Howard Houlder & Partners, Inc.

Convers & Kirlin, of New York City (J. M. Woolsey and J. Parker Kirlin, both of New York City, of counsel), for Steamship Rutherglen Co., Limited.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The owners of the British steamer Rutherglen chartered her to Howard Houlder & Partners for a voyage from New York to Dalny and Takow, Formosa, with a cargo of railway material which has been duly delivered. Various disputes have arisen between the parties which are now to be disposed of.

[1] 1. The owners filed a libel to recover an unpaid balance of charter hire. The charter called for a lump sum hire of £9,400 to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—54

be paid before sailing. The charterers paid only £9,122.12.6, claiming that the vessel fell short of the dead weight capacity guaranteed by the owners to the extent of 219.3 tons. The charterers filed a cross-bill to recover the freight engaged for the cargo shut out by this breach of guaranty.

The District Judge found that the vessel did fall short of the guaranty as claimed by the charterers, and that the bill of lading freight coming to them for cargo shut out would be, if it had been carried, £397.11.6. He allowed to the charterers the difference between the charter hire and the bill of lading freight, to wit, £120.3.11. The owners claim that the charterers are only entitled to the difference between the unpaid charter hire, £277.7.7, and £120.3.11, the profit on the bill of lading freight. This would result in the charterers being liable to the owners on this account for the sum of £157.3.8.

We think the District Judge was right. If the vessel had conformed to the guaranty the charterers would owe £277.7.7. Because it did not, they have lost £397.11.6. Setting one claim off against the other, the difference is against the owners and in favor of the charterers, £120.3.11.

The court below entered a decree in each action, the effect of which is precisely the same as if the better practice of entering one decree as in case of bill and cross-bill in equity had been followed. The contention of the owners is manifestly wrong, because it makes the charterers pay £157.3.8 for cargo space they never received, and this for the singular reason that they had sustained an additional loss of £120.3.11. In other words, if they had not engaged at a profit the cargo shut out, they would have been better off, because they would have been allowed £277.7.7 for the cargo capacity short, instead of £157.3.8.

2. The owners claim 15½ days' demurrage at Dalny, and the District Judge allowed it. The provisions as to demurrage are as follows:

"Fifteen (15) running days, Sundays and holidays excepted, to be allowed charterers for loading steamer and the cargo to be discharged with all possible speed, according to the custom of the port of discharge. Vessel to receive cargo on clearing day if required, free of demurrage. Demurrage over and above the said lay days to be paid at the rate of four pence per net register ton per day for each and every day the steamer is detained at port of loading by the default of the charterers."

The steamer arrived December 17th, was free of pratique on the morning of December 18th, and on that day served notice of readiness to discharge upon the charterers' agents. She did not get into her berth until January 2d, nor begin discharging until January 3d. The District Judge allowed demurrage at the rate of four pence per net registered ton for every day from December 19th to January 3d.

[2] The charterers contend that they were relieved of liability for anything occurring at Dalny by virtue of the cesser clause, which reads:

"Charterers' liability to cease on cargo being shipped and freight paid."

The freight was paid at New York on the shipment of the cargo, and the owners make no claim for demurrage or anything else occur-

ring there. The clause would protect the charterers from liability for anything done at the discharging port by others, but not for anything which they had themselves agreed to do. The charter contemplates that the charterers will receive the cargo at Dalny. It provides that in certain circumstances they will be obliged to provide lighters, and that for delay in discharging, due to certain excepted causes, they are not to be liable, and that the vessel is to be consigned to their agents. Accordingly the cesser clause does not protect them from liability for delay incurred in discharging at Dalny not within the exceptions.

[3] There is a wilderness of law upon the subject of demurrage. The decisions depend upon the language of the various charters and are difficult to reconcile. Mr. Carver has laid down six propositions in his work on Carriage by Sea (section 623), which have been approved in the case of *Leonis S. S. Co. v. Rank*, 1 K. B. (1908) 499. We need not consider them, because they are confined to charters which provide for a fixed number of lay days within which a charterer is bound to load or unload, and which generally, as in the case of the *Leonis Company*, define precisely when the lay days shall begin to run. Notwithstanding these propositions, it is the law in England that, where no lay days are provided for, the charterer is only required to load and receive cargo with reasonable diligence. *Carver, Carriage by Sea*, § 628; *Hulthen v. C. A. Stewart & Co.* [1903] A. C. 389; *Id.*, 8 Com. Cas. 297. What constitutes reasonable diligence will depend upon all the circumstances of the case; among others, the character, condition, and customs of the port of loading and discharging. In such a case, where no place of loading is specified, nor any agreement that the vessel shall go to a berth as ordered, the charterer has the right to name the loading or discharging place; but, if he does not do so within a reasonable time, the master may choose one for himself.

[4] In the present case the charter did provide lay days for loading, the rate payable for demurrage, and that the vessel should load at a berth or berths as ordered by the charterers. In respect to discharging, however, it only provided that "the cargo be discharged with all possible speed according to the custom of the port of discharge," and that any time lost in discharging for certain excepted causes, should not be chargeable to the charterers. The owners admit that, after the discharge began, the cargo was received without delay. When the steamer arrived at Dalny, all berths where she could lie afloat were occupied or congested with freight, and neither the charterers' agents nor the master of the steamer were able to get a berth for her sooner. In such circumstances we do not think that the charterers can be said to be chargeable with any lack of reasonable diligence in discharging.

The District Judge, however, held that the charterers were bound to employ lighters to take off enough cargo to enable the vessel to lie afloat safely at one of the unoccupied berths, where there was not water enough for her when fully loaded. It was his opinion that they could have obtained such lighters, but, even if they could not, that

they were liable for not enabling the steamer to go to such a berth, and so saving time in discharging. He rested his conclusion upon the parenthetical clause, *supra*:

"(Charterers to provide lighters, if necessary, to enable steamer to go alongside any safe dock, wharf, or anchorage as ordered where steamer shall discharge always afloat.)"

If we are to construe this clause as requiring the vessel to go to any wharf as ordered by the charterers, then clearly no claim for demurrage could arise until she had arrived alongside the wharf as ordered by them. But the clause in our opinion gives the charterers the privilege of requiring the vessel, if lightened, to go to a wharf where she could not lie afloat with all cargo aboard. They are not obliged to order her to such a berth. It is to be noted that the bill of lading gives the owners the same privilege. By it they are entitled "to convey goods in craft ^{and/or} lighters to and from the steamer at the risk of the owners of the goods." Neither party can be said to have been at fault for not exercising this privilege.

The owners contend that the charterers are liable for demurrage at Dalny, because the cargo was not discharged with "all possible speed according to the custom of the port," as required by the charter. They treat the clause as containing two separate propositions, viz.: "All possible speed," in respect to the time in which the vessel shall be discharged; and "according to the custom of the port," in respect to the method of discharging after it has begun. Whether this is what these clauses mean when used separately need not be considered, because we think that in the clause as it reads the custom of the port applies both to the time and to the method of discharging. There was, to say the least, no proof showing that the cargo was not discharged according to the custom there prevailing either in respect to the time or the method of discharging.

Finally, we think that, if there was delay in discharging at Dalny, the charterers are relieved from liability therefor by the exceptions contained in the charter party, viz.:

"Any time lost in loading ^{and/or} discharging through riots, fire, frosts, floods, storms, strikes, lock-outs, accidents to mills or machinery, or any causes beyond the personal control of the said charterers not to be computed as part of the said lay-days."

The last words cover an independent category of causes not subject to the doctrine of *ejusdem generis*. It is quite clear that the vessel got the first vacant berth where she could lie afloat as loaded in accordance with the practice prevailing at Dalny. *Pyman S. S. Co. v. Mexican Cent. R. Co.*, 169 Fed. 281, 94 C. C. A. 557; *Leonis S. S. Co. v. Rank*, No. 2, 13 Com. Cas., 161.

[5] 3. The last claim in the owners' libel was for \$70.56, being excess of attendance fee over £10.10 paid by them to the charterers' agents at Takow. The charter party provided "steamer to be consigned to charterers' agents at port of loading and discharge on usual terms, say £10.10 at each port." It is a printed form of the agents for owners. If they had intended to fix a sum beyond which the owners

were not to be liable to the charterers' agents, they could easily have stated it. Or they could have stipulated to pay only the usual charge without saying more. When charterers under such a clause name no agents, the owners may employ whom they will. If the agents named refuse to act for the fixed charge, or for the usual charge, the owners are not bound to employ them. In this case the charter party bound the owners to pay only the usual charge estimated at £10.10. The agent named by the charterers refused to act for less than £25, which the owners paid. They are entitled to recover from the charterers any amount paid above the usual charge, and, there being no proof as to what the usual charge is, nothing should have been allowed them.

The decree in favor of the libelants is reversed, and that in favor of the cross-libelants set aside. The court below is directed, instead of two decrees, to enter a single decree dismissing the libel, with costs, and awarding the cross-libelants \$584.93, with interest from October 18, 1907, and the costs of both courts.

HULTBERG v. ANDERSON et al.

SAME v. CHYTRAUS.

(Circuit Court of Appeals, Seventh Circuit. February 13, 1913.)

No. 1,970.

COURTS (§ 405*)—ASSIGNMENT OF ERRORS—CONSTRUCTION OF RULE.

The requirement of rule 11 of the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii) that no writ of error or appeal shall be allowed, unless an assignment of errors has been filed, is not jurisdictional, but is a rule of practice; and even though there is no assignment of errors in the transcript the appellate court may exercise its jurisdiction either by punishing the appellant by dismissal for noncompliance with the rule, or by hearing the controversy and deciding the merits as justice may seem to require in the particular case. The case will not be dismissed where but a single question is involved, which is apparent from the record, and an assignment of errors would have served no useful purpose.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. § 405.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohl-saat, Judge.

Suit in equity by Nels O. Hultberg against Peter H. Anderson and others. From a decree for defendant Axel Chytraus, complain-ant appeals. On motion to dismiss appeal. Motion denied.

John Barton Payne, Silas H. Strawn, and Max H. Whitney, all of Chicago, Ill., David Ritchie, of Salina, Kan., and Harris F. Williams, of Chicago, Ill., for appellant.

John J. Healy and E. Allen Frost, both of Chicago, Ill., for ap-pellee.

Before BAKER, Circuit Judge, and LANDIS, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BAKER, Circuit Judge. Appellee presents his motion that the appeal be dismissed on the ground that this court lacks jurisdiction to entertain it by reason of appellant's failure to file with the clerk of the trial court an assignment of errors before the appeal was allowed.

Rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) requires such a filing, and declares that "no writ of error or appeal shall be allowed until such assignment of errors shall have been filed." When this appeal was allowed in open court at the time the decree was announced, no assignment of errors had been filed. If strict compliance with the above-quoted portion of rule 11 is jurisdictional, the subsequent filing of the assignment of errors, with leave of the trial court and before the transcript of the record was prepared and filed in this court (all within the statutory time for taking the appeal), was without avail, and this court would have no lawful right to look into the record for any purpose.

In determining whether the aforesaid provision is jurisdictional or merely directory of practice, it should be read in *pari materia* with subsequent parts of the same rule. "Such assignment of errors shall form part of the transcript of the record and be printed therewith. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned." Taking the rule as a whole, we are of the opinion that this court has jurisdiction of a cause wherein a transcript of the proceedings and judgment or decree has been duly filed in this court, whether an assignment of errors is in the transcript or not, and may exercise its jurisdiction either by punishing the appellant with a dismissal for noncompliance with the practice rule, or by hearing the controversy and deciding the merits. This result is confirmed by considering the purpose of having an assignment of errors in the record, namely, to advise the appellee of the contentions he has to meet, and to lessen the labor of the court in getting hold of the case. If, as is admitted in the present instance, but a single question is involved, and that question is apparent from a reading of the decree, an assignment that the appellant contends the question was erroneously decided by the trial court would neither enlarge the information of the appellee, nor assist the court in understanding the question. A construction of the rule which would make an idle formality an indispensable condition of being heard should not be adopted, if any other construction is reasonably possible.

In the Fifth Circuit the Court of Appeals has decided that compliance with the provisions of rule 11 respecting assignments of errors is not jurisdictional. *Dufour v. Lang*, 54 Fed. 913, 4 C. C. A. 663. Cases relied on by appellant do not seem to us to sustain the contention to the contrary.

In *Mast v. Superior Drill Co.* (Sixth Circuit) 154 Fed. 45, 83 C. A. 157, the assignment of errors did not comply with the requirements of rule 11, and was disregarded; that is, in legal effect there was no assignment of errors. Nevertheless the court proceeded to

examine the record to see whether substantial justice had been rendered in the trial court. If an assignment of errors is jurisdictional, the court in that case had no more right to determine the merits from an examination of the record than it would have to decide a street controversy from reading a newspaper account.

The same thing may be said of *Mutual Life Ins. Co. v. Conoley* (Fourth Circuit) 63 Fed. 180, 11 C. C. A. 116, and *United States v. Goodrich* (Eighth Circuit) 54 Fed. 21, 4 C. C. A. 160, for in each case the judgment was affirmed on the ground that the record showed that no substantial error had been committed. In later cases the court in the Eighth Circuit has dismissed appeals and writs of error for noncompliance with rule 11. *Frame v. Portland Gold Min. Co.*, 108 Fed. 750, 47 C. C. A. 664; *Webber v. Mihills*, 124 Fed. 64, 59 C. C. A. 578; *Lockman v. Lang*, 128 Fed. 279, 62 C. C. A. 550. And appellant counts strongly on an expression therein that "the assignment of errors is indispensable to the perfection of the appeal." But we take it that the court did not intend to deny the existence of a jurisdiction it had theretofore been exercising, but only meant that an assignment of errors was indispensable to inducing the court to use its power in favor of hearing parties, instead of punishing them for delinquencies of practice.

Rule 11 has its warrant in the act creating the Courts of Appeals, and the rule has the force of a statute. Sections 997 and 1012, Rev. St. (U. S. Comp. St. 1901, pp. 712, 716), also provide for assignments of errors and for other matters of procedure. These sections, as clearly as rule 11, seem to us to be directory of practice and not jurisdictional.

In the cases of *In re Hill*, 148 Fed. 833, 78 C. C. A. 522, *Pooler v. Hyne* (C. C. A.) 202 Fed. 194, and *In re Quality Shop* (C. C. A.) 202 Fed. 196, this court has held that matters of citation and of bond are not jurisdictional. Whether the matter be one of bond or of citation or of assignment of errors, we believe there should be no difficulty in protecting appellees and defendants in error in all their substantial rights without rewarding them or punishing their opponents for shortages of practice.

The motion to dismiss is overruled.

THE CAMPANIA.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 85.

1. SHIPPING (§ 81*)—LIABILITY OF VESSELS—INJURY TO OTHER VESSELS BY SWELL.

The rule that large vessels navigating New York Bay must so regulate their speed as not to injure by their swells small craft, which are seaworthy and properly loaded and navigated, is also applicable to the lower bay, though not with the same strictness. Owing to its less crowded condition and nearer proximity to the sea, incoming steamers may there

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

proceed at greater speed, provided the channel is free, but not when it is full of boats, at night, or in a fog.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347; Dec. Dig. § 81.*]

2. SHIPPING (§ 81*)—LIABILITY OF VESSELS—INJURY TO OTHER VESSEL BY SWELL—NEGLIGENCE OF TOWING TUG.

An incoming steamship *held* in fault for an injury to a scow in tow in lower New York Bay at night, caused by her swell, owing to excessive speed and inattention; it appearing that she did not see the tug and tow, nor hear her signals, or did not heed either. The tug also *held* in fault for having the scows made up too close together.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347; Dec. Dig. § 81.*]

Liability of vessel for injuries caused by creation of swell, see note to *The Asbury Park*, 78 C. C. A. 3.]

Appeal from the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Suit in admiralty by William Beard and another against the steamship *Campania*; the Cunard Steamship Company, claimant. Decree for respondent, and libelants appeal. Reversed.

S. D. Smith, of New York City, for appellants.

Lord, Day & Lord, of New York City (A. B. A. Bradley, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] The rule is well settled that large steamers navigating the waters of New York Bay must so regulate their speed as not to injure by their swells small craft properly operated. The reason for the rule is pointed out in the opinion of this court in *The Majestic*, 48 Fed. 730, 1 C. C. A. 78:

"Such waters are not to be appropriated to the exclusive use of any one class of vessels. We do not mean to hold that ocean steamers are to accommodate their movements to craft unfit to navigate the bay, either from inherent weakness, or overloading, or improper handling, or which are carelessly navigated. But of none of these is there any proof here, and, in the absence of such proof, we do hold that craft such as the libellant's have the right to navigate there without anticipation of any abnormal dangerous condition, produced solely by the wish of the owners of exceptionally large craft to run them at such a rate of speed as will insure the quickest passage. To hold otherwise would be virtually to exclude smaller vessels, engaged in a legitimate commerce, from navigating the same waters."

Broadly, the rule is as applicable to the lower bay as to the upper bay and was applied in respect of it in *Ross v. Central R. R. Co.* (D. C.) 146 Fed. 608, affirmed 157 Fed. 1004, 85 C. C. A. 678. See also *The St. Paul* (D. C.) 124 Fed. 103. The only distinction is that by reason of closer proximity of the sea and less traffic more latitude may be allowed incoming steamers in their operation and more care may be required from small craft in their handling. Thus undoubtedly steamships may proceed there at a high rate of speed when the channel is free and no danger is to be apprehended. But they have no right to so proceed when the channel is full of boats or when, at night or by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reason of fog, it is impossible to tell what craft may be affected by their swells. So steamers may have the right to assume that tugs and tows will be better prepared to withstand heavy waves in the lower than in the upper bay. And on the other hand, while tugs may, on account of the congestion of traffic in the upper bay, be obliged there to make up their tows in close arrangement and in a manner not adapted to avoid danger from displacement waves, there may be no such necessity in the less crowded waters of the lower bay.

[2] In the present case the accident occurred at night and we are satisfied that the *Campania* was going at a comparatively high rate of speed. She was certainly going at such speed as to involve danger to small craft because not only was the scow in question injured by the displacement waves, but they boarded the tug itself. Apparently those on board the *Campania* did not see the lights of the tug and tow and did not reduce speed on their account. Nor did they regard the alarm signals if they heard them. We think that the *Campania* was negligent in navigating the lower bay at a high rate of speed at a time when she either could not see or did not look to see the tow liable to be injured by her swells. Her speed was such that we think she had no right to assume no craft would be injured by the waves caused by it.

On the other hand, we are not satisfied that the tug was free from fault. The scows were less than six feet apart and so close that the swells caused the rear scow to override the other. No substantial excuse is given for this method of making up the tow. The prevention of sheering seems, in respect of the lower bay, an inadequate reason. We cannot see why the rear scow could not have been towed on a much longer line. In the absence of proof showing that the arrangement was necessary, we think that the libelants cannot be heard to say that they were not negligent or that their negligence did not contribute to the injury. While the scow might have been injured by the swells in a different way in the case of a different make up, she could hardly have been injured in the same way.

It must be distinctly understood that we are not laying down any general rule as to the obligation of incoming steamers to tows in the lower bay which are in a "bunched up" arrangement. If there are substantial reasons requiring very short hawsers upon tows there it may be that such method of towing does not constitute negligence and that incoming steamers must govern their movements with respect thereto. But the present testimony fails to show in this case any substantial necessity for the arrangement.

The decree of the District Court is reversed with costs and the cause remanded with instructions to decree for the libelants for one-half damages.

MAGUIRE v. MORTGAGE CO. OF AMERICA et al.

(Circuit Court of Appeals, Second Circuit. February 17, 1913.)

No. 143.

CORPORATIONS (§ 684*)—JURISDICTION TO APPOINT RECEIVERS—STOCKHOLDER'S SUIT—FOREIGN CORPORATIONS.

A federal court of equity has no jurisdiction of an original stockholder's suit against a corporation of another state for the appointment of a receiver to wind up its affairs and distribute its assets, even though the assets may be within its jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2666; Dec. Dig. § 684.*]

Appeal from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

Suit in equity by William M. Maguire against the Mortgage Company of America and another. From an order denying a motion to vacate an order appointing a receiver, Louis G. Hart appeals. Reversed.

Cardozo & Nathan, of New York City (M. H. Cardozo, Jr., of New York City, of counsel), for appellant.

L. J. Obermeier, of New York City, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The power of courts of chancery to appoint receivers of corporations is examined at length in the recent opinion of this court in the Express Company's Appeal (Pennsylvania Steel Co. v. New York City R. Co. [C. C. A.] 198 Fed. 736). It is there shown that the general rule is that such courts have no inherent power to appoint such receivers but that an exception has grown up in the case of creditors' suits against insolvent corporations. But it is also pointed out that there is no departure from the rule that, in the absence of statutory authority, a court of equity has no right to appoint a receiver of a corporation at the instance of a stockholder for the purpose of winding it up and distributing its assets. Statutes of many states and acts of Parliament in England, however, do provide for the liquidation of the affairs of corporations through receivers and when such statutes exist, the courts within the appropriate jurisdictions may enforce them.

The present suit is by a minority stockholder charging that the assets of the defendant corporation are within the jurisdiction; that only its president has qualified as an officer and that lawsuits are threatened, and praying for the appointment of a receiver and "that the assets of the company after the payment of its just debts be applied to the payment of such proportion which the stock of the plaintiff and other shareholders similarly situated are justly entitled to." There is no averment of insolvency. The order involved in this appeal appoints a "temporary receiver" but confers upon him the general powers of receivers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is apparent that this is a stockholder's suit for the winding up through a receiver of the affairs of the defendant corporation and if it were a domestic corporation, we should look for a statute of New York authorizing the action prayed for. If we found such a statute and if it were broad enough to create a right in the complainant which could be enforced in the District Court as a court of equity by reason of diverse citizenship, we should say that that court had jurisdiction. Otherwise there would be no warrant for its intervention.

But this is not the case of a domestic corporation. The defendant corporation exists under the laws of the state of Delaware and it is elementary that it is alone for the state which creates a corporation to provide for its dissolution and winding up. A federal court of equity has no jurisdiction over an original stockholder's suit against a foreign corporation for the appointment of a receiver to wind up its affairs and distribute its assets. *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; *Sidway v. Missouri Land & Live Stock Co.* (C. C.) 101 Fed. 481. See also cases post.

But it is urged that all the assets of the corporation are within this jurisdiction and that they may be wasted unless a receiver is appointed here. Well-established equity procedure provides for just such a situation. When a stockholder's suit has been brought in the courts of the state which created the corporation and a receiver has been appointed there, the federal courts in other states will protect property within their jurisdictions by the appointment of ancillary receivers. *Parks v. U. S. Bankers' Corp.* (C. C.) 140 Fed. 160; *Haydock v. Fisheries Co.* (C. C.) 156 Fed. 988; *Hutchinson v. American Palace Car Co.* (C. C.) 104 Fed. 182.

There is nothing in the present bill to show that the established practice would fail to afford the complainant adequate relief and we are, therefore, not called upon to determine whether, under any extraordinary circumstances, the District Court as a court of equity might intervene to protect property of a foreign corporation while awaiting action in the court of primary jurisdiction.

The order of the District Court appointing the temporary receiver is set aside, with costs and the cause remanded with instructions to dismiss the bill for want of jurisdiction without costs.

McWILLIAMS et al. v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Second Circuit. February 18, 1913.)

No. 147.

TOWAGE (§ 15*)—LIABILITY FOR INJURY TO TOW—NEGLIGENCE OF MASTER OF Tow.

Respondent's two tugs hung up a flotilla of 11 coal-laden boats at a pier in East River, while distributing them to their various destinations. The tow was secured by the master of the hawser boat next the pier making his boat fast with lines to the end of the pier. On the turn of the tide the tow swung around, breaking the lines, and such hawser boat, with another of the same owner, which went adrift, were compelled

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to pay salvage. *Held*, on the evidence, that such manner of leaving the tow was usual and customary, and that its breaking loose was due to the fault of the master of the boat next the pier to properly adjust the lines when the tide turned, for which respondent was not liable to its owner.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 30–38; Dec. Dig. § 15.*]

Appeal from the District Court of the United States for the District of New York; George B. Adams, Judge.

Suit in admiralty by Owen J. McWilliams and others against the Philadelphia & Reading Railway Company. Decree for libelants, and respondent appeals. Reversed.

P. M. Brown, of New York City, for appellant.

De Lagnel Berier, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. January 30, 1905, Philadelphia & Reading tugs Pencoyd and Wyomissing at about the last of the flood tide hung up a flotilla of 11 coal-laden boats at the foot of Nineteenth street, East River, from which point they were to be singled out and distributed to their destinations. The libelants are the owners of the boats Ben Miller and Blue Mountain; the former being the port and the latter the starboard hawser boat. Their libel alleges that the respondent's servants made the flotilla fast, and that, when it swung downstream on the turn of the tide, it got adrift because of the insufficiency of the fasts, as a result of which they had to pay salvage in the sum of \$602.55 to a tug which rescued their boats, and were also obliged to lay out some \$200 for repairs to the Ben Miller, caused by her coming into contact with several piers and a lighter. The libel was filed October 4, 1907, some 2 years and 10 months after the accident.

The proof is that it is usual in this port to hang up a tow in the way described for distribution, and that the practice is for the master of the hawser boat next to the pier, which in this case was the Blue Mountain, to make his boat fast, and so secure the tow. He did so in this case with what he testifies were good, strong lines. When it was properly made fast, and the boatmen had notified the tug they were all right, the master of the Wyomissing told them to let the hawsers go, and left. The Pencoyd had previously left, taking three of the boats to their destination at Harlem.

At the trial, 3 years, less 16 days, after the accident, the master of the Blue Mountain, testified that the master of the Pencoyd, as he was leaving, said:

"I will be back before the tide changes and look after you fellows."

He further testified that it was ice coming down with the ebb tide that broke the boats loose, and that the tug should have put them into the slip, instead of at the end of the pier. Not a word was said in the libel about any of these things; the sole charge being that the respondent's servants made the tow fast, and made it fast insufficiently, whereas all the testimony was to the effect that the tow was made fast by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

master of the Blue Mountain. He let the tow swing around on the ebb tide, with a constant strain on the fasts, which naturally parted them. We can see no reason to doubt that if he had rendered the lines a little as the flotilla swung, or had put out more lines, if necessary, the manoeuvre would have been safely executed. The only other witness for the libelants was the master of the Jack, the middle boat in the head tier, who testified that the East River was covered with solid ice, but said nothing about the master of the Pencoyd promising to come back.

The practice of bringing suit years after a cause of action has accrued, and of omitting to state in the libel the grounds of negligence relied upon at the trial, cannot be too strongly deprecated. The libelants in such cases are entitled to little latitude. Their conduct results in loss of witnesses, impairment of memory, and surprise at the trial. In this case we think that the tugs acted in accordance with the usual practice known to all coal boatmen and owners of coal boats. It may well be that, if the hawser boat did not put out safe fasts originally, the respondent would be answerable for injuries resulting from that fact to the other boats in the tow; but certainly it would not be liable to the owners whose master was negligent in making fast.

The District Judge rested his conclusion on *Hughes v. Pennsylvania R. Co.* (D. C.) 93 Fed. 510, and *Id.*, 113 Fed. 925, 51 C. C. A. 555, which was a very different case. There the tug hung up the tow at the Battery, and did not return in a thick fog which ensued, although she knew the tow would swing around in that crowded thoroughfare and be perfectly helpless to protect itself from collision, which was what actually occurred. We see no reason for the tugs in this case to expect that the tow would get adrift on the turn of the tide, if the libelant's master had attended to his duties.

The decree is reversed, with costs.

AUBRY SISTERS v. CREME DE MOHR CO., Inc., et al.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 109.

TRADE-MARKS AND TRADE-NAMES (§ 60*)—INFRINGEMENT—LABELS.

A trade-mark for a face cream, designed to be printed on a label and placed on the top of the jar containing the preparation, *held* not infringed by the label of another manufacturer, on which different colors and lettering were used, and which resembled that of complainants only in that both contained a picture of a woman's head surrounded by a circle.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 73, 74; Dec. Dig. § 60.*]

Misleading or false labels, see notes to *Raymond v. Royal Baking Powder Co.*, 29 C. C. A. 250; *Holeproof Hosiery Co. v. Wallach Bros.*, 97 C. C. A. 265.]

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by Aubry Sisters against the Creme de Mohr Company, Incorporated, and Siegfried Mohr. Decree for defendants, and complainants appeal. Affirmed.

C. P. Goepel, of New York City, for appellants.

Louis J. Rosett, of New York City, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is a trade-mark case pure and simple. It is based upon a registered trade-mark which consists of a drawing showing a circular center containing a woman's face, and, in a circle around the head, the words "Aubry Sisters Beautifier." The words are printed so that the first two appear in the upper segment of the circle and the last in the lower segment, with figures resembling maltese crosses between the proper name and the descriptive name. A third circle is drawn around the circle containing the names leaving a blank space between the two outer circles. In practice the trade-mark is placed on the top of the jar containing the pharmaceutical preparation, the picture being in black and white, with a vermilion border around it in which appears the letters, as before stated, printed in white or black. The defendants have a woman's head in the center of their labels with a green border surrounding it, on which are printed the words "De Mohr Cream Face Powder" with crosses before and after the name "De Mohr."

Practically the only resemblance between the two labels is the fact that both have a woman's head in the center. In every other respect they are essentially different and no one who really desired to purchase the complainants' product could be induced to take the defendants' in place thereof. The trade-mark makes no mention of color, it is shown only in black and white and the description does not intimate that any part may be colored. Even if this were otherwise, the defendants, as before stated, use green where the complainants use red. The proof is wholly inadequate to establish infringement.

The decree is affirmed with costs.

H. CHANNON CO. v. PARSONS NON-SKID CO., Limited, et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913. Rehearing Denied March 11, 1913.)

No. 1,931.

PATENTS (§ 328*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The granting of a preliminary injunction against infringement of the Parsons patent, No. 723,299, for a chain tire grip, *held* within the discretion of the trial court.

[Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Parsons Non-Skid Company, Limited, the Weed Chain Tire Grip Company, and Harry D. Weed against the H. Channon Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

Walter H. Chamberlin, of Chicago, Ill., for appellant.

Edward Rector and Victor Elting, both of Chicago, Ill., and Frederick S. Duncan, of New York City, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Appellees began this suit to restrain appellant from continuing an alleged infringement of the Parsons patent, No. 723,299, for antiskidding means, commonly used on automobile tires, and applied for and obtained a preliminary injunction.

In the Parsons patent the essence of the invention is that the antiskidding means shall be held across the tread of the tire by means of two rings, one at each side of the wheel, of less diameter than that of the wheel, but held so loosely that the antiskidding means may travel circumferentially about the wheel and thus not injure the tire, as would antiskidding means held fixedly in place. *Excelsior Supply Co. v. Weed Chain Co.*, 192 Fed. 35, 113 C. C. A. 1.

For the purposes of the hearing of the application for the preliminary injunction, the trial court, in view of our decision above cited, did not commit an abuse of judicial discretion in accepting the patent as valid and in believing that appellant on full proofs might be unable to make a more effective assault upon the patent than had the *Excelsior Supply Company*.

Respecting the fact of infringement there was a cloud of conflicting affidavits. No matter to what conclusion any member of this court, if he were acting as the trial judge, might come in regard to the preponderance of the affidavits, this court as an appellate tribunal will not undertake to settle the fact of infringement on the preliminary record. It is enough that we find in the showing a fair basis for the trial judge's present finding of the fact of infringement; that is, there is evidence in the affidavits to the effect that appellant was making the identical structure of the Parsons patent and that his supplying a means with which to fasten his structure rigidly to the wheel (with instructions that his structure should be so used) was a cover and a sham. See *Parsons Non-Skid Co. v. Atlas Chain Co.* (C. C. A.) 198 Fed. 399.

In short, as to both validity and infringement, appellant fails to establish by this record that the trial court abused that judicial discretion which may properly be exercised in granting or withholding a preliminary injunction. Compare *Winchester Repeating Arms Co. v. Olmsted*, 203 Fed. 493, at this term.

The decree is affirmed.

DETROIT & M. R. CO. v. MICHIGAN RAILROAD COMMISSION et al.

(District Court, E. D. Michigan, S. D. March 22, 1913.)

No. 5,533.

1. CARRIERS (§ 12*)—REGULATION—RAILROAD COMMISSION ACT—RATES—"REASONABLE."

The Michigan Railroad Commission Act (Pub. Acts 1909, No. 300) authorizes the Commission to fix and determine reasonable rates. Section 26 (a) provides that any common carrier or person in interest, who is dissatisfied, within 30 days from the issuance of the order, may sue in the circuit court in chancery against the Commission to vacate the rates as unlawful or unreasonable, and section 26 (e) declares that in all such actions the burden of proof shall be on complainant to show that the order complained of is unlawful or unreasonable, as the case may be. *Held*, that the word "reasonable," as used in section 26, means nonconfiscatory; that from a judicial standpoint a rate is unreasonable only when it yields less than that minimum return which invested capital has a right to demand, that increment which is so inherently incidental to the investment that destroying the increment is a confiscation of the property; while from the legislative standpoint a rate may be reasonable which is not unfair to the shipper and at the same time is large enough to meet the demands of the legislative policy in encouraging railroad investments, contemplating a return much beyond the legal rate of interest on the money invested.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 7, p. 5953.]

2. JUDGMENT (§ 828*)—RES JUDICATA—JUDGMENT SUSTAINING RAILROAD RATES—RAILROAD COMMISSION.

The Michigan Railroad Commission Act (Pub. Acts 1909, No. 300) authorizes the Railroad Commission to fix rates, and provides by section 26 (a) that any carrier or person dissatisfied with a rate fixed may sue the Commission in a circuit court to set aside the rates as unlawful or unreasonable, that the evidence taken in such action shall be transmitted to the Commission for its consideration, and, if the original order be not rescinded or changed, judgment shall be rendered thereon; section 26 (e) places the burden of proof on the complainant to show that the Commission's order is unlawful or unreasonable, as the case may be; and section 26 (d) authorizes an appeal to the Supreme Court. *Held* that, under Const. Mich. art. 4, §§ 1, 2, dividing the powers of government into legislative, executive, and judicial departments, and providing against infringement, the authority of the court in a suit to vacate a rate order of the Railroad Commission did not involve legislative action and was essentially judicial; and hence, where a judgment confirming a Commission's order had been affirmed on appeal to the Supreme Court, and a writ of error from the Supreme Court of the United States had been denied, the rate was res judicata, precluding a further contest thereof in the federal courts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

In Equity. Suit by the Detroit & Mackinac Railroad Company against the Michigan Railroad Commission and others. On motion for preliminary injunction. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

James McNamara and Fred A. Baker, both of Detroit, Mich., for complainant.

Assistant Attorney General McGill and Gillett & Clark, of Bay City, Mich., for defendants.

Before KNAPPEN and DENISON, Circuit Judges, and TUTTLE, District Judge.

PER CURIAM. Complainant owns and operates a railroad running both north and south from Alpena. All questions here involved are with regard to traffic moving wholly within the state. The railroad company, pursuant to the Michigan statute and the regulations of the Michigan Railroad Commission, made and published a local tariff, known as "M. R. C. [Michigan Railroad Commission] 205," giving rates upon logs from specified stations to Alpena. It later so made and published a mileage tariff, known as "M. R. C. 208," giving mileage rates on logs, applicable "only when the manufactured product is to be reshipped via the Detroit & Mackinac Railway, and in the absence of tariffs naming specific rates." If the mileage basis, specified in tariff M. R. C. 208, was applied to the local rates fixed by tariff M. R. C. 205, they would be greatly reduced. Certain shippers complained to the Commission that the rates in 205 were unreasonable, and that this tariff, in connection with 208, operated as a discrimination against them, and favored other shippers, who were so situated as to take advantage of 208. Due notice was given, other shippers intervened on both sides of the controversy, proofs were taken, and a hearing had before the Commission. It found that the complaint was well based, and that the rates in tariff 205 were unjust, unreasonable, and excessive; and it ordered that the railway company should make and publish a new local tariff with specified lower rates. This required new tariff was made up mainly, if not wholly, by applying the mileage rate fixed in tariff 208. The Commission also made a further order, which need not be described, because fully within the rule which we are to consider.

The Michigan Railroad Commission Act (No. 300, Pub. Acts Mich. 1909), which undertakes, quoting from its title, to "define and regulate common carriers and the receiving, transportation and delivery of persons and property, prevent imposition, unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan Railroad Commission," etc., contains a variety of provisions, of which those thought to be here important are quoted in the margin.¹

¹ Sec. 26. (a) Any common carrier or other party in interest, being dissatisfied with any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within thirty days from the issuance of such order and notice thereof commence an action in the circuit court in chancery against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable, in which suit the Commission shall be served with a subpoena and a copy of the complaint. The Commission shall file its answer, and on leave of court any interested party may file an answer to said complaint. Upon the filing of the answer of the

Thereupon the railway company filed, in the circuit court for the county of Wayne, in chancery, its bill of complaint, reciting the facts above stated, and alleging the cost of its road, cost of operation, and value of the products shipped; that the local tariff under attack was, in all respects, just and fair; that the special mileage tariff (M. R. C. 208) was justified by special conditions stated; and that the two tariffs did not operate to cause any improper discrimination. It also alleges that the orders in question were against the just rights of com-

Commission said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the circuit courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the Commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law.

(b) No injunction shall issue suspending or staying any order of the Commission, except upon application to the circuit court in chancery or to the judge thereof, notice to the Commission having been given and hearing having been had thereon.

(c) If, upon the trial of said action, evidence shall be introduced by the complainant which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon receipt of such evidence the Commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence. If the Commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order.

(d) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal to the Supreme Court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a different nature except criminal cases at the next term of the Supreme Court.

(e) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be.

Sec. 27. (a) In all actions and proceedings in court arising under this act all such process shall be served and the practice and rules of evidence shall be the same as in actions in equity, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil process shall execute any process issued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services.

plainant, and were unjust, unreasonable, and illegal, and if put into execution will financially cripple the complainant and interfere with the just and legal operation of its railroad; that no effort was made by the Commission to ascertain the cost of the carriage involved; that portions of the hauls covered by the order are upon logging branches, which are not railroads within the jurisdiction of the Commission; that the rates in M. R. C. 205 do not exceed the actual cost of carriage with a reasonable profit added; that complainant cannot be required to perform such services for less than cost and a reasonable profit; and that the orders of the Commission operate to compel service for less than such cost and a fair profit, and are in conflict with the due process of law clause of the fourteenth amendment to the federal Constitution. It further shows that, if the orders are enforced, its earning capacity will be reduced below the minimum rate of return on its investment, and its capital will be impaired, and its property will be taken, and again invokes the protection of the fourteenth amendment. It thereupon prays (1) that the logging spurs and branches be declared not subject to regulation by the Commission; (2) that the tariff rates of M. R. C. 205 may be decreed to be reasonable and just, and those fixed by the Commission to be unreasonable and unjust; (3) that the rates fixed by the Commission may be decreed to be confiscatory, and a deprivation of property without due process of law; (4) that the rates fixed by the Commission may be declared to be in conflict with the Michigan Constitution; and prays for general relief.

The Commission and intervening shippers answered, a large amount of evidence was taken, and the circuit judge certified the evidence to the Commission. It made a report to the court, adhering to its former opinion, and stating the reasons therefor. The circuit judge filed an elaborate opinion, pursuant to which the bill was dismissed. The complainant appealed to the Supreme Court of Michigan, the case was there heard like any other appeal in chancery, and the decree of the Wayne circuit court was affirmed. *Detroit & Mackinac Railroad Co. v. Michigan Railroad Commission*, 137 N. W. 329, decided July 22, 1912.

Complainant's application for the allowance of an appeal or writ of error to the Supreme Court of the United States was denied by Mr. Justice Day. His order of denial did not state the reasons therefor. Thereupon complainant filed its bill in this court. This bill is essentially similar to that filed in the Wayne circuit court, recounts the same proceedings, sets up substantially the same grounds of right, and prays for substantially the same relief.

Upon the argument of the motion for preliminary injunction, many different questions were presented; but we find it necessary to consider only one, and that is whether or not the matter is *res judicata* by reason of the action of the Michigan state courts. On the one hand, it is urged that complainant and the intervening shippers who approved its action have been fully heard in a court of competent jurisdiction, and have been defeated by the final decree of the court of last resort; on the other hand, it is said that the proceedings in the

Michigan courts were various steps to the final fixing of the rate, and that there has not, as yet, been any judicial decision. Complainant's counsel, in maintaining this proposition, relies essentially upon the decision of the United States Supreme Court in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, and it is only necessary to determine whether that case is applicable. It arose in Virginia, and it seems that, in that state, there is no constitutional separation of the legislative and judicial powers, but that the state Railway Commission possesses power of both characters. From its decision, which is thus both a legislative act and a judicial decree, an appeal is provided to the Supreme Court of Appeals of the state; here, also, this dual character of power continues.

In the opinion in the *Prentiss Case* (211 U. S. 227, 29 Sup. Ct. 70, 53 L. Ed. 150), and after stating the conclusion—a conclusion vital to the result reached—that the order and decree of the Commission was so far legislative that it would not be *res judicata*, but would be open to attack in subsequent litigation, Mr. Justice Holmes stated the further conclusion, not so vital, but not irrelevant:

"And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co. v. Commonwealth*, 102 Va. 599, 621 [46 S. E. 911]. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation has past."

It is quite obvious that what is here said about the decision of the Supreme Court of Appeals, and the argument for its application to the instant case, depend utterly upon the idea that the action of the Supreme Court of Appeals, in an appeal from the Railway Commission, was so far legislative, rather than judicial, in character, that it must be subject to be treated as legislation is treated. Is this, then, true of the review provided for by the Michigan statute?

We pass by the natural query whether the whole matter is not determined, without analysis of the statute, but necessarily by the constitutional policy of Michigan, whereby judicial power cannot be vested in anything but the courts, or legislative power be vested in either of the other governmental branches. The 1909 Constitution of Michigan (article 4, §§ 1 and 2) provides that the powers of government are divided into three departments, the legislative, executive, and judicial, and that no person belonging to one department shall exercise powers properly belonging to another, except in cases expressly provided in the Constitution. These provisions are the same as found in article 3 of the Constitution of 1850, and this rule of strict division and limitation has been often interpreted and applied by the Supreme Court of Michigan.

In *Shumway v. Bennett*, 29 Mich. 451, at page 464 (18 Am. Rep. 107), Judge Campbell said:

"The judicial power must be vested in courts. Such legislative power as can be delegated at all must be delegated to municipal corporations or local boards or officers."

In *Houseman v. Kent Circuit Judge*, 58 Mich. 364, at page 367, 25 N. W. 369, at page 370, Judge Champlin said:

"The design of the Constitution is that each of the three branches of the government shall be kept, as far as practicable, separate, and that one of the departments shall not exercise the powers confided by that instrument to either of the others. Any legislation, therefore, authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the others, cannot be regarded as valid."

In *Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520, it was expressly held that the establishing of reasonable rules and regulations for a public service corporation is a legislative or administrative function, and not a judicial one. See, also, *Locke v. Speed*, 62 Mich. 408, 28 N. W. 917, and *Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603.

In the face of this clear rule that a Michigan court cannot constitutionally perform the function of which we are speaking, complainant apparently must finally come to the position that the intent of the act was to confer on the courts of Michigan a legislative as well as a judicial power of review, and that, since such intention must fail, the entire review is nugatory; but, however that may be, we must at least assume that the constitutional situation raises a presumption of non-intent to confer on the courts any power of legislation.

Let, us, then, examine the act, and see whether such intent is disclosed sufficiently to overcome the adverse presumption. We see no occasion to review the details as stated in the margin. In most respects, the provisions are appropriate, and appropriate only, for a judicial proceeding. In four respects only are there provisions not thus exclusively appropriate to the theory of judicial action. These are: (1) The provision in section 26 (a) that the action to be commenced by the carrier against the Commission to vacate its order may be "on the ground that" the rate fixed is "unlawful or unreasonable," or that some provision of the order is "unreasonable"; (2) the provision in section 26 (a) that the court may not only vacate the order in whole or in part, but may "make such other order or decree as the courts shall decide to be in accordance with the facts and the law"; (3) the requirement found in section 26 (c) that the additional evidence taken before the court shall be certified to the Commission, which may set aside, modify, or affirm its former order, and which must report its action to the court, which then proceeds to act with reference to the new or modified order; and (4) the implication arising from section 26 (e) that the controlling issue is whether the order of the Commission was "unlawful or unreasonable." The condition called the third in this enumeration is thought to tie the court and the Commission together, so as to indicate the single quality of the final decision; the first and fourth are said to indicate that the court has to decide exactly the question passed upon by the Commission, viz., what is "rea-

sonable"; and the second is said to imply the right of the court to fix for itself a reasonable rate, or such rate as it may decide to be "in accordance with the facts and the law."

[1] If the provisions which require the court to say what is "reasonable" stood alone, unaffected by the context or the presumptions arising from the constitutional distribution of powers, it would not be easy to determine their meaning; but, with the help of these aids to interpretation, it is clear that the word "reasonable" is here used as meaning "nonconfiscatory." As was pointed out in *Louisville & Nashville Railroad Co. v. Siler* (C. C.) 186 Fed. 176, at page 189, the problem whether a rate or a return is reasonable is a problem with a double aspect, legislative and judicial. From the legislative standpoint, that rate or return is reasonable which is not unfair to the shipper and at the same time is large enough to meet the demands of legislative policy in promoting and encouraging railroad investments. The Legislature, or the legislating administrative board, takes into account the risk involved, the community service rendered, past or prospective unprofitable periods, and all other elements tending to determine what a wise policy may be, and it may well fix a rate contemplating a return much beyond the legal rate of interest upon the money invested; in other words, from this point of view, a very liberal return may be "reasonable." On the other hand, it cannot be *judicially* said that a rate is unreasonable unless it yields less than that *minimum* return which the invested capital has a right to demand; in other words, that increment which is so inherently incidental to the investment that destroying the increment is a confiscation of the property. Only then, from the standpoint of a court, does a rate become "unreasonable"; and, finding this word "unreasonable" used in this statute with reference to the action of courts, which can have no other viewpoint, the word must receive this construction.

[2] The suggestion that the court has power to fix the rate, in addition to its power to vacate the action of the Commission, would also be plausible, if we observe only the single clause giving it power to "make such other order or decree," etc.; but this suggestion, likewise, must yield to the interpretation made necessary by the constitutional limitation. Again we may refer to the opinion in the *Siler* Case, and particularly to pages 183-189, for a review of the cases leading to the inevitable conclusion that the rate-fixing power is legislative, and is not judicial; and with equal certainty it follows that the rate-fixing function cannot be vested in or performed by a body which, like a Michigan court, cannot exercise executive or legislative power.

With these premises, it is plain that such tying together of the court and of the Commission as is accomplished by section 26 (c) is intended only to aid the court in its actions as a court, and not to transform the court into something else. The practice prescribed is one of convenience, entirely suitable to the elastic powers of a court of equity, and well adapted to reach a just and final disposition of the whole matter without delays and repeated trials.

We do not overlook some expressions in the opinion of the Supreme Court of Michigan, in this controversy, which may be thought inconsistent with our conclusion. That court says:

"We apprehend that the words 'reasonable and just,' in the statute, do not mean 'nonconfiscatory,' as the word 'confiscatory' is usually defined."

The court is here speaking, we think, of the Commission, and of the powers and duties of that body, and of the words "reasonable and just," as used in the statute with reference to the Commission. The court did not expressly consider the force of the words "reasonable" or "unreasonable," as used in the statute with reference to the courts, nor whether these words might, in that connection, have a different force.

The court also said:

"The duty of the courts in the premises is not essentially different from that of the Commission."

It is clear that this expression was not intended in its broadest sense, because, although the court indicated that the Commission was not confined to the question whether a rate was confiscatory, the court proceeded to discuss and dispose of the case on the theory that the courts were confined to that question. The sum of the whole matter was that the bill was dismissed because the complainant did not, with sufficient certainty and clearness, prove the existence of that confiscation, the presence of which was necessary to enable courts to give relief. We are satisfied that the opinion, upon the whole, confirms our view that the Michigan courts could consider only this question, and had no legislative or administrative discretion in determining what was reasonable, and that, therefore, when complainant resorted to the Michigan courts, it invoked the protection of the judicial power.

It follows that the right of the railway company to such a review as any court could give became fixed when the order of the Commission was promulgated; that, to prevent an invasion of its legal right, the railway company could resort to any court of competent jurisdiction; and that, having selected the Wayne circuit court in chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan, the railway company cannot now try the same controversy over again in this court.

The motion for injunction must be denied.

IN RE ANSON MERCANTILE CO.

(District Court, N. D. Texas. May 5, 1911.)

1. BANKRUPTCY (§ 165*)—CONDITIONAL SALE—CONTRACT—"TRANSFER"—"PREFERENCE."

Rev. St. Tex. 1895, art. 3327, provides that all reservations of title to or property in chattels as security for the purchase money thereof shall be held to be chattel mortgages, and, when possession is delivered to the vendee, shall be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages. *Held* that, since a reservation of title to chattels in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

seller confers on the buyer a mere equity of redemption, such transaction, as between the seller and the buyer, who subsequently becomes a bankrupt, does not constitute either a transfer or preference within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*

For other definitions, see Words and Phrases, vol. 6, pp. 5498-5499; vol. 8, pp. 7759, 7064-7070.]

2. BANKRUPTCY (§ 140*)—CONDITIONAL SALE—CONTRACT—REGISTRATION—TIME—"CREDITORS."

The word "creditors," as used in Rev. St. Tex. 1895, art. 3327, providing that reservations of title to or property in chattels as security for the purchase money shall be void as to creditors, unless registered as a chattel mortgage, having been defined to mean only persons whose claims have been fixed by some legal procedure as liens on the property, a trustee in bankruptcy of a buyer under a conditional sale contract does not become a creditor with a lien on the property in possession of the bankrupt until adjudication under Act Cong. June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1491), conferring on trustees the rights of creditors holding a lien, and hence, where the contract of conditional sale was duly registered before adjudication, it was valid as against the buyer's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

In Bankruptcy. In the matter of the Anson Mercantile Company. On certificate of referee to review an order allowing a claim of the John Deere Plow Company to the proceeds of certain property sold to the bankrupt under a conditional sale contract. Affirmed.

See, also, 185 Fed. 993.

Etheridge & McCormick, of Dallas, Tex., for claimant.

MEEK, District Judge. The trustee of the bankruptcy estate of Anson Mercantile Company (hereinafter called mercantile company or bankrupt), feeling aggrieved at the action of K. K. Legett, Esquire, the referee, in allowing the claim of John Deere Plow Company (hereinafter called plow company), has brought the matter before me on certificate for review.

The issues arising upon the contest of the claim of the plow company were submitted to the referee on an agreed statement of facts, the substance of which is, in part, as follows:

It is admitted: That at the time the alleged orders for goods were made by the mercantile company, and at the time they were received and filed by the plow company, the mercantile company was engaged in the grocery, hardware, and implement business at Anson, Jones county, Tex., and was so engaged at the time the alleged orders were filed for record in the office of the county clerk of Jones county as chattel mortgages. That during all of this time the mercantile company was pursuing the avocation of a merchant, and had a stock of goods which was duly exposed for sale at retail in the regular course

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of business. That at the time of the ordering and shipment of these goods it was understood and contemplated by and between the parties that the mercantile company, upon receipt of same, should place them in the stock and remain in continuous possession and actual control of them, and such goods so sold and delivered would be by the mercantile company duly exposed to sale in the regular course of business. That this was the course in fact pursued. That the contracts of sale containing the clause as to retention of title in the plow company were not filed in Anson, Jones county, Tex., where the goods were then located, until December 5, 1910, one day prior to the filing of the voluntary petition in bankruptcy. That the trustee and other general creditors shown in the bankruptcy schedules filed herein had no knowledge of the existence of the said alleged chattel mortgage contracts until they were filed. That said goods so sold and delivered by the proponents to the bankrupt were sold and delivered to the bankrupt prior to December 5, 1910. That no additional goods were sold to the bankrupt at the time the mortgage was filed for record, and no new consideration was passed between the proponent and the bankrupt at the date of the filing of the mortgages. That at the time the alleged contracts or mortgages were filed the mercantile company was insolvent, as insolvency is defined in the National Bankruptcy Act now in effect, and at such time it was indebted to the Walker-Smith Grocery Company and to many others, as shown by its schedules in bankruptcy, here referred to and made a part hereof. That the goods were in the hands of the bankrupt at the time of the filing of the petition and adjudication, and came into the possession of the trustee by virtue of his appointment. That subsequently, under the order of this court, they were sold separately and brought \$510, which sum is now in the hands of the trustee as a special deposit to await the decision of the court on this claim. That at the time the plow company filed its contracts of mortgage for record in Jones county it then knew the mercantile company was insolvent, as insolvency is defined by the Bankruptcy Act. That the mercantile company had not complied with the conditions in the order for goods which required it to turn over to the plow company the money received for goods sold and delivered under the contract, or to turn over to the plow company notes which might be received in settlement for goods that had been purchased under and by virtue of written orders.

It is agreed that the contracts and each of them mentioned in the claim contains the following language:

"(3) To look to transportation companies for all losses occasioned by damage in transit or failure to deliver any goods in good order.

* * * * *

"(7) It is also agreed that the title to, and ownership of, and the right to immediate and exclusive possession, upon demand either oral or written to all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale shall be the property of, John Deere Plow Company and subject to its order until full payment shall have been made for the same by the undersigned in money; but nothing in this clause will release the undersigned from making payment as herein agreed."

It is further agreed that the amount of the indebtedness due at the time of adjudication of the bankrupt to the plow company was \$3,853.64, and that same was for goods furnished under said contract.

In addition to the agreed statement of facts as above set forth, the referee made the following finding:

"That the effect of the enforcement of the claim of the plow company, and setting aside to it of the \$510, the proceeds of the goods as set out and described in its claim presented in this clause, will have the effect of giving said plow company a greater percentage of its debt than the estate will pay to general creditors of the mercantile company."

Under the above findings, the referee allowed the claim of the plow company as a secured claim to the extent of the value of the property covered by its liens which had theretofore been liquidated at the sum of \$510, and directed the trustee to pay claimant this amount as a credit on its claim, and ordered that the balance of said claim amounting to \$3,853.64 be allowed as an unsecured claim to be paid in due course of administration.

The questions presented on this review are as follows:

(1) Will the enforcement of the contract of the plow company involve and create a preferential transfer within the inhibition of Bankr. Act, § 60, subdiv. "b" thereof?

(2) Is the instrument evidencing claimant's lien void because not filed for more than a year after it was taken, and no new consideration passing between the parties as of the date same was filed for record in Jones county, Tex. In other words, is the instrument void under section 67, subdiv. "d," thereof?

(3) Is the instrument evidencing the claimant's lien void as to the trustee in bankruptcy under section 47, subdiv. "a" (2), of the Bankruptcy Act, as amended in the year 1910?

[1, 2] The referee filed and transmits as a part of his certificate in this matter his opinion, from which I quote at length, as follows:

"The questions of law were argued before me, and those principally urged and relied on by the trustee were:

"(1) That the transaction between the bankrupt and the claimant involved preferential transfer in the nature of a lien which had not been recorded more than four months before the bankruptcy proceeding was instituted, and therefore was voidable by the trustee.

"(2) That the instrument evidencing the claimant's lien is void because the delay in registering it left the lien for some time after the goods covered by it had been delivered to the bankrupt subject to the attack of legal lien creditors, into which class the trustee in bankruptcy is introduced by the recent amendment to the bankrupt law.

"Considering these questions in the order in which they are stated:

"It is observed that the transaction between the claimant and the bankrupt is of the character treated in the legislation of Texas under the designation, 'Reservations of the title to or property in chattels as security for the purchase money thereof.' The legal effect of such instruments as between the parties and as to creditors is declared in article 3327 of the Revised Statutes of Texas (1895), which reads as follows: 'All reservations of title to or property in chattels as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages; provided, that nothing in this law shall be construed to contravene the Landlord and Tenant Act.' Construing this statute, the Supreme Court of Texas, in the lead-

ing case on the subject, says of the transaction involved: 'It is a reservation by the vendor, and not any form of lien attempted to be given by the owner.' *Bowen v. Wagon Works*, 91 Tex. 390, 43 S. W. 874. Indeed, this would clearly seem to be so and to exclude the idea of a transfer, because the effect of the reservation of title is not to enforce the lien upon something which the bankrupt then had, but rather to clothe him with the equity of redemption only in property which theretofore had been wholly owned by another.

"I cannot find in the transaction the essence of a depletion of the bankrupt's estate by taking therefrom in the form of payment or security something which at the time of the transaction constituted a fund for the payment of creditors. My conclusion on this point, therefore, is that the transaction involved between the claimant and the bankrupt was not a transfer nor a preference.

"Coming to the second question: It must be observed at the threshold that the effect of registration or its absence is left by the bankrupt law to be determined by the local state jurisprudence. The statute covering the record of such instruments has been set out above and uses the familiar words 'creditors' and 'bona fide purchasers' as to those protected by the registration.

"No question can arise here as to a bona fide purchaser, but the trustee insists that he is made by the recent bankruptcy legislation a 'creditor' as that term is used in the registration acts. In the *Bowen Case*, supra, the Supreme Court of Texas, discussing the meaning of the word 'creditors' in the registration act, says: "'Creditors,' as here used, has been generally held to mean persons whose claims have been fixed by some legal procedure as liens upon property.' Numerous other decisions from the appellate courts of this state are to the same effect, and there are no conflicting decisions; so that it may and must be assumed that failure to register a reservation of title contract leaves it subject to attack only by those creditors, if any, who have fixed liens upon the property by some legal process levied before the registration. The recent amendment to the Bankruptcy Act provides: 'Trustees, as to all property in the custody or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.' Section 47, cl. (2), of subdivision 'a,' as amended by Act June 25, 1910.

"The question arises as of what date the trustee should be deemed vested with these rights? There must be some point of time before which the rights did not accrue, and after which they are vested. There are obvious considerations tending to the conclusion that the intent was to vest these rights as of date of the adjudication; for it may be seen that many petitions for involuntary bankruptcy are filed which are defeated and dismissed without an adjudication, and in such cases it would seem burdensome that the mere filing of a petition in bankruptcy, however unfounded the ground on which the proceeding may prove to be, should operate as a levy of legal process on all of the property of the person so proceeded against. On the other hand, there are considerations leading to the conclusion that the intent was that the filing of a petition should constitute the equivalent of a levy, and vest in the trustee to be subsequently appointed after and when he was appointed the right of a legal lien by relating back as of date on which the petition was filed. In this case, however, it is not necessary to determine whether the rights of the trustee are to be considered as having become vested on the date of the adjudication or on the date of the institution of the proceedings, for the facts in this case show that the instruments evidencing claimant's liens had been duly filed before either of these dates.

"The question then occurs: Can these rights of the trustee be considered as having antedated the institution of the bankruptcy proceedings? I can find no reason for so holding. I can find no point of time prior to the institution of the bankruptcy proceedings which would determine the validity of such instruments by validating those filed prior to that time and invalidating those which should be subsequently filed, and to fix a date prior to the institution of the bankruptcy proceedings would be in effect to hold that such instruments were void for want of record as against the trustee in bankruptcy

if not at once recorded, and such a holding would, in my opinion, fail to reflect the meaning of that portion of the bankrupt law quoted supra, and conflict with the decisions of the Supreme Court of Texas on the meaning of the Registration Acts. I therefore find that the contracts of the claimant were duly filed, and are not subject to the attack of the trustee for want of record. The effect of a failure to register such contracts before the institution of bankruptcy proceedings is not a question involved in this contest."

I adopt the referee's reasoning and the conclusions reached by him. The order complained of and heretofore entered by him on the 11th day of April, 1911, is hereby approved and affirmed.

The costs of this certificate will be taxed against the estate of the bankrupt as costs of administration.

**PARKVIEW BUILDING & LOAN ASS'N v. HEROLD, Collector of
United States Internal Revenue.**

(District Court, D. New Jersey. March 12, 1913.)

1. INTERNAL REVENUE (§ 9*)—CORPORATIONS—TAXES—BUILDING AND LOAN ASSOCIATION—ASSOCIATION ORGANIZED AND OPERATED EXCLUSIVELY FOR "MUTUAL" BENEFIT OF MEMBERS.

Where a building and loan association was organized under New Jersey Act April 8, 1903 (P. L. p. 457), and supplemental acts solely for the purpose of making building loans to its members, who were entitled to vote in the management of the association's affairs according to membership and not by virtue of stockholding, it was an association for the mutual benefit of its members, within Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]), exempting such corporations from liability for the taxation, though under its plan of operation there might be inequality in the returns to the prepaying stockholder, etc., since the word "mutual" is not to be construed as synonymous with "equal."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 5, p. 4646.]

2. TAXATION (§ 204*)—EXEMPTIONS—CONSTRUCTION OF STATUTE.

A citizen is exempt from taxation, unless the tax is imposed on him by clear and unequivocal language; any fair doubt being determined in favor of the taxpayer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 321, 322, 325, 332, 333; Dec. Dig. § 204.*]

Action by the Parkview Building & Loan Association against Herman G. H. Herold, Collector of United States Internal Revenue for the Fifth District of New Jersey, to recover certain corporation taxes alleged to have been wrongfully imposed on and collected from plaintiff. Judgment for plaintiff.

Riker & Riker and Spaulding Frazer, both of Newark, N. J., for plaintiff.

John B. Vreeland, of Norristown, N. J., and Harrison P. Lindabury, of Newark, N. J., for defendant.

ORR, District Judge (specially presiding). The plaintiff has brought its action at law to recover from the Collector of Internal Revenue for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the Fifth District of New Jersey the amount of the tax which, plaintiff says, was wrongfully exacted. The tax was assessed under the act providing for a special excise tax on the business of corporations, which is found in Act Aug. 5, 1909, c. 6, 36 St. at Large, pt. 1, p. 112 (U. S. Comp. St. Supp. 1911, p. 946). The question to be determined is whether or not the plaintiff is one of the organizations excepted by the proviso of that statute. The material portions of the act and the proviso are as follows:

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association: * * * Provided, however, that nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders or associations, operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

[1] At the suggestion of counsel for both parties and in pursuance of their agreement, the court found the following facts in the nature of a special verdict:

"That the plaintiff is a building and loan association existing under and by virtue of the provisions of an act of the Legislature of the state of New Jersey entitled 'An act concerning building and loan associations,' approved April 8, 1903 [P. L. p. 457], and the acts supplementary thereto and amendatory thereof; that said association was in existence under the provisions of said act on the 1st day of January, 1909, and continuously hitherto; that said association issues two varieties of stock, one known as prepaid stock, on which the full par value of \$200 per share is paid by the holder thereof at the time of the issuance of said stock, and upon which the plaintiff pays to the holder thereof out of the profits of the association the sum of 5 per cent. per annum in lieu of participation by said stockholder in the general profits of said association, in accordance with the provisions of the fifty-third section of said act concerning building and loan associations; the second, stock known as installment stock, whereon the holders pay the sum of \$1 per share per month, and whereto the proportionate share of the profits of the association, after the deduction of the necessary expenses of operation of the association, are annually added until the aggregate of the payments and profits equals the sum of \$200, when said sum of \$200 is paid to the holder of said shares, and said shares retired; that the plaintiff is at liberty at any time, upon 30 days' notice, to cancel any outstanding prepaid stock upon paying to the holders thereof the par value thereof, together with interest at the rate of 5 per cent. per annum from the date of the last payment of interest to the holder, and each holder of such prepaid stock may likewise, upon 30 days' notice and the tendering of his certificate, require such payment from the association.

"That said association borrows no money from individuals, whether members or nonmembers, loans no money to persons other than members of the association, but borrows from time to time as its business demands moneys from the Essex County National Bank of the city of Newark in amounts not in excess of the amount which it is permitted to borrow under said act concerning building and loan associations.

"That the rights of the two classes of shareholders are in all respects identical, except as to the participation in the profits of the association, as

above set forth; that the profits of the Parkview Building & Loan Association during the year 1909 and subsequently thereto have been in excess of 5 per cent. per annum.

"That said association claimed to be exempt from making the return required by the special corporation excise tax law of 1909, and made no return for the year of 1909, as required by said law, prior to the 1st day of March, 1910; that a return was subsequently made under protest, and that a tax was levied against said association for the year 1909 amounting to \$47.36, to which 50 per cent. of such tax, amounting to \$23.68, was added, making a total of \$71.04; that said tax was paid by the plaintiff under protest, and a petition for its refund was filed by the plaintiff with the Commissioner of Internal Revenue, which petition for refund was denied; that the plaintiff has taken all necessary steps precedent to its right to sue in this court for the recovery of the tax so paid, if said tax was wrongfully exacted."

It is necessary to refer to the New Jersey Act of 1903, under which the plaintiff was incorporated, in order to ascertain its real nature. The first section provides:

"Upon executing, recording and filing a certificate pursuant to this act nine or more persons, citizens of this state, may become an incorporated association for the purpose of assisting each other and all who may become associated with them in acquiring real estate, making improvements thereon and removing incumbrances therefrom, by the payment of periodical installments, and for the further purpose of accumulating a fund to be repaid to its members (subject to the right of earlier redemption), who do not obtain advances for the purposes above mentioned when the funds of such association shall amount to a certain sum per share to be specified in the certificate of incorporation."

We notice that the fifth section provides that:

"Members of the association shall be those to whom its shares shall be issued and their personal representatives and those to whom said shares may be transferred under the regulations prescribed by the association, subject to the making of the periodical payments required and compliance with the other terms of membership according to the constitution and subject to such fines or penalties as shall be determined by the constitution; minors and parents or guardians in behalf of their minor children or wards may hold shares in any such association and have all the rights and privileges of other members except the right to hold office; * * * at all meetings of the association, each member shall be entitled to one vote, * * * provided a minor under the age of sixteen years shall not have the right to vote."

Section 24 provides:

"The funds of every such association shall be invested in the following and no other way: First, in the purchase of lands or building lots and erecting buildings and improvements thereon, or in the purchase of lands already improved, which lands, buildings and improvements shall be within this state, and shall be already contracted to be sold to the members of such association, payable in the shares of the association, or in periodical installments for a period such as shall be agreed upon and designated in their constitution, at the expiration of which term, all payments having been made, the lands, dwellings and improvements so sold and conveyed to the members of such association shall become the property of the grantee discharged from all further payment."

The next provision provides for investment in loans to members on bonds secured by mortgage, which shall be a first lien on real estate, etc. Then follows the third provision for investment in the redemption of shares in the association. Then follows a provision for investment of moneys not required for the three purposes above mentioned

in loans to persons not members upon real estate security, and in the acquisition, by purchase or otherwise, of such securities as savings banks in the state are authorized to take as investments.

The fifty-third section of the act provides:

"All shares of stock issued by any such association of this state, or doing business therein, shall be of the same par or maturity value. No such association shall issue preferred or other than common stock, and all shareholders shall occupy the same relative status as to debts and losses of the association; but nothing herein shall forbid agreements with shareholders who pay the full par or maturity value of their shares in advance whereby they may waive participation in the general profits of the association in consideration of a fixed annual profit."

Other provisions in the act need not be set forth. There are provisions limiting the amount to be paid for the expenses of operation and provisions for state supervision and control. The act contains other provisions regulating foreign building and loan associations who may seek to do business in the state.

The plaintiff is clearly a domestic building and loan association. If, therefore, it be "organized and operated exclusively for the mutual benefit" of its members, it would seem to come within the proviso of the statute. It will be observed that under the law each member has the same right to dictate the policy of the association. It does not increase his influence to own many shares of stock, because his right to vote does not depend upon the number of shares that he may hold, but simply upon his membership. There is therefore in the association, under the law, no means by which a single stockholder, or a group of stockholders, by the acquisition of the majority of the shares, could control the association as against a majority of the members of the association. There is therefore a mutuality of right with respect to the control of the corporation. Nor do we think that the mere provision in the fifty-third section of the act for agreements to pay 5 per cent. interest to shareholders who pay the full par or maturity value of their shares affects the mutuality. It is not contemplated by the act that the shareholders who pay in advance shall have any priority in distribution of assets. There is therefore mutuality between the shareholders with respect to the assets of the corporation. Each person intending to become a member of the association has the right to prepay the full par or maturity value and take a fixed sum as his share of the annual profits of the association. The mere fact that there may be an inequality in the returns to the prepaying shareholder and the other shareholder in favor of the one or the other does not seem to the court to destroy the mutuality among the shareholders required by the proviso of the act of Congress.

The word "mutual" cannot always be considered a synonym of "equal." Mutual credits are not necessarily equal credits; mutual debts need not be equal in amount. That the issuance of prepaid shares does not destroy the mutuality among the members of a building and loan association is the opinion of Judge Endlich, whose work on Building and Loan Associations is deemed an authority, as may be seen in his discussion of the subject in paragraphs 461 to 464. That view is also taken by the Supreme Court of Pennsylvania in *Folk v.*

State Capitol Savings & Loan Association, 214 Pa. 529, 63 Atl. 1013, where the Supreme Court affirms the lower court, which was presided over by Judge Endlich. The following quotation from Judge Endlich's opinion in that case is helpful. He says (214 Pa. 535, 63 Atl. 1016):

"That the allowance of a fixed dividend upon such paid-up stock out of the profits of the corporate business is a reasonable incident to its issuance, just to both classes of shareholders, and not calculated to give either an undue advantage over the other; that, on the contrary, the practical effect of the concurrent issuance of both installment and full-paid stock is likely to prove beneficial to both classes of shareholders; that no essential characteristic of the building association scheme can be regarded as forbidding, and no essential purpose of it as defeated by this device; that it is contrary to no accepted rule of policy applicable to or involved in the nature of building associations."

[2] If the consideration thus given to the case still leaves the matter in doubt, there should be applied the well-settled rule that the citizen is exempt from taxation, unless the same is imposed by clear and unequivocal language, and that, if there is a fair doubt as to the construction of an act imposing taxation, the doubt should be resolved in favor of those upon whom the tax is sought to be laid. This rule is referred to, with citation of several cases, in the opinion of Judge Cross in *Mutual Benefit Life Ins. Co. v. Herold* (D. C.) 198 Fed. 199. We must conclude, therefore, that the plaintiff must be deemed to have been "organized and operated exclusively for the mutual benefit" of its members.

A decision has been cited in behalf of the government apparently holding a view contrary to that herein expressed. It is the case of *Pacific Building & Loan Association v. Millard T. Hartson*, and found in 24 Treasury Decisions, No. 6; but that case does not appear to be applicable. The shareholders in that association voted for the directors by the share, thereby affording opportunity for a few individuals, by the acquisition of shares, to control the policy of the corporation. The funds of that association appear to have been a subject of loans to any borrower, without respect to membership in the association; and there was a provision for the cancellation of outstanding certificates of stock not borrowed upon whenever the board of directors deemed advisable to pay the holder the book value of the stock so canceled. In almost every aspect the case cited on behalf of the Collector is not applicable to the present case.

We might add that it is unnecessary to determine the effect of the words at the end of the proviso in the act, "no part of the net income of which inures to the benefit of any private stockholder or individual." The plaintiff is entitled to judgment on the special verdict; and it is therefore so ordered.

And now, March 11, 1913, the clerk is directed to enter judgment for \$71.04 in favor of the plaintiff, the Parkview Building & Loan Association, and against the defendant, Herman C. H. Herold, Collector of United States Internal Revenue for the Fifth District of New Jersey.

MOYER, Warden, v. ANDERSON.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1913.)

No. 2,455.

HABEAS CORPUS (§ 30*)—SCOPE OF WRIT—VALIDITY OF SENTENCE.

Petitioner was charged in the first count of an indictment for unlawfully and forcibly breaking into a post office, and in the second count with larceny of postage stamps from such post office on the same day, and in the third count with larceny of \$3 from the post office on the same date. The three counts were submitted to a jury and a verdict of guilty returned thereon, on which petitioner was sentenced to pay a fine of \$100, and to imprisonment for 5 years on the first count and 2½ years on each of the second and third counts. *Held* that, the court having jurisdiction of the offense described in the indictment, error, if any, in imposing sentence on the second and third counts, on the ground that since the burglary and larceny were committed at the same time they were but one transaction, was reviewable on writ of error, and was not ground for writ of habeas corpus to procure petitioner's release after he had served a term of imprisonment imposed on the first count and worked out the fine.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

On petition of Charles Anderson for habeas corpus against William H. Moyer, warden of the United States penitentiary at Atlanta, Ga. The district court having granted the writ and discharged petitioner, the warden appeals. Reversed.

An indictment containing five counts was returned May 7, 1907, in the United States District Court for the District of Oregon against Charles Anderson and three others. The first count charged them with unlawfully and forcibly breaking into the Sellwood post office, in the city of Portland, Or., with intent to commit a larceny therein, on January 18, 1907; the second count charged them with larceny of postage stamps from said post office on that date; the third with larceny of \$3 from that post office on the same date; the fourth with receiving and concealing on the same date the postage stamps stolen by them from the post office; and the fifth with receiving and concealing on the same date the money that they had stolen from the post office.

The defendant, Charles Anderson, having filed his plea of not guilty, was tried by a jury, and on October 11, 1907, the jury returned a verdict finding him guilty as charged in the first, second, and third counts, and not guilty as charged in the fourth and fifth counts of the indictment. Whereupon, he was sentenced to pay a fine of \$100 and to imprisonment at hard labor in the United States penitentiary at McNeil's Island for a term of 5 years on the first count, 2½ years on the second count, and 2½ years on the third count. After serving part of said sentence at McNeil's Island, he was transferred to the United States penitentiary at Atlanta, Ga.

After serving his term of imprisonment on the first count, deducting the usual allowance for good time, and 30 days additional time in lieu of the fine imposed, he applied to the District Court of the United States for the Northern District of Georgia, where he is now confined in the federal prison at Atlanta, Ga., for a writ of habeas corpus, on the ground that the acts charged in the three counts of the indictment on which he was convicted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and sentenced constituted but one offense, and that, therefore, the additional sentence on counts 2 and 3 are void. The application was denied by the court for the reasons stated in *Anderson v. Moyer*, Warden (D. C.) 193 Fed. 499. The application for the writ was made on the strength of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Halligan, Warden, v. Wayne*, 179 Fed. 112, 102 C. C. A. 410.

Later, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Munson v. McClaughry*, Warden, 198 Fed. 72, 117 C. C. A. 180, followed the decision in the *Wayne* Case. On the strength of the decision in the *Munson* Case, the appellee herein renewed his application for a writ of habeas corpus on the ground that the criminal acts charged in the indictment constituted but one offense, to wit, the crime of breaking into a building used as a post office with intent to commit larceny therein, in violation of section 5478 of the Revised Statutes of the United States as charged in the first count of the indictment, and that the sentences upon the second and third counts of the indictment for larceny were ultra vires and void. The writ was allowed, served, due return made, and upon the hearing the court below held that the *Wayne* and *Munson* Cases were controlling in this case, and discharged the appellee herein.

F. C. Tate, U. S. Atty., and John W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., for appellant.

Lamar Hill, of Atlanta, Ga., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge (after stating the facts as above). Two questions are presented by the record in this case. The first is whether the sentence of a defendant convicted on two separate counts of an indictment under sections 5478 and 5456 of the Revised Statutes¹ of burglary of a post office building with intent to commit larceny and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is ultra vires and void as to the sentence for the larceny. The second is whether, if so, such a defendant, having satisfied the sentence for the burglary, is entitled to his release on habeas corpus. As our conclusion is against the appellee upon the second question with the result that the judgment is to be reversed and the writ denied for that reason, it becomes unnecessary for us to consider the first question.

The function of the writ of habeas corpus has been recently and thoroughly settled by the Supreme Court. In the case of *Glasgow v. Moyer*, Warden, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, three propositions are settled by the court in the language quoted:

(1) "The writ of habeas corpus cannot be made to perform the office of a writ of error."

(2) "The rule that on habeas corpus the court examines only into the power and authority of the court restraining the petitioner to act, and not the correctness of its conclusions, applies where the petitioner attacks as unconstitutional, or as too uncertain, the law which is the foundation of the indictment and trial."

(3) "A defendant in a criminal case cannot reserve defenses which he might make on the trial, and use them as a basis for habeas corpus proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice."

¹ U. S. Comp. St. 1901, pp. 3683, 3696.

In the case of *Matter of Gregory*, Petitioner, 219 U. S. 210, 31 Sup. Ct. 143, 55 L. Ed. 184, the Supreme Court said:

"Habeas corpus cannot be made to perform the functions of a writ of error, and this court is not concerned with the questions of whether the information is sufficient, or whether the committing court properly applied the law if that court had jurisdiction to try the issues and render the judgment. * * * When the statute defining the crime is valid, it is within the range of judicial consideration to determine whether the acts of the accused are within the definition, and if the court has jurisdiction its judgment cannot be reviewed on habeas corpus."

In the case of *Harlan v. McGourin*, Marshal, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849, the Supreme Court said:

"The writ of habeas corpus cannot be used for purposes of proceedings in error; the jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law."

Similar principles were enunciated by the Supreme Court in the cases of *Ex parte Watkins*, 3 Pet. 203, 7 L. Ed. 650, *Riggins v. United States*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303, *In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984, and in the recent case of *Johnson v. Hoy*, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. —, decided February 3, 1913.

From them we deduce the conclusion that it is not competent for a convicted defendant to reserve any defense he might have made on his trial and first present it after conviction and sentence as a ground for his release upon habeas corpus, that the writ of habeas corpus cannot be in this way made to perform the function of a writ of error, and that its only function is to secure the release of one imprisoned without authority of law, or by a tribunal without jurisdiction to try the detained person, and that it cannot be used to secure the release of one convicted by a tribunal having jurisdiction of the offender and the offense, but who has been wrongly convicted by reason of an error of that tribunal. The correct solution of the case depends upon the determination as to whether it falls within the one class or the other of those mentioned.

The verdict in the case at bar shows that petitioner Anderson was convicted upon the first, second, and third counts of the indictment. The first count was for burglary of a post office and the second and third counts were for larceny of stamps and money, respectively. There was a verdict of acquittal under counts 4 and 5. The court below submitted all the counts of the indictment to the jury. If the petitioner is correct in his position that the larceny was merged in the burglary or vice versa, then the court should have directed the jury that they might find the defendant guilty of either crime, but not of both. If the court gave no such instruction, but permitted the jury to return a verdict against the defendant upon both of the charges, it must have been either because it was of the opinion that petitioner's contention was not legally correct, even though the burglary and larceny were parts of one transaction and committed at the same time and place, or because it was shown upon the trial that the

burglary and larceny were committed at different times and places, and were consequently different transactions. In either case, the court below had jurisdiction to determine whether or not, under the law and the facts, the petitioner was guilty of both offenses, and, having determined it, the petitioner can question the correctness of its conclusion, only by means of a writ of error, and cannot use the writ of habeas corpus for that purpose. It is not a case where the court is shown upon the face of the record to have imposed an excessive or unauthorized sentence. The jury having found the defendant guilty of both charges, so long as its verdict was allowed to stand, the court had no other course open than to impose sentence for each offense. If error existed, it went back of the sentence and to the verdict, which was not a general verdict of guilty, but a verdict of guilty as to each of the first three counts. The matter could have been reached by a request to the trial court to direct the jury that they could not find the defendant guilty of both the burglary and the larceny, and in the event of its refusing to so charge, by a motion to set aside the verdict of guilty of both offenses upon that ground, or by assigning error thereon upon a writ of error.

The petitioner upon his trial could have interposed as a defense to the count charging the breaking that the misdemeanor of breaking into the post office was merged into the felony of the larceny of the stamps and the money or vice versa. Having failed to do this, he could not reserve this defense for presentation upon habeas corpus.

For this reason and for the additional reason that the record in this court does not sufficiently show that the burglary and the larceny were committed at the same time and place and were parts of one and the same transaction, we think the judgment should be reversed and a judgment entered here denying the writ.

In the cases of *Halligan, Warden, v. Wayne*, 179 Fed. 113, 102 C. C. A. 410, and *Munson v. McClaughry, Warden*, 198 Fed. 72, 117 C. C. A. 180, no question was presented as to the propriety of the writ of habeas corpus as a remedy, but in each case its appropriateness as a remedy was assumed, and it was conceded also that the burglary and larceny were parts of one and the same transaction.

Ordered that the judgment of the District Court discharging the appellee be reversed and a judgment entered in this court denying the writ, and taxing the petitioner with the costs of this proceeding.

NORTHERN PAC. RY. CO. v. CHERVENAK.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1913.)

No. 2,137.

1. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—ACTION—QUESTIONS FOR JURY.

Defendant railroad company had a switch track covered by a snowshed leading downgrade to a coal tipple. The track was crossed by a planked road leading from the end of a cross street through a gate in the shed which was used by coal teams and by the public generally in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

crossing from the town to a suburb. Cars in strings of 6 or 7 were run down the switch to the coal tipple by gravity, in charge of a brakeman who stopped each on a scale near the crossing and weighed it. Plaintiff, who was five years old, with other children wished to cross the track, but the crossing was blocked by cars which were standing still. After waiting from 15 minutes to half an hour, and seeing no engine attached to the cars and no one in charge, the children started to cross between the cars, which were started up by an employé of defendant without warning, and plaintiff was caught and his foot crushed. *Held*, that it was a question of fact for the jury whether, under all the circumstances, defendant was charged with a duty toward plaintiff which it neglected to perform by the exercise of reasonable care not to move its cars without warning to persons who might desire to cross the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 325*)—CONTRIBUTORY NEGLIGENCE—CHILDREN—AGE AT WHICH CHARGEABLE WITH NEGLIGENCE.

A child five years old, injured while attempting to cross a railroad track over a commonly used crossing on which unattached cars were standing, cannot be charged with contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1029-1036; Dec. Dig. § 325.*]

3. DAMAGES (§ 167*)—PERSONAL INJURY—EVIDENCE—LIFE EXPECTANCY.

In an action for a personal injury which caused the loss of plaintiff's foot, life tables showing his expectancy of life at the time of the trial were admissible on the question of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 487-489; Dec. Dig. § 167.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Frank H. Rudkin, Judge.

Action at law by John Chervenak, a minor, by his guardian ad litem, John Piper, against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff brought an action in the United States District Court for the Western District of Washington, Southern Division, in December, 1910, against the defendant to recover damages for personal injuries alleged to have been received by the plaintiff, and charged to have been caused by the defendant at the town of Roslyn, in the state of Washington, on the 7th day of September, 1897. Roslyn is and was at the time of the injury a station on the defendant's railroad. The plaintiff was born on May 31, 1892, and at the time of the injury was a child aged five years, three months, and six days.

The defendant, the Northern Pacific Railway Company, owned and operated a railroad running through the town of Roslyn, and in conducting its business in that place owned and operated several lines of side track or switches. The Northwestern Improvement Company was a corporation owning and operating coal mines in the vicinity of Roslyn, and also owning certain tracts of land on a portion of which were the tracks of the Northern Pacific Railway. The Northwestern Improvement Company was originally made a defendant in the case; but at the close of the testimony on behalf of the plaintiff, no evidence appearing tending to show negligence on the part of that company with respect to the injury to the plaintiff, the action was dismissed by the plaintiff as against that company. Roslyn at the time of the accident was a mining town of about 3,000 inhabitants. Pennsylvania avenue was the principal street of the town, and, extending through its principal business part, terminated at the right of way or tracks of the railroad company. One of the tracks was inclosed by a snowshed about 300 feet long and extended

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over that part of the track which would have been crossed by Pennsylvania avenue had it been extended. A wagon road extended from the termination of Pennsylvania avenue across the railway tracks and through an opening in this snowshed, which was about 10 or 12 feet wide. This roadway, planked for teams to cross over, had been used for a number of years by the Northwestern Improvement Company to transport material and supplies from Roslyn to its mines, and in passing to its machine shops, carpenter shops, blacksmith shops, etc., which were located on the opposite side of the railway tracks from the town of Roslyn. It was also used by the miners going to and from their work, by children going to school, and by others residing on the opposite side of the tracks from the town in a place known as Brookside addition. There was another crossing about 225 yards above, but this was the crossing generally used by people crossing from one side of the track to the other. The railway track which passed under the snowshed was used for delivering empty cars down to the tippie at a mine below to be loaded. This track was on a grade so that the cars would run down toward the tippie of their own momentum. The track runs north and south, the tippie being at the south end, and the manner of operating the cars was to place the empty cars at the north end of the track, where they could be taken charge of by a man in the employ of the railway company, who would usually take a string of seven or eight cars coupled together, loosen the brakes, and let the cars run down the track under the shed until the first car would be upon the scales, located about 75 feet north of the roadway passing through the snowshed. He would then stop the cars by setting the brake on one of them, get off the car and weigh the one on the scales, and then go back on the car, loosen the brake, and let the cars run until the next car was on the scales, when he would again set the brake, stop the cars, get off and weigh the car, and then go back on the car and repeat this process until all the cars which he had in the string were weighed, when he would again go back on the car, loosen the brake, and let the cars run down to the tippie.

On the day of the accident, the plaintiff, together with four other boys, whose ages ranged from 7 to 10 years, had gotten together at a point on the west side of the tracks next to the town and south of Pennsylvania avenue, where they had been attracted by a car that was off the track. From there they started to go to their homes in the Brookside addition to Roslyn, which lay east of the tracks and to the north of the roadway through the snowshed. The boys followed the roadway passing through the snowshed; but, arriving there, they found the roadway blocked with cars which had been or were being weighed and passed over the scales in the manner above described. No engine was attached to these cars and no one seen by the boys to be in charge of the cars. After waiting outside of the snowshed for some time, estimated by the boys from 15 to 30 minutes, during which time the cars were not moved, and as there was no indication that they were about to be moved, and no one seen by the boys to be in charge of them, they decided to cross the track by going under the cars. The older boys started, and the plaintiff followed; he passing under the coupling between two cars and was the last to attempt to go through. About this time an employé of the defendant, for the purpose of letting the cars down to the tippie, proceeded without notice or warning of any kind to release the brakes holding the cars and permitting them to run down the track by force of gravity. Before the plaintiff could get through, the cars were in motion, and as he was passing over the last rail a wheel of one of the cars caught his foot and crushed it so that amputation of his foot was necessary, and the operation was performed by a surgeon soon after the injury. The cars were being handled at the time by one Robert Jackson, an employé of the defendant, who died before this action was commenced.

In the course of the trial the plaintiff called as a witness H. P. Howell, a life insurance agent, who was permitted to testify over the objection of the defendant that the life expectancy of a man 19 years of age was 42.87, and a man of 20 years of age 42.20.

Upon the conclusion of the testimony on the part of the plaintiff, the defendant moved the court to direct the jury to return a verdict for the defend-

ant. The motion was denied, and the defendant allowed an exception. The jury returned a verdict in favor of the plaintiff in the sum of \$2,850. The defendant brings the case here upon writ of error.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, Wash., for plaintiff in error.

Robert M. Davis and Frank C. Neal, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). Defendant refers to the fact that this action was not brought until 14 years after the injury and would have been barred by the statute of limitations had not the plaintiff been a minor. This circumstance, defendant suggests, is of such an unusual and suspicious character as to impose upon the court the duty of investigating the circumstances with unusual care and not impose the penalty upon the defendant unless the plaintiff's evidence shows a clear right to recovery. The explanation of the delay in bringing the suit is not in the record. A probable and plausible explanation is stated in the brief of the plaintiff, but we do not propose to enter into a discussion of the fact or its explanation. It is sufficient that the statute of limitations of the state of Washington does not apply to persons under the age of 21 years. Remington & Ballinger's Ann. Codes & Statutes of Washington, § 169. The delay does not appear to have had any substantial bearing upon the merits, nor has it been in any way prejudicial to the rights of the defendant. Further than this it is the duty of this court to examine every case before it with care and without regard to matters not properly before it.

[1] The action of the court in denying defendant's motion to instruct the jury to return a verdict for the defendant is assigned as error.

The motion was necessarily based upon the objection that there was no question of fact to be submitted to the jury. The objection involves the question whether, under all the circumstances, the defendant was charged with a duty to the plaintiff which the evidence tended to show it neglected to perform. The plaintiff was a child a little more than five years of age. Defendant's train of cars blocked a crossing where people including children were in the habit of passing from one side of the track to the other. To this train of cars no engine was attached, and plaintiff testifies that he saw no one in charge of it. The presence of a live engine attached to the train would have been of itself a warning to a child of five years of age that there was danger in crossing under the cars, and the absence of this warning was to that extent an absence of notice that there was danger. Furthermore, the cars had not been moved for some time, and the boys did not see any one in charge of them, and were not warned by any one that the cars were about to be moved. Had the cars been moved while the boys were waiting, or had the boys seen that they were in charge of some one, the situation might have been a sufficient warning that there was danger that the cars would be likely to be moved at any moment; but in the absence of these usual and ordinary warning signs, and in the absence

of any actual warning from the person in charge of the cars that he was about to move them, it was plainly a fact for the jury to determine whether under all the circumstances the defendant was charged with a duty to the plaintiff which it had neglected to perform.

But was the fact that the crossing was blocked with cars a sufficient warning to all persons whether young or old that the crossing was not to be used? This might be so in some cases, but was it so in this case?

Lewis J. Moore, who was city marshal at the time of the accident, and at the time of the trial one of the justices of the peace of the town of Roslyn, testified as to the situation at the time of the accident. He said:

"I have occasionally seen the crossing blocked with a string of cars under the snowshed maybe for an hour at a time, and in crossing there would climb over between the cars, and if there was no danger, or they were not moving, they would probably crawl under it between the cars. A person in the west side of the tracks at Pennsylvania avenue would have to cross that way in order to go up to Brookside marked 'A' on the plat, or else go around and cross above at Idaho avenue. There is no other way unless they would go on the company's right of way, either up the track or down the track by the tipple. If a person was on the west side and wanted to get to the point marked 'A' (a point in Brookside addition), he would most likely walk through that crossing. They would have to cross the track even if they went back and up by the way of Idaho avenue."

This testimony tended to establish the fact that when this crossing was blocked by cars people would cross from one side of the track to the other, either over or under the couplings between the cars. If the jury believed this testimony, then a situation was presented requiring the defendant in moving its cars over this crossing to exercise reasonable care so as not to injure persons who might be passing from one side of the track to the other, and a reasonably prudent person charged with the duty of moving cars over the crossing as in the manner described in the evidence would have exercised this reasonable care by keeping a lookout for persons approaching or near the crossing and warning such persons of the movement of the cars.

The law applicable to the situation is well stated by the Court of Civil Appeals of Texas in *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 Tex. Civ. App. 87, 93, 118 S. W. 198, 201, as follows:

"We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be; and in our judgment it can make no difference, so far as the duty of the railroad company is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another when the presence of and danger to such other person is reasonably anticipated."

In *Philadelphia, B. & W. R. Co. v. Layer*, 112 Pa. 414, 3 Atl. 874, the plaintiff was a child six or seven years of age, walking on a street in a densely populated portion of the city of Philadelphia. He came to the railroad crossing, where he found a train of freight cars of the defendant on the crossing barring his progress. He entered an opening between a lumber car and a box car. These two cars were coupled

together by a pole, and as he got hold of the coupling pole, which was directly over the street crossing, the box car struck him and threw him upon the track, and as he attempted to escape the impending danger his left hand and three fingers of his right hand were caught and completely severed by the wheel. Upon the trial of the cause the defendant asked the court to instruct the jury:

"If it found that the child crossed between the cars taking hold of the coupling just as the train started, there was no duty of the defendant to it, and the verdict should be for the defendant."

This instruction was refused by the court.

The defendant also asked the court to instruct the jury that:

"When a train covers in part a crossing, while on a journey, no one has a right to pass under it at any point. It is the duty of all to stop or go around, and the defendant had a right to presume plaintiff's duty would be performed, and the verdict should be for the defendant."

This instruction was modified to read that:

"When a train covers a crossing and is actually in motion, it is illegal for any one to cross between the cars, and while it is not in motion it is illegal for any one capable of contributory negligence to cross, except in case of a child of tender years, who is not capable of contributory negligence."

The court then read what appears to be an additional part of the instruction requested by the defendant:

"And if you find the plaintiff crossed or attempted to cross while the cars were in motion, the verdict in such case should be for the defendant."

With respect to this clause of the instruction the court said:

"That would be a presumption and point of law certainly well taken with respect to an adult as one capable of contributory negligence. In this case it is qualified by a want of capability of contributory negligence if the cars were not in motion when the plaintiff attempted to cross."

The case was submitted to the jury, and there was a verdict and judgment for the plaintiff.

The case was taken to the Supreme Court of Pennsylvania, where the judgment was affirmed. In discussing the case the court said:

"Negligence has very often been defined to be the absence of care under the circumstances. There was evidence in the cause tending to show that the train was not only standing upon the street, but that it had been standing there as an obstruction to the crossing for ten minutes; that several adult persons in the meantime had crossed the avenue over or under this coupling; that a score or more of children were at the time playing in the street on the north side of the train; that one of these boys had actually ridden upon this pole across Second street; that this was a crossing of an important and much traveled street in a densely populated portion of a great city, and in the immediate vicinity of a number of primary and secondary schools. It also appears that there were no gates or guards erected across Second street; no flagman stationed there; no brakemen at the crossing; and there is evidence that no whistle or other warning was given when the train was about to start. We do not say that the defendant was required to erect gates, or that flagmen should have been stationed at this point; but we do say that, under the circumstances of this case, in the absence of these useful precautions, it was not unreasonable to expect that some proper warning would be given of the starting of the train. Certainly the defendant could not, in view of this evidence, call upon the court to instruct the jury as a matter of law that the company owed no duty to the public or to this child. It may

be that the warning, if given, would not have been heeded by the child; but this does not dispense with the duty. The defendant cannot be relieved from liability on mere conjecture. If, after the exercise of due care by the company, the child had been injured, no responsibility would result. * * * Whether or not, therefore, the defendant was guilty of negligence, in our opinion was a question of fact to be determined upon a consideration of all the evidence. There was evidence, we think, from which that fact might be fairly inferred, and the determination of that question was properly submitted to the jury."

[2] With respect to the question of contributory negligence on the part of the plaintiff in that case the court said:

"The plaintiff was at the time of the injury a child of tender years, without any experience and discretion which would enable him to understand the dangerous character of the act which resulted in his injury. A child's capacity is the measure of his responsibility. If he has not the ability to foresee and avoid danger, negligence will not be imputed to him. * * *"

With respect to this defense the defendant, in its answer in the present case, alleges, among other things:

"That said injury was caused by the carelessness and negligence of the said John Chervenak, and not by reason of any carelessness or negligence on the part of this defendant."

Defendant also cites as authority in support of this defense the case of *Studor v. Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, where a child between 12 and 13 years of age attempted to cross between two cars of a train standing on a street crossing, and while in the act of climbing over the coupling the train started backward, without giving any notice by bell or whistle, and he was injured by being crushed between the cars and subsequently died from the injuries received. The plaintiff was nonsuited upon the trial. The Supreme Court held that the evidence clearly showed that the proximate cause of the injury was due to the boy's negligence, and that a nonsuit was justified. But the court observed that:

"The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise."

With respect to the child injured in that case the court said:

"The capacity and intelligence of the child are not controverted, and he must be presumed to have had all the qualities ordinarily belonging to a person of his age."

It follows that, as the plaintiff in this case was but little more than five years of age at the time of the injury, contributory negligence was not an element in the case, and that the only question was whether, under all the circumstances, the defendant company was charged with the duty which it neglected to perform.

In *Northern Pac. Ry. Co. v. Curtz*, 196 Fed. 367, 116 C. C. A. 403, the action was brought by a guardian ad litem to recover damages for an injury to a minor. Upon the trial of the case there was evidence that children had for several years been in the habit of going into defendant's cars from which wheat had been unloaded, and while the cars were standing on a track of defendant's road in a public street; that this fact was known to defendant's employés, who made no objec-

tion; that while plaintiff, a boy of 11 years of age, was in such a car engaged in sweeping up loose wheat on the floor of the car, an engine to which was attached other cars was driven against this car and the plaintiff thrown from it and injured. Upon this state of facts the defendant asked the court to instruct the jury to find for the defendant. The motion was denied, and the case was brought to this court, and the action of the court in submitting the case to the jury was affirmed. The court in stating the law applicable to such a case said:

"The occupant or owner of premises who invites, either expressly or impliedly, others to come upon them, owes to them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; and an implied invitation to another to enter upon or occupy premises arises from the conduct of the parties, and from the owner's knowledge, actual or imputed, that the general use of his premises has given rise to the belief on the part of the users thereof that he consents thereto. This doctrine has often been applied to cases where a railroad company permits the public to cross its track between given points, and it is universally held that, where for a considerable period persons have been accustomed so to cross a railroad track, the employés of the company in charge of its trains are required to take notice of that fact, and to use reasonable precautions to prevent injury to persons whose presence there should be anticipated."

It was accordingly held that whether the employés of the railroad company have taken reasonable precaution to prevent injury in such a case was a question for the jury.

The same rule was applied to children at railroad crossings under substantially the same circumstances as in the present case in the following cases: *McMahon v. North Cent. Railway Co.*, 39 Md. 438; *Hofler's Adm'r v. Southern Railway Co.* (Ky.) 53 S. W. 665; *Carmar v. C., St. P., M. & O. Ry. Co.*, 95 Wis. 513, 70 N. W. 560; *Misouri, K. & T. Ry. Co. v. Kemendo* (Tex. Civ. App.) 124 S. W. 968; *Gesas v. Oregon S. L. Ry. Co.*, 33 Utah, 156, 93 Pac. 274, 13 L. R. A. (N. S.) 74.

In *Hall v. Cleveland, C., C. & St. L. Ry. Co.*, 15 Ind. App. 496, 44 N. E. 489, cited by the defendant, the complainant brought suit to recover damages for the death of his boy, who was between 13 and 14 years of age. The boy had attempted to cross a railroad track where a train of cars had been standing across a public street. He undertook to pass between two cars, and while he was so doing the cars were suddenly started without warning, and the boy caught and killed. A complaint alleging these facts, among others, was demurred to, and the demurrer sustained on the ground that the averments were insufficient because there was no allegation in the complaint that the deceased was upon the track by invitation of the defendant, nor were the facts set forth sufficient to show an implied invitation as a necessary conclusion of law or fact.

In the case before us it was alleged in the complaint:

"That said crossing at such point had been in common use as a crossing for a period of 20 years or more and was provided by defendants with facilities for a crossing for the public, and was so used by the permission and request of defendants."

There was evidence tending to support this allegation. The witness Moore testified that the crossing was in common use by the public in

general; that the crossing had been there 10 years before the accident. Other witnesses testified that the crossing was used by children. This was evidence from which a jury might infer an invitation, and in the absence of the instruction given by the court, it will be presumed that the question was submitted to the jury with proper instructions.

In *Wagner v. Chicago & N. W. Ry. Co.*, 122 Iowa, 360, 98 N. W. 141, also cited by the defendant, a child four years of age was run over and killed in defendant's switchyard in the city of Des Moines, Iowa. The child was struck by a car on a track described as the "scale track." There was no crossing over this track, at or near where the child was struck; but there were footpaths running parallel with it. The child was not using one of these paths at the time it was struck, but had wandered onto the "scale track," and the evidence tended to show that it was crawling along on its hands and knees under the cars when it was run over and killed by the movement of the cars. These cars had been struck by an engine attached to a work train which was being switched onto the "scale track" for the purpose of allowing a passenger train to pass on the main track. The conductor, superintendent, engineer, and fireman on the work train testified that they were on the lookout as the work train approached the cars on the "scale track," and saw no children there, and, as there was no crossing at this point, there was nothing in the situation as appears from the evidence that would have reasonably caused the defendant's employes to anticipate the presence of the child. But the case was not taken from the jury. The question whether the defendant owed any further duty to the child was submitted to the jury, and the Supreme Court held that, while the instructions given by the trial court to the jury were in the main correct, certain other instructions should have been given. Referring to one such instruction, the court said:

"The question is not one of contributory negligence, but rather of duty on the part of the defendant. The place where plaintiff's intestate was injured was private property of the defendant. The boy had no right to be there except upon invitation, and the defendant was not required to keep a lookout for persons at any other places than where they were invited to come. Having provided a place for people to walk, it had a right to assume that those who availed themselves of its invitation would confine themselves to the places set apart for their use."

The court said further:

"Railway tracks are known places of danger. They are not made for the use of foot passengers, and ordinarily a railway company has a right to assume that they will not be so used. It certainly may assume that no children are playing about or under its cars, and, unless it knows or has reasonable ground to anticipate their presence, it is not bound to look out for them."

Upon the facts of this case as they are stated in the opinion of the Supreme Court, it might well have been contended by the defendant that the case should have been taken from the jury and a verdict directed for the defendant. The submission of the case to the jury with instructions as to the duty of the defendant makes the case an authority for the plaintiff in the present case.

We are of opinion that the question of defendant's negligence was properly submitted to the jury.

[3] The testimony of the life insurance agent as to the life expectancy of a man of 19 and 20 years of age as stated in the American Expectancy Table was properly admitted. Plaintiff's disability is permanent and will continue during his life. The probable length of his life was a fact for the jury to consider in determining the damage he had sustained.

The objection is that the plaintiff at the time he was injured was only five years of age, and that therefore it was improper to prove his life expectancy at the age of 19 or 20. The objection is based upon what was said by the Supreme Court of Wisconsin in *Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554, that "the admission of a mortality table in evidence showing the expectancy of life of a child 10 years of age was error in an action for the death of a child 4½ years of age"; but this was upon the admission of the witness "that the expectancy of life of a child of 4 years was less than that of a child of 10 years, but could not state what it was nor did the table give it." There was no such admission in this case.

But a further objection to the table was that it did not tend to prove the real fact in issue. The action was to recover damages for the loss suffered by the plaintiff as the administrator of the estate of the deceased child arising from an injury causing the death of the child, and the question was as to the evidence that would justify the jury in finding the pecuniary benefit to the parents from the continuance of the life of the child during a term of expectancy divided into two periods, involving different elements: (1) During the period of the minority of the child; and (2) during the period of its majority. Referring to the evidence in the case, the court said:

"We cannot say that there was any evidence which would justify the jury in finding that there was any reasonable expectancy of pecuniary benefit to the parents from the continuance of the life of the child beyond its minority. * * * Nevertheless the court submitted to the jury the question as to the pecuniary loss suffered by the plaintiff, resulting from the loss of the boy's services and help after he attained his majority, and we are unable to say what part of the damages allowed by the jury was allowed for services after majority. Nor can we say with any certainty what should have been allowed by the jury for the boy's services while a minor."

This objection to the mortality table was not made, and could not have been made, in the present case.

In this case there is no admission, and nothing in the evidence from which we can infer, that the expectancy table did not tend to prove the precise fact in issue, namely, the plaintiff's life expectancy as one entire period of future disability, omitting all past disability for which he appears to have made no claim.

Finding no error in the record, the judgment of the District Court is affirmed.

CHRISTIANSON v. KING COUNTY.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1913.)

No. 2,163.

1. STATUTES (§ 54*)—TERRITORIES—PROBATE COURTS.

Under Act Cong. March 2, 1853, c. 90, 10 Stat. 172, establishing the territory of Washington, section 9 providing that the judicial power of the territory shall be vested in the Supreme Court, district courts, probate courts, and in justices of the peace, and that the jurisdiction of the probate courts and justices of the peace shall be established by law, it was competent for the legislative assembly to establish probate courts and confer on them full power and authority in all probate proceedings, which was done by Wash. Sess. Acts 1854-62, p. 315, and by Laws 1862-63, p. 198 et seq.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 52; Dec. Dig. § 54.*]

2. COURTS (§ 198*)—PROBATE COURTS—JURISDICTION—STATUTES.

Probate Act Wash. Jan. 16, 1863 (Laws 1862-63, p. 198, etc.) §§ 3, 4, 5, and 10, and sections 317, 318, conferring jurisdiction on probate courts and providing for the partition and distribution of estates in probate, gave to probate courts of that territory full power and authority within their respective counties of the subject-matter of probate proceedings in the administration of the estates of deceased persons, which jurisdiction carried with it the presumption of the integrity of the judgment, the same as a judgment of a court of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471-475, 478; Dec. Dig. § 198.*]

3. EXECUTORS AND ADMINISTRATORS (§ 315*)—ESTATES—PARTITION AND DISTRIBUTION—JURISDICTION OF PARTIES.

Probate Act Wash. (Laws 1862-63, p. 255, c. 16), relating to the partition and distribution of estates in probate, provides in section 319 that the decree of distribution may be made on application of the executor or administrator or of any person interested in the estate, and shall only be made after notice in the manner required with reference to the application for the sale of land by an executor or administrator in regard to which section 219 declares that notice shall be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or be published at least four successive weeks in such newspaper as the court shall order. *Held*, that where an intestate's estate in process of administration was held for distribution, and the record showed that a notice of hearing was published for four successive weeks in accordance with an order of the court, and that on the date specified in the notice a final decree of distribution was entered, the court had jurisdiction over all persons interested in the estate, whether they were present or represented or not, and the decree became conclusive on all persons so interested subject only to be reversed, set aside, or modified on appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

4. STATUTES (§ 56*)—TERRITORIES—ESCHEAT—PROPERTY OWNER DYING WITHOUT HEIRS—DISTRIBUTION TO COUNTY.

Congress never having passed an act providing for the escheat of estates and Wash. Territorial Probate Act Jan. 16, 1863 (Laws 1862-63, p. 261) § 340, providing that property of an intestate dying without kindred shall be escheated to the county in which the estate is situated, and shall be so distributed by the probate court, not having been disapproved by Congress on being submitted to it as required by Act Cong. March 2,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1853, c. 90, § 6, 10 Stat. 175, establishing a territorial government for Washington, such act was valid, and conferred authority on the probate court to distribute property of a citizen dying without heirs to the county in which it was located.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 18; Dec. Dig. § 56.*]

5. STATUTES (§ 55*)—TERRITORIES—ESCHEAT—STATUTORY PROVISIONS—VALIDITY.

Probate Act Wash. Jan. 16, 1863 (Laws 1862-63, p. 261) § 340, providing for the distribution of escheated land to the county in which it is located, was not in violation of Territorial Government Act March 2, 1853, c. 90, 10 Stat. 172, providing that no laws shall be passed interfering with the primary disposal of the soil, since such restriction was limited to the disposition of the public domain of the United States, and had no application to laws relating to the disposition of land which had been segregated and disposed of by patent by the United States.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 55.*]

6. ESCHATE (§ 2*)—STATUTES—REPEAL.

Sess. Laws Wash. 1854, p. 218, § 480, providing that whenever any property should be escheated to the territory for its use the legal title should be deemed to be in the territory from the time of escheat, and an information may be filed by the prosecuting attorney in the district court for the recovery of the property and like proceedings, and judgment should be had as in a civil action therefor, was repealed so far as the requirement of recovery by a civil action was concerned by its re-enactment as a part of Act Jan. 28, 1863 (Laws 1862-63, p. 192) § 519, after which escheated property of an intestate was subject to disposal by the probate court distributing the intestate's estate.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 2; Dec. Dig. § 2.*]

7. LIMITATION OF ACTIONS (§ 19*)—RECOVERY OF ESCHATEED PROPERTY.

Civil Practice Act Wash. 1863, § 17 (Laws 1862-63, p. 86), provided that actions for the recovery of real property should be barred unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within 20 years before the commencement of the action. By Code Wash. 1881, § 26, the limitation was reduced to ten years. *Held*, that where, in the administration of an intestate's estate, real estate belonging to him was escheated to the county in which it was located for want of heirs on May 26, 1869, the fact that the intestate had changed his name, and that his heirs had not learned of his death until within three years prior to suit brought to recover the land in April, 1911, did not relieve them from the bar of the statute so as to enable them to recover the land in ejectment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Frank H. Rudkin, Judge.

Ejectment by Thomas Christianson against the County of King to recover possession of certain real property, and to quiet title to the same. Judgment for defendant (196 Fed. 791), and plaintiff brings error. Affirmed.

The complainant is a subject of the kingdom of Norway. The defendant is a municipal corporation organized under the laws of the state of Washington. The action is in ejectment. The complainant claims to be one of the heirs, and the grantee of all the other heirs, of one Lars Torgerson Grotnes, who died in King county, in the then territory of Washington, in March, 1865.

*For other cases see same topic & § NUMBER in Dec. & AM. Digs. 1907 to date, & Rep'r Indexes

The decedent left an estate which included the land described in the complaint. The estate was administered in the probate court, and, no heirs appearing to claim the estate, it was, by a final decree of distribution, entered in the probate court, escheated to the county of King, in the then territory of Washington.

The land in controversy is within the limits of the city of Seattle, in the present state, and former territory, of Washington. The original tract contained 160 acres. The defendant obtained control of the land in 1869, under claim of title of an escheated estate. The defendant is using a portion of the tract in connection with its county hospital. Another portion is used as a poor farm. Another portion, described as the King county addition to Seattle, has been subdivided and a large part sold in lots. Another portion, described as the King county second addition to Seattle, has been subdivided, and a considerable part of that addition has been sold in lots. The original tract is traversed by many highways and railroad rights of way.

The plaintiff disclaims any purpose of disturbing the public, or the railroad, in the easements acquired in the property, or persons holding lands as innocent purchasers from the defendant. The purpose of the action, as declared by the plaintiff, is to recover the land occupied by the King County Hospital, the King County Farm, and such lands as remain unsold in the King county additions to Seattle. The plaintiff also concedes that the defendant may retain the buildings placed by it upon the hospital grounds.

It appears from the amended complaint that Lars Torgerson Grotnes was born in the city of Porsgrund, in the kingdom of Norway, on the 30th day of August, 1829; that at the age of about 21 years he shipped as a sailor from his native city, and went by way of England to Australia, and thence in the year 1856 to the city of San Francisco, in the state of California; that while in the harbor of San Francisco Grotnes deserted the ship on which he was employed, and changed his name from Lars Torgerson Grotnes to John Thompson, in order to conceal his identity and avoid apprehension. He then went to the neighborhood of Elliott Bay, in King county, in the then territory of Washington, and resided in King county and in Kitsap county in that territory until the time of his death in March, 1865; that he acquired title to the land described in the amended complaint under the name of John Thompson.

In the amended complaint the proceedings in the probate court of King county, territory of Washington, are set forth, from which it appears that on the 26th day of March, 1865, one Daniel Bagley was appointed administrator of the estate of John Thompson by the probate court of the county of King, in the territory of Washington, and on the 26th day of May, 1868, the county commissioners of King county presented to the probate court a petition averring that they were informed that Thompson's administrator had a large sum of money in his hands; that no heirs had appeared to claim the same; that they believed no heirs were known to exist; that King county was entitled to the balance in the administrator's hands, and praying for an order requiring the administrator to account and pay the balance in his hands to the treasurer of said King county. A citation was thereupon issued by said probate court, reciting the contents of said petition, and commanding the administrator to show cause why the order asked for should not be entered. This citation was served upon the administrator on May 27, 1868, and thereafter, on February 12, 1869, the administrator petitioned the court for a disposition of the estate. In pursuance of this petition the court directed the publication of a notice of a hearing upon such petition for four successive weeks in a newspaper published in King county. The notice was published as directed, and a hearing had upon the petition, and thereafter a final decree was entered distributing the residue of the "estate to the county of King, in Washington Territory."

The complaint avers that this decree was null and void; that the said probate court was wholly without jurisdiction to in any manner vest, transfer, convey, fix, or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated; that all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be ex-

exercised by the defendant over said land, had been made, done, performed, and exercised under and by virtue of said null and void decree; that the defendant had not, and never had had, any contract, deed, conveyance, decree, judgment, nor other writing, record, or document evidencing, or purporting to evidence, any title on its part in or to said land; that the defendant had never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer, or tribunal for the purpose of having an escheat of said land adjudicated, adjudged, or declared, nor had any other authority or officer ever begun or instituted any such suit or legal proceeding; that the defendant had never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer, or tribunal for the purpose of having any title, or claim of title, which it had or might have in said land, established, approved, confirmed, or quieted, nor had any other public authority or officer ever begun or instituted any such suit or legal proceeding.

The complaint further avers that, after the entry of said decree, the land described therein was marked upon the assessor's roll as county property, and as exempt from taxation, and had ever since been so treated, except certain portions thereof which the defendant had assumed to convey to private parties by deed; that about the year 1885 the county of King, in the then territory of Washington, occupied a certain portion of the tract of land described in said complaint, which said portion remained in its occupancy, and after the organization of the state of Washington had remained in the control of the defendant, and was generally known as the "King County Farm"; that this tract of land had never been used for any county purposes, but had been let out to tenants for the purpose of being farmed and producing a monetary income for the county; that about the year 1900 the defendant occupied a portion of the tract, which portion was known as the "King County Hospital Grounds"; that the defendant had placed upon the last-mentioned tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which was to the plaintiff unknown, and since thus occupying the same had been and was then using it for county hospital purposes; that in the year 1892 the defendant assumed to make a plat of a certain portion of the tract, called "King county addition to the city of Seattle," and caused the said plat to be recorded in the office of the auditor of King county; that the defendant had assumed to sell and convey to private parties all of the land composing said addition, except certain portions which were specially described in the complaint; that in the year 1903 the defendant had assumed to make a plat of a certain portion of the tract, called "King county second addition to the city of Seattle," and caused said plat to be recorded in the office of the auditor of said King county; that the defendant had assumed to sell and convey to private parties all of the land composing said last-named addition, except certain portions, which were particularly described in the complaint; that the tracts of land described as the "King County Farm," "King County Hospital Grounds," "King county addition to the city of Seattle," and "King county second addition to the city of Seattle," together comprise the whole of the tract described in said complaint as being the property belonging to Lars Torgerson Grotnes, except certain portions which had been appropriated for public or quasi public purposes, for railroad rights of way or highways.

The complaint further avers that the plaintiff is a son of the sister of Lars Torgerson Grotnes, and one of his heirs at law; that all of the other now living heirs at law of said Lars Torgerson Grotnes had by proper mesne conveyances conveyed their right, title, and interest in and to the land described in the complaint to the plaintiff, who was then the sole owner in fee thereof.

It is further averred that the heirs at law of Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last past; that since learning thereof such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

To the amended complaint the defendant interposed a demurrer, on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action, and that the action had not been commenced within the time limited by law.

The trial court sustained the demurrer, and thereupon dismissed the cause of action.

Edward Judd, S. S. Langland, and W. A. Keene, all of Seattle, Wash., for plaintiff in error.

John F. Murphy and Robert H. Evans, both of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The main question to be determined is the jurisdiction of the probate court of King county at the time it entered the decree escheating the estate of John Thompson in favor of the defendant. Had the court jurisdiction to enter that decree?

[1] The territory of Washington was established by the act of Congress approved March 2, 1853, c. 90 (10 Stat. 172). The act provided for the exercise of executive, legislative, and judicial power and authority in the territory.

By section 4 of the act it was provided:

"That the legislative power and authority of said territory shall be vested in a legislative assembly, which shall consist of a Council and House of Representatives."

By section 6 it was provided:

"That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil. * * * All the laws passed by the legislative assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

The act provides a number of restrictions upon the legislative authority of the assembly. But no restriction is placed upon the legislative authority in conferring jurisdiction upon the courts established by the act.

By section 9 it was provided:

"That the judicial power of said territory shall be vested in a Supreme Court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law."

Under this statute, it was perfectly competent for the legislative assembly to establish probate courts, and confer upon them full power and authority in all probate proceedings. And this appears to have been done originally by the act of April 14, 1854 (Laws of Washington, Session Acts 1854-1862, p. 315), and subsequently by the more elaborate statute entitled, "The Probate Act," passed January 16, 1863 (Laws of Washington 1862-63, p. 198, etc.). This last act was in force at the time of the death of Thompson (Grotnes), in March, 1865,

and during the probate proceedings relating to his estate, from March 26, 1865, to the final decree of distribution on May 26, 1869.

[2] Chapter 1 related to the probate court, its powers and jurisdiction. It was provided by section 3 of that chapter:

"That said probate courts shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same; * * * in the settlement and allowance of accounts of executors, administrators and guardians; * * * to allow or reject claims against estates of deceased persons as hereinafter provided; to award process and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be intrusted with or in any way be accountable for any lands, tenements, goods or chattels, belonging to any * * * estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction. * * *"

Section 4 provided:

"The said court shall provide and keep a suitable seal."

Section 5 provided:

"That the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction."

Section 10 provided:

"That all process issuing out of the probate court, shall be attested by the clerk, and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the district court."

Chapter 16 of the act related to partition and distribution of estates in probate. Section 317 of that chapter provided:

"Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled."

Section 318 provided:

"In the decree the court shall name the person and the portion, or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

These provisions of the statute gave the probate courts full power and authority within their respective counties of the subject-matter of probate proceedings in the administration of the estates of deceased persons; and this jurisdiction carried with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction. *Magee v. Big Bend Land Co.*, 51 Wash. 406, 410, 99 Pac. 16, 18. "In so far as probate courts have general jurisdiction, their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depends. And the rule applies even though the court is one of limited jurisdiction, where it is invested with full authority over probate and testamentary matters

and is a court of record." 11 Cyc. p. 697. In this case it appears affirmatively from the record that the proceedings were in substance in conformity with the statute, and in our opinion gave the court jurisdiction of the subject-matter.

[3] The next question is, Did the statute further provide a method of procedure whereby the court would obtain jurisdiction over all parties interested in such estates? Section 319 provides:

"The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to the application for the sale of land by an executor or administrator."

The notice required to be given upon an application by the executor or administrator for the sale of land was provided in section 219 of the act as follows: The order to show cause why an order should not be granted to the executor or administrator for the sale of real estate was required to be "personally served on all persons interested in the estate at least ten days before the time appointed for hearing the petition, or be published at least four successive weeks in such newspaper as the court should order."

It appears from the record that the notice was by order of the court published in a newspaper in King county for four successive weeks, and that the hearing upon said notice was fixed for the 26th day of April, 1869, and such proceedings were thereupon had that a final decree of distribution was entered in said estate on the 26th day of May, 1869. This decree recited, among other things, that the administrator had on the 12th day of February, 1869, petitioned for an order settling and allowing his final account, that a time had been fixed for hearing the application for a decree of distribution, and that due and legal notice of such hearing had been given.

It is averred that the decree of distribution recited:

"That said administrator has fully accounted for all the estate that has come to his hands, and that the whole estate, so far as it has been discovered, has been fully administered, and the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution. That all the debts of said decedent and of said estate, and all the expenses of the administration thereof thus far incurred, and all taxes that have attached to or accrued against the said estate, have been paid and discharged, and said estate is now in a condition to be closed; that said decedent died intestate in the county of King, Washington Territory, on the ——— day of March, A. D. 1865, leaving no heirs, surviving him: * * * there being no heirs of said decedent, that the entire estate escheat to the county of King, in Washington Territory. Now, on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise, it is hereby ordered, adjudged, and decreed that all the acts and proceedings of said administrator, as reported by this court and as appearing upon the records thereof, be and the same are hereby approved and confirmed, and that, after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to wit: The entire estate to the county of King, in Washington Territory."

Then follows a particular description of the residue of the estate referred to in the decree.

Proceedings in probate being essentially in rem, a statute providing for a constructive notice by publication gives notice to the whole world.

As said by the Supreme Court of California in *William Hill Co. v. Lawler*, 116 Cal. 359, 362, 48 Pac. 323:

"A proceeding for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and any person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim as if his claim after presentation had been disallowed by the court."

In the case of *Broderick's Will*, 88 U. S. (21 Wall.) 503, 22 L. Ed. 599, persons claiming to be the heirs of Senator Broderick sought by a suit in equity to avoid the sale of certain property of the estate in the probate proceedings upon substantially the same grounds as in the present case. The probate proceedings were upheld, and the court, referring to the probate proceedings, said:

"The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership, and consequently that there should be some convenient jurisdiction and mode of proceeding by which the devolution may be effected with least chance of injustice and fraud, and that the result obtained should be firm and perpetual."

In *Goodrich v. Ferris*, 214 U. S. 71, 80, 29 Sup. Ct. 580, 583 (53 L. Ed. 914), *Id.* (C. C.) 145 Fed. 844, the action was to set aside a final decree of distribution of an estate in probate in the state court on the ground that the notice of the hearing given under the statute did not as to the complainant amount to due process of law. The bill was dismissed in the lower court, and on appeal to the Supreme Court the judgment of dismissal was affirmed. The Supreme Court said:

"It is elementary that probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem, and is therefore one as to which all the world is charged with notice."

In our opinion the proceedings under the statute were sufficient to give the court jurisdiction over all parties claiming interest in the estate.

The next question is, Did the probate court have authority to distribute the residue of the estate to King county by a judgment of escheat?

[4] Section 340 provides:

"When any person shall die seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for

the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows: * * * If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

The plaintiff contends that the probate court had no power or authority to distribute the estate of the deceased to King county; that during the territorial period the United States was the sovereign, and to this sovereign alone could an estate be distributed by a judgment of escheat.

Admitting the sovereignty of the United States in the territory, and that the residue of an unclaimed estate in such territory is primarily vested in that sovereignty, it does not follow that the United States cannot divest itself of its right of escheat and place it elsewhere. Congress has never passed an act providing for escheating of estates, but has always left the matter with the territory during the territorial period, and with the states after the states have been formed. *Crane v. Reeder*, 21 Mich. 24, 75, 4 Am. Rep. 430. The validity of the Washington statute was recognized by the Supreme Court of the state in *Territory v. Klee*, 1 Wash. 183, 187, 23 Pac. 417, and by this court in *Pacific Bank v. Hannah*, 90 Fed. 72, 32 C. C. A. 522.

By section 6 of the act of March 2, 1853 (10 Stat. 172), establishing the territorial government of Washington, it was provided that the legislative power of the territory should extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States. Territorial legislation providing for escheating of unclaimed estates in the territory was not inconsistent with the Constitution and laws of the United States.

[5] The contention that it was inconsistent with the prohibition of the statute, "that no law shall be passed interfering with the primary disposal of the soil," is not applicable to this case, and cannot be sustained as an objection to the decree. That restriction was intended by Congress to prohibit the territorial legislation from passing a law interfering with the authority of Congress to direct the manner in which the public domain of the United States should be disposed of to those settling upon it, or claiming it under the public land laws of the United States. The land involved in this case was originally part of the public domain, but it had been segregated and disposed of by the United States and conveyed to a grantee by patent. The deceased held that title at the time of his death derived by mesne conveyance from the original grantee. The judgment of escheat had, therefore, nothing whatever to do with the primary disposal of this land. Furthermore, it was provided in the act of Congress that all laws passed by the legislative assembly should be submitted to the Congress of the United States, and, if disapproved, should be null and of no effect. It will be presumed, in the absence of evidence to the contrary, that the laws passed by the legislative assembly, including the probate act, were submitted to the Congress of the United States, and were not disapproved, and that the provision providing for the escheating of unclaimed estates to the counties in which such estates were situate was in effect approved as a rightful exercise of the legislative power of the territory.

[6] In the act of the territorial Legislature regulating the practice and proceedings in civil actions, approved April 28, 1854, it was provided in section 480 (Session Laws of Washington, p. 218) that:

"Whenever any property shall escheat or be forfeited to the territory for its use, the legal title shall be deemed to be in the territory from the time of escheat or forfeiture, and an information may be filed by the prosecuting attorney in the district court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

It is contended that an escheat could only be decreed under this statute by a common-law action in the district court for the recovery of property, but in the Civil Practice Act of January 28, 1863, § 519 (Laws 1862-63, page 192), section 480 of the act of 1854 was re-enacted with respect to the forfeiture of property, and the provision relating to civil actions for the recovery of escheated property was omitted. It was further provided in section 547 of the act of 1863 that:

"All acts or parts of acts heretofore enacted upon any subject-matter contained in this act be, and the same are hereby, repealed."

This action of the Legislature not only disposes of the contention that a civil action was required to secure a judgment of escheat in this case, but it confirms the jurisdiction of the probate court under the Probate Act of January 16, 1863, to enter such a judgment.

[7] We are of the opinion also that the statute of limitations is an effectual bar to this action. It was provided in section 17 of the Civil Practice Act of 1863 (Laws Wash. 1862-63, p. 86) that the period for the commencement of civil actions should be as follows: Within 20 years:

"First. Actions for the recovery of real property, or for the recovery of the possession thereof, and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action."

By section 26 of the act to regulate the practice and proceedings in civil actions, approved December 7, 1881 (Code of Washington 1881, p. 39), the period of limitation was reduced to 10 years. The judgment of escheat was entered in this case on May 26, 1869. This action was commenced by the plaintiff on April 24, 1911, or nearly 42 years after the entry of the judgment. The allegations of the complaint as to certain acts of the defendant with respect to occupancy of the premises in controversy are not sufficient to stay the running of the statute of limitations, nor was the statute stayed by the allegation that neither the heirs of the decedent, nor the plaintiff, learned of the death of Grotnes, the place of his death, and the fictitious name which he had assumed until within three years last past, and that since learning thereof the heirs, and particularly the plaintiff, had been diligently engaged in searching for and procuring the proper proof of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

In the case of Broderick's Will, *supra*, it was alleged in the complaint that complainants had no knowledge or information of Brod-

erick's death, nor of the forgery of the will, nor of its presentation for probate, nor of the probate or order of sale, nor of any of the proceedings, until the last day of December, 1866, within three years of filing the bill, and that since that time they had been diligently endeavoring to discover the facts and the evidence relating thereto. It was provided by the statute of limitations of the state of California that actions for relief on the ground of fraud could only be commenced within three years. The Supreme Court, commenting upon this statute, said:

"It is true that it is added that the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. But that is only the application to cases at law of a principle which has always been acted upon in courts of equity. If fraud is kept concealed so as not to come to the knowledge of the party injured, those courts will not charge him with laches or negligence in the vindication of his rights until after he has discovered the facts constituting the fraud. And this is most just. But that principle cannot avail the complainants in this case. By their own showing their delay was due, not to ignorance of the fraud, nor any attempt to conceal it, but to ignorance of Broderick's death, and all the open and public facts of the case. * * * They do not pretend that the facts of the case were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem."

If a court of equity could not afford relief against the running of the statute of limitations in the case of Broderick's heirs, it is plain that a court of law could not in a suit of ejectment afford relief against the running of a similar statute in the present case.

The judgment of the court below is affirmed.

NORTHERN PAC. RY. CO. v. GOSS et al.

GOSS & SLEEEGER v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 22, 1913.)

Nos. 3,790, 3,792.

1. INTEREST (§ 50*)—BUILDING CONTRACT—ACTION FOR CONTRACT PRICE—CONDITIONAL TENDER.

Plaintiffs contracted to build certain buildings for defendant railroad company, the contract providing that on final payment they should execute "a valid discharge from all claims and demands growing out of, or connected with this contract." On completion of the work, the amount due therefor was not in dispute, and defendant tendered payment, provided plaintiffs would sign a receipt releasing it from all claims "of every kind and description * * * arising out of, or connected with, said contract or its obligations." At that time certain damage claims

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

for injuries to employes and otherwise growing out of the collapse of one of the buildings while under construction were pending and unjustified. *Held*, that plaintiffs were justified under the circumstances in refusing to execute a receipt so sweeping in its terms, and on recovery under the contract were entitled to interest from the date when the payment was due under its terms.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.*]

2. CONTRACTS (§ 302*)—BUILDING CONTRACTS—RIGHTS AND LIABILITIES OF PARTIES—DEFECTIVE PLANS.

While an owner who, though his architect or engineer, makes plans and specifications for a building, to be followed by a contractor, is liable to the latter for damages resulting to him from serious defects in such plans, which are not patent to an ordinary mechanic, nor discoverable by ordinary diligence, it is also the duty of the contractor to examine the plans and judge of their efficiency, and he may be bound by his contract even if they are defective, especially if the defects are patent or reasonably discoverable, and he examines the plans before he enters into the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1401-1408; Dec. Dig. § 302.*]

3. CONTRACTS (§ 353*)—BUILDING CONTRACT—ACTION FOR BREACH—ISSUES AND PROOF.

Plaintiffs, who were experienced builders, contracted to build two ice-houses for defendant in accordance with plans and specifications made by defendant's engineer. The structures were very simple, consisting of four hollow sides which were to be held together, above the bottom, only by the roof trusses. In constructing the walls plaintiffs secured them in position by braces fastened to stakes on the inside. When the first building was inclosed, they made the roof trusses inside of it, raising them from there into position, commencing at one end of the building. As this work progressed the braces holding the walls, which were in the way, were removed, and not replaced. When about two-thirds of the trusses had been raised, the building collapsed in a moderate wind, and plaintiffs were put to expense in paying damages to injured workmen and for reconstruction, to recover which they brought an action against defendant, alleging that the collapse was due to the insufficiency of the plans and specifications. There was a conflict of testimony as to whether the building would have been sufficiently stable when completed, but the evidence showed that it would have been much more so than when it collapsed, and tended to show that it would not have collapsed if the braces had been kept in place. *Held*, that the question was not as to the stability of the building when completed, but whether it could have been safely completed in accordance with the contract by the use, by plaintiffs, of known and ordinary methods of construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.*]

4. JUDGMENT (§ 708*)—JUDICIAL RECORDS—COMPETENCY AND RELEVANCY.

In such action, neither the judgment recovered, nor the evidence introduced, in a prior action against the contractors for the death of an employe killed when the building collapsed, based on the alleged negligence of the contractors in removing the braces, was competent evidence against the owner.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 708.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action at law by M. N. Goss and A. K. Sleeper, copartners as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Goss & Sleeper, against the Northern Pacific Railway Company. From the judgment both parties bring error. Reversed in part.

Goss & Sleeper, plaintiffs below, were a firm of contractors and builders of St. Paul, Minn. Sleeper, the more practical member of the firm, had been engaged in this business for a period of 11 or 12 years as superintendent and inspector of construction for others, and as a builder and contractor both independently and as a member of the plaintiff firm. In 1908 defendant below, a railway corporation, through a subsidiary company, was constructing 35 houses at Laurel, Mont., the contract for which was let to the plaintiffs. While the latter were engaged upon this work they learned that the railway company was about to construct two icehouses and a yard office at the same place. At their desire, plans and specifications were submitted to them, and they were awarded the contract over other competitive bidders. The contract price for the buildings and their appurtenances was \$6,585. Each icehouse was to be 216 feet long, 36 feet wide, and 26 feet high to the top of the plate; trusses to support the boards of the roof were to be placed four feet apart for the entire length of the building, the bottom chord of the truss to be nailed securely to the top plate; the studding for the sides was to be 2 inches by 12 inches; the outside wall was to be covered with 1-inch by 6-inch drop siding, and the inside walls were to be sheathed with 1-inch by 10-inch boards. Thus, as will be seen, the building when completed was to be a box like structure of very simple character, consisting of four walls with a roof covering binding the whole together. In erecting the walls it was found necessary to use braces to hold them in position as the work progressed. These braces consisted of boards 2 inches by 8 inches in dimension, nailed to the studding of the wall on the inside about 3 feet from the top, and extending diagonally downward toward the center of the building, where they were nailed to stakes. As the sheathing was put on, by which the walls were made heavier, it was found necessary to strengthen each brace by the addition of a second plank or board nailed to the side wall near the ground, and extending diagonally toward the center of the building. Neither this nor any other system of bracing was prescribed by the plans and specifications. It was adopted as a usual and ordinary method of safeguarding work in progress of construction until such time as the permanent features of the structure should furnish the necessary or contemplated stability.

The contract was made September 23, 1908, and by the 28th of November following the four walls of the first icehouse had been completed with the exception of 10 feet square of drop siding on the north side and 33 of the 54 roof trusses had been placed. These trusses were connected and in some degree supported by temporary strips or boards nailed across them; but the roof boards, which would add homogeneity to the entire roof, had not been nailed on. The plans contemplated a plank walk 3 feet wide to be constructed directly under the ridge of the roof on the bottom chord; this walk had not yet been constructed. Also it was provided that rods of 1-inch wrought iron should bind the foundation sills together at the corners; these supporting rods had not yet been placed. The walls having been erected, and being supported in position by the braces heretofore described, plaintiffs began the work of putting on the trusses—starting at the west end of the building. The trusses were built on the ground inside of the building, and each truss, weighing 900 pounds, was hoisted to its position at the top of the building by means of a gin pole. While constructing these trusses, or at least before raising them to the top of the walls, plaintiffs removed the bracing heretofore described, and the braces thus removed were not replaced. If the trusses had been constructed and raised to position outside the building, the removal of these braces would have been unnecessary; but to construct and raise within the building was deemed more convenient and economical. The braces, crossing each other and anchored on the ground at a point midway between the walls, obstructed the building and raising of the trusses by the method adopted by the contractors. Consequently it was deemed necessary to remove such braces—from west to east—as the trusses were built and raised. It will thus be seen that when 33 trusses, counting from the west end, had been raised and set in place, all that portion of the walls immediately under

them, or approximately $\frac{3}{8}$ of the length of the building, was without bracing, except that afforded by the trusses themselves, and the temporary boards nailed upon them. It would have been both possible and practicable to have restored these braces after each truss had been raised to position, or other means of bracing could have been employed. Neither method was adopted by the contractors. On this 28th day of November, the wind was blowing at the rate of 12 to 15 miles an hour from the southwest. The building suddenly showed signs of collapsing, and before steps could be taken to prevent this the entire structure fell toward the north and east. One workman, named Johnson, was killed outright, several others were injured, and a large amount of material was wrecked and destroyed.

The plaintiffs then requested of the defendant that for the reconstruction of this icehouse, and the building of the second house, additional braces, known as knee-braces, and a bulkhead or cross-partition, should be added as parts of the permanent structure. To this the defendant acceded. Plaintiffs then completed their contract, and the buildings were turned over and accepted. At the completion of the contract there was due plaintiffs on the contract price and for extra work \$2,220.84. This claim accrued March 30, 1909, and defendant tendered payment, provided plaintiffs would sign a receipt declaring "every claim of every kind and description arising from said contract in our favor and against said Northern Pacific Railway Company, its successors and assigns, arising out of or connected with said contract, or its obligations, fully paid, satisfied and discharged." This plaintiffs refused to do.

On or about April 1, 1909, the administrator of the estate of Joseph E. Johnson, plaintiffs' employé who was killed by the collapse of the building, brought suit against Goss & Sleeper in the district court of Ramsey county, Minn., to recover damages for the death, alleging gross negligence and carelessness on the part of Goss & Sleeper in removing the braces hereinbefore referred to; that the removal of these braces rendered the building unsafe, and was the direct cause of the accident. This was denied by Goss & Sleeper, who charged in their answer that deceased came to his death by reason of his own carelessness and negligence. The jury returned a verdict for the plaintiff in the sum of \$4,000, and judgment for this, together with interest and costs, was entered in the sum of \$4,121.03. Goss & Sleeper paid this judgment, and incurred additional expenses, in the defense of said action, in the sum of \$1,194.20. Before trial they notified the Northern Pacific Railway Company to appear and defend the action; to which the Railway Company, disclaiming responsibility for the negligence charged, did not respond.

It is admitted that after the accident the plaintiffs below paid on account of injuries to the other workmen the sum of \$457 in full settlement thereof.

It further appears, practically without dispute, that plaintiffs' actual outlay for labor, services, and material necessary to the reconstruction of the collapsed building to the stage of completion at the time of collapse was \$967.81.

April 19, 1910, Goss & Sleeper brought suit against the railway company upon four causes of action: The first, to recover the sum of \$5,315.23, on account of the judgment and other expenses which they had been compelled to pay because of the death of the workman Johnson; the second, for the recovery of \$457, with interest, paid in settlement of claims of other injured workmen; the third, for the recovery (as finally asserted) of \$967.81, with interest, for their outlay in the reconstruction of the collapsed building; the fourth, for the recovery of the balance due on contract price and for extra work, with interest from the date it was due and payable. The first three causes of action are founded upon the contention that the damages laid therein were wholly due to the defects and insufficiency of the plans and specifications tendered by the railway company, and that the latter is liable upon the implied warranty that such plans and specifications were in all respects safe, adequate, and sufficient for the purposes designed.

In support of the first cause of action counsel for complainants offered the record of the evidence taken in the case of Johnson's administrator against Goss & Sleeper. This was excluded. Plaintiffs next sought to prove by two witnesses that Johnson left a family surviving him, and of what it consisted.

Neither witness proved competent to testify. The court directed the jury to find for the defendant upon this cause of action.

The second and third causes of action were submitted to the jury. As bearing upon the issues joined therein experts introduced by plaintiffs testified, in substance, that the plans used were inadequate for buildings of sufficient stability to withstand such strains from wind, or otherwise, as might reasonably be anticipated. Other experts, produced on behalf of the defendant, testified directly to the contrary. All were of opinion, however, that the contractors could have brought the building to completion by the use of such bracing, as they did in fact employ, before the trusses were raised, and that the building would have been stiffer when finished in all details, as specified, than it was when the collapse took place. Upon these points Mr. Sleeper, one of the plaintiffs, testified: "Q. Do you say that it would have been impossible to complete that structure in accordance with the plans and specifications, and to have turned it over to the railway company, regardless of how long it would stand? A. I don't say it was impossible. Q. Do you think it would have been possible? A. A man could have done that. Q. Don't you think that if the bracing which you had put in temporarily, the temporary bracing, had not been taken out, but had been left in place until you got the rafters on, that the wall would not have collapsed? A. It wouldn't at that time, as long as the braces were in there the building would have stood. Q. The building would have stood? A. Yes, sir. Q. That is, the walls would not have collapsed? A. No, sir. * * * Q. Would the presence of that three-foot walk have a stiffening effect upon the trusses, and have a tendency to stiffen the top of the building? A. It might tend to stiffen it a little. Everything would help some. * * * Q. Of course, with the four walls put in place there is no stiffening on the top, and there is a tendency to collapse. It would be like four cards set against each other with nothing on the top of them to form a square? A. Yes, sir. Q. It is the top that finally gives solidity to the whole thing? A. Yes, sir; the top which set on top of the plate, that is what holds your building in position."

Concerning the extent of supervision exercised by defendant he testified as follows: "Q. You don't mean to give the impression, Mr. Sleeper, that you were controlled as to how you did the work, in any sense, by Mr. Blum or by Mr. Rigney (defendant's employes)? A. No. Q. You were to construct and put up the building in any way that you saw fit, providing you followed these plans and specifications? A. Yes, sir; I was supposed to follow the plans and specifications, which I presume I did. Q. You were a perfectly free agent as to how you would go ahead and do the work, what you would do first and what you would do second? A. Yes, sir."

On the fourth cause of action a verdict was directed for plaintiffs in the sum of \$2,220.84, with interest from the same date. The jury returned a verdict for plaintiffs upon the second, third, and fourth causes of action in a sum aggregating \$4,233.81, and judgment was entered accordingly. Each party being dissatisfied with the judgment has sued out a writ of error; the defendant complaining of any recovery whatsoever under the second and third causes of action, and of the allowance of interest from March 30, 1909, on the fourth cause of action; the plaintiffs assigning as error the action of the court in directing a verdict for defendant upon the first cause of action.

Charles Donnelly, of St. Paul, Minn. (Charles W. Bunn, of St. Paul, Minn., on the brief), for Northern Pac. Ry. Co.

James D. Shearer, of Minneapolis, Minn. (L. B. Byard, of Minneapolis, Minn., and Arthur J. Stobbart, of St. Paul, Minn., on the brief), for Goss & Sleeper.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge (after stating the facts as above). For convenience the several causes of action will be taken up in their inverse order:

[1] 1. It is agreed that upon the completion of the work defendant owed the plaintiffs a balance of \$2,220.84 on contract price and for extra work. This was due and payable March 30, 1909; therefore, legal interest should run from that date, unless circumstances intervened which justified the railway company in withholding payment. The defendant coupled its tender with insistence upon a receipt releasing defendant from all claims of every kind and description arising out of or connected with the contract or its obligations. It based this demand upon the following provision of the contract:

"When in the opinion of the chief engineer this contract shall have been performed, he shall so certify in writing and give a final estimate and a statement of the balance unpaid; and the company will within thirty days thereafter pay the full amount so found unpaid. The contractor will at final payment execute, acknowledge and deliver to the company under his hand and seal a valid discharge from all claims and demands growing out of or connected with this contract."

The contract had been performed, and the engineer made the required certificate February 28th. While the language of the receipt conforms to the contract requirement, nevertheless the claims for damages, arising out of the collapse of the building, were then pending and unadjusted. In view of that situation, plaintiffs might well have declined to sign a receipt so sweeping in its terms. We agree with the court below that these claims, although in a sense arising out of the contract, were not connected with the performance of the work, and were not intended to be covered by the clause requiring a release as a condition to payment of the final estimate. For this reason interest from March 30, 1909, was properly allowed.

2. The second and third causes of action present the same questions, and will be considered together. The liability of an owner for damages incidental to the erection of buildings upon his property varies according to the circumstances of the case and the relationship of the parties. This has led to confusion and apparent conflict in the decided cases. The English rule, as stated by Mr. Hudson in his late work on Building Contracts, is that the contractor has no remedy against either architect or employer if the plans and specifications turn out to be unworkable, unless he has obtained some express warranty as to their nature and quality. Both parties must make their own calculations, and if one does not inquire into the matter, or runs the risks, he must take the consequences. While this statement is probably too broad to be accepted as the rule in the courts of this country, it must be said to embody the basic principle involved, and departures must be in the nature of exceptions arising under special circumstances; otherwise great instability and confusion would be introduced into all building transactions, great or small, public or private, and the doctrine thus announced would be constantly invoked to repair losses due to incompetency and improvidence. Certain it is that the contractor must be held to the exercise of reasonable care and the employment of reasonably essential and recognized methods of work. He must make such examination and assume such risks as the general nature of the work and the situation of the parties impose upon him. The law does not raise in his favor such

an implied warranty as will excuse the contractor from all practical responsibility.

[2] In this connection it will not be unprofitable to restate the general principles to be deduced from a careful examination of the American decisions. An owner through his architect or engineer cannot erect upon his own property a structure so frail as to be a menace to life and limb of the public, and hence a nuisance, and avoid responsibility upon the ground of having taken counsel of those supposed to be skilled in that field of knowledge. This rule, though harsh, is sustained by reasons of public policy. *Wilkinson v. Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490. So an owner who presents plans and specifications which contain serious defects not patent to an ordinary mechanic, and not discoverable by ordinary diligence upon inspection, is liable to the contractor for damages resulting from such latent defects, where the plans are complex and involved, where the contractor is held to strict performance of specifications, and where the owner through his architect or engineer retains a controlling direction and supervision exclusive of direction in the contractor. In such cases the guaranty raised by the law is that the architect or engineer has sufficient learning, experience, skill, and judgment properly to perform the work, and that such plans, drawings, and specifications are suitable and efficient for the purpose designed. If they fall short of this, the owner is liable, and cannot shield himself behind the presumed skill and the advice of his agent, but such agent may be liable to his employer for shortcomings in the nature of malpractice. *Bentley v. State*, 73 Wis. 416, 41 N. W. 338.

Where the contractors build according to the prescribed plan furnished by the employer, they are not responsible for consequences resulting from any defect in the plan in a suit against them by the owner, as for a cistern that is not water tight (*Porter v. Wilder & Son*, 62 Ga. 520); or for insufficient strength in steel designed and specified (*Murphy et al. v. Liberty Nat. Bank*, 184 Pa. 208, 39 Atl. 143), or for a leaky reservoir (*Filbert v. City of Philadelphia*, 181 Pa. 530, 37 Atl. 545); if the contractor follows the plans and uses good material (*MacKnight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 54 N. E. 661; *Bush v. Jones*, 75 C. C. A. 582, 144 Fed. 942, 6 L. R. A. [N. S.] 774). Nor are contractors responsible for what may happen afterwards to a building if they have followed the plans and used proper material and good workmanship. *Clark v. Pope et al.*, 70 Ill. 128. This would include the case of a building completed, but not formally turned over, if it collapsed from its own inherent weakness due to defective plans.

[3] A contractor, however, owes the duty to examine the plans and judge of their sufficiency, and may be bound by his contract even if parts specified be insufficient; especially is this true if he has made full examination and guarantees that the work can be done. *Giles et al. v. Foundry Co.* (Tex. Civ. App.) 24 S. W. 546. He is bound to discover defects that are reasonably discoverable or patent. *Siebert v. Leonard*, 17 Minn. 433 (Gil. 410). He is not excused by misunderstanding plans, as his entering into the contract implies that he understands. *Clark v. Pope et al.*, 70 Ill. 128. All this is true if he

has experts at his command by whom the plans could be inspected and passed on (*Thorn v. Mayor & Commonalty of London L. R.*, 1 Appeals Cases, 120); or has large experience and presumed competency, or holds himself out to have such, and the contrary is not known to the employer; or if the work is so simple that it cannot be presumed to have defects not readily discoverable to one who would undertake the work. Unforeseen difficulty, however great to the performance of a building contract, will not excuse a breach by the contractor. *Dermott v. Jones*, 2 Wall. 1, 7, 17, 17 L. Ed. 762; *Simpson v. U. S.*, 172 U. S. 372, 19 Sup. Ct. 212, 43 L. Ed. 482. Bearing in mind the general principles thus laid down, what situation do we find presented by the case at bar?

A contract with the usual powers of inspection and discretion in acceptance of work and material, but with neither implied nor assumed control of the construction by the railroad company.

Plans concerning the ultimate efficiency of which there is a conflict in the testimony, with an apparent preponderance in favor of the conclusion that they were not adapted to the erection of an exceedingly stable building of such dimensions.

Practically a consensus of opinion that the building could have been erected by the contractors in full satisfaction of the terms of the contract by the employment of such braces as were actually used in the earlier stages of construction.

Plaintiffs had had years of experience as building contractors. They employed no engineers, and relied on their own judgment and the reputation of the defendant's engineering department; but they undertook in competitive bidding to do this specific work, and held themselves out as understanding it and able to perform it. The structure was as simple in plan as can well be conceived, and required no more than ordinary carpenter's skill to understand it. No fraud appears on the part of the defendant. The building, like a shed, was not intended to withstand severe strains, and it is practically conceded that its condition at the stage of collapse could not determine and fix the measure of its stability at completion. We are not concerned with whether it might have stood for a longer or shorter period in actual use, whether it might then have collapsed and injured third parties, or whether if it had collapsed after completion defendant could have recovered damages from plaintiffs, or plaintiffs could have recovered under the contract from defendant. No such questions are in this case, and the rules applicable thereto are not controlling here. This is a case of a contractor who has undertaken to erect a structure of simple plan, which concededly could have been built in safety by the employment of no extraordinary methods of construction, upon whom was imposed the duty of using reasonable precaution, and of keeping safe during the progress of the work what must at that stage have been less stable than at the period of completion. It appears almost conclusively that the contractors did not themselves exercise due care; and there is presented in the record an adjudication to that effect. In a case like this the question of latent defect, and therefore implied guaranty, is not present. The plaintiffs when they contracted must be presumed to have known what methods of con-

struction essential to safety must be employed, and whether they could afford such for the price at which they announced themselves willing to undertake the work.

It remains to consider whether the court in its charge correctly submitted the issues. Respecting this phase of the controversy it instructed in substance as follows:

(1) That there was an understanding or guaranty on the part of the defendant that the plans and specifications were suitable and efficient for the purposes designed.

(2) If the jury should find that the plans and specifications were not suitable and efficient for the purposes designed, then the following questions must be answered:

(a) Did the plaintiffs know, or in the exercise of ordinary care should they have known, that the plans were not suitable or efficient?

(b) Was the work prosecuted by the contractors in the exercise of ordinary care?

(c) Was the collapse caused solely by defective plans and specifications?

(3) If all these propositions were resolved against the defendant, then the verdict must be for the plaintiffs upon the second and third causes of action for the amounts therein claimed, with interest.

From the viewpoint of the trial judge the charge was clear and unexceptionable, but we are of opinion that the conditions did not justify the application of the principle first stated in so broad and absolute a sense. Whether the plans were suitable and efficient for the purposes—that is, of course, the ultimate purposes—designed, is not the crux of this case. The question is, Could this building have been safely erected in accordance with contract by the use of known or ordinary methods of construction? If it could have been, and the testimony is unanimous to that effect, then we are not concerned with the extent to which experts may differ as to the ultimate virtues of the plan and efficiency of the structure. The original premise was wrong as applied to the facts in this case, and was distinctly prejudicial, because the jury may have been, and probably was, influenced by the fact which clearly appears that the building was not and was not intended to be one of stanchest resistance. This erroneous direction was several times repeated.

[4] The action of the court in directing a verdict on the first cause of action was correct. This claim was founded upon the same assumption as those embraced within the second and third counts, namely, that the defendant was responsible for all injuries resulting from the collapse of the building, because of alleged defects in plans and specifications. Apart from any consideration of the soundness of this proposition, no competent evidence was offered in support of the claim asserted in this first count. The judgment in the state court founded upon a petition charging negligence of the contractors, of a nature which was not and could not be negligence on the part of the railway company, was not binding upon the latter. Nor was the record evidence in that case admissible, either in form or substance, to sustain the issues in this case. The testimony of the other witnesses offered was clearly incompetent.

It follows from what has been said that the judgment of the trial court must be affirmed as to the first and fourth counts or causes of action; that as to the second and third causes of action the judgment must be reversed and the cause remanded for further proceedings in harmony with the views herein expressed. The costs in this court, in both cases, will be taxed equally against the parties.

It is so ordered.

CAMP et al. v. BONSAI et al.

(Circuit Court of Appeals, Fourth Circuit. March 7, 1913.)

No. 1,110.

1. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—DISTRICT OF SUIT.

The requirement that, where federal jurisdiction depends on diversity of citizenship, the suit shall be brought only in the district of the residence of either plaintiff or defendant, confers a privilege only on the defendant which he may waive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 269*)—FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES—LIEN OR CLOUD ON REAL PROPERTY.

The Judicial Code (Act March 3, 1911, c. 231, § 57, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 152]), provides that when in any suit commenced in any District Court of the United States to enforce any legal or equitable lien on or claim to, or to remove any incumbrance or lien or cloud on, the title to real or personal property within the district where such suit is brought one or more of the defendants therein shall not be an inhabitant or be found within the district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur, which may be served on him wherever found, or by publication, etc. *Held*, that where complainant, thinking he was acting with defendant B. in the purchase of certain timber land, was in fact fraudulently induced by B. to make the purchase on false representations as to the value of the property, and that B. would take a one-twentieth interest and later increase his interest to one-eighth, whereupon complainant sued to set aside the transaction, divest himself of the title, and recover the purchase money, B.'s equity to call for a conveyance of a one-twentieth interest was not a cloud, but a perfect equity, and complainant's suit was therefore not within such section; and hence could not be maintained in a federal court on the ground of diversity of citizenship as against B. in a district in which he did not reside, over his objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. § 269.*]

3. COURTS (§ 343*)—NECESSARY PARTIES—FEDERAL COURTS.

Rules applicable in state courts with reference to the joinder of necessary parties in equity are not binding on the federal courts, which courts, in the exercise of discretion, will require complainant to bring in every party in interest which he can, but, if the case can be completely decided as between the litigant parties, the circumstance that an interest ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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ists in some other person whom the process of the court cannot reach will not prevent a decree on the merits as to the parties before the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

4. COURTS (§ 343*)—FEDERAL COURTS—NECESSARY PARTIES—DISMISSAL FOR NONJOINDER.

A dismissal of a suit in equity in a federal court will not be granted for nonjoinder of a necessary party, unless no court could adjudicate directly on the rights in issue without the party's presence, the only indispensable party in the federal courts being the one having such an interest in the controversy or subject-matter that a final decree between the parties before the court cannot be made without affecting his interest or leaving the controversy in such a situation that its final determination might be inconsistent with equity and good conscience.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

5. COURTS (§ 343*)—FEDERAL COURTS—PARTIES.

Complainant, having confidence in B., who had previously acted as his agent, was fraudulently induced by him to purchase nineteen-twentieths of a tract of timber land which complainant had never seen, and which he purchased entirely on B.'s recommendation, paying \$38,000; B. agreeing to pay \$2,000 for the other one-twentieth, and to increase his interest thereafter to one-eighth. This he subsequently refused to do, complainant ascertaining that B.'s contribution had been settled by an allowance from the seller as a commission for making the sale. Complainant, on discovering that the timber on the land had been fraudulently overestimated, elected to rescind, and sued the seller and B. for rescission and to recover the consideration paid. *Held*, that B.'s interest in the land was not such as to make him a necessary party to the suit as between complainant and the seller; and hence complainant's inability to sue B. in a federal district in which suit was maintainable against the seller was not ground for dismissal of the suit as against the seller.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

Appeal from the District Court of the United States for the Eastern District of North Carolina; Henry G. Connor, Judge.

Suit by Clarence Camp and others, as executors of W. N. Camp, deceased, against W. R. Bonsal and another. From a decree dismissing the bill, complainants appeal. Affirmed as to defendant R. F. Brewer, and reversed as to defendant W. R. Bonsal.

T. D. Savage and W. L. Williams, both of Norfolk, Va. (Williams, Tunstall & Thom and Peatross & Savage, all of Norfolk, Va., on the brief), for appellants.

Thomas H. Willcox, of Norfolk, Va., and James H. Pou, of Raleigh, N. C., for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. W. N. Camp filed this bill. He was a citizen of Florida, and has since died. The appellants are his executors. It is admitted that, if he could maintain this suit, they can. He com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plained that he had been fraudulently induced to purchase timber lands and timber rights. He seeks to rescind the purchase and to recover \$38,000 he paid for them. It will tend to clearness if both he and his executors are referred to as the buyer. The bill named two respondents. One of them, W. R. Bonsai, is a citizen of North Carolina, and an inhabitant of the Eastern district of that state. He was the seller of the land and the rights of which the complainant was the buyer. He will be referred to as the seller. The other respondent was R. F. Brewer. He was a citizen of Tennessee. He negotiated the sale.

The bill says that prior to the purchase Brewer had been in the employ of the buyer. The latter had great confidence in his integrity and honesty. In 1905 he suggested to the buyer to buy a certain tract of land and standing timber in Robeson, Cumberland, and Scotland counties in North Carolina. These counties are all in the Eastern district of that state. The bill alleges that Brewer told the buyer that timber on the tract was large and fine; that there were some 50,000,000 or 60,000,000 of feet of it—certainly in no event less than 40,000,000. Brewer said that he greatly desired to buy the land and timber himself, but that at the time he could raise sufficient funds to pay for only a part of it. He urged the buyer to join him in the purchase, agreeing that he would take and pay for a one-twentieth, and would later increase his interest to one-eighth. The buyer authorized Brewer to negotiate for the property. Those negotiations resulted on November 16, 1906, in a purchase of the whole of such land and such timber rights for the sum of \$40,000, of which the buyer paid \$38,000. Brewer told the buyer that he had personally paid the remaining sum of \$2,000. The buyer, who lived in Florida, had not visited the land prior to the purchase. He relied implicitly upon Brewer's statements. After the purchase he attempted to resell the property. Possible purchasers made unfavorable reports of the land. Brewer absolutely refused to pay for the additional interest necessary to bring up his holding to the one-eighth which he had at first said he would take. The buyer's suspicions were then aroused. He caused an independent examination of the land to be made. He found out that there was less than 20,000,000 feet of timber on the property, and that the lands and rights were not worth one-half the price the buyer paid for them. He made further investigation, the result of which may be summarized in the following charges made by the bill: The seller, shortly before the buyer paid him \$38,000 for nineteen-twentieths of the land and rights, had himself bought all of them for less than \$5,000. The seller knew that the buyer had great confidence and trust in Brewer, and would rely upon the representations of the latter. For the deliberate purpose of defrauding the buyer by selling him the land at a great, excessive, and exorbitant price, the seller employed Brewer to sell the land and rights to the buyer. The seller paid Brewer not less than \$5,000 for making the sale. The seller knew that there was not 40,000,000 of feet of timber on the property. He also knew that Brewer told the buyer that there was. He also knew of the other representations made by Brewer and heretofore mentioned. The seller was aware that the buyer made the purchase solely because he

believed that what Brewer had told him was true, and would not have made it had he thought otherwise. The seller knew that the buyer thought Brewer was acting for him, and had no idea that he was in the employ of the seller. The bill charges that Brewer told the buyer that he was paying \$2,000 to the seller, making, with the \$38,000 paid by the buyer, the full purchase price of \$40,000, but in point of fact no such payment of \$2,000 was ever made otherwise than by the seller making a deduction from the commission which he would otherwise have paid Brewer.

When the buyer found out the facts above set forth, he offered to reconvey the property to the seller, and demanded the return of the purchase price paid by him. In the bill the buyer again tenders himself ready to reconvey all his interest in the land to the seller. The bill charges that the seller absolutely refused to return the purchase money or to enter into any negotiations upon the subject. It alleged that Brewer claimed to own a one-twentieth undivided interest in the lands and rights, and that said claim was a cloud upon the title to them.

The bill says that immediately after the buyer discovered the real state of facts he instituted suit in the circuit court of Norfolk City, Va., against the seller to recover from him the purchase money; that he obtained a decree for the full amount of such purchase money, with interest thereon; that the seller thereupon appealed to the Supreme Court of Errors and Appeals of Virginia, which reversed the decree of the lower court upon the sole ground that Brewer had not been made a party to the suit. He was not joined therein because during the pendency of the suit he was a resident of Tennessee, and was not and could not be served with process in Virginia. As a result in June, 1911, the Virginia suit was finally dismissed.

The present bill was filed on the 27th of the same month. On the 8th of August, 1911, James H. Pou, Esq., as attorney for Brewer, made application to be allowed to enter a special appearance for the sole purpose of disputing the jurisdiction of the court over the latter. Leave so to do was given him. He thereupon moved to dismiss the bill as to Brewer because it was instituted in a district other than that of which either the plaintiff or the defendant was an inhabitant, and he also set up such defense by special plea. The learned judge below at first overruled the plea as not sufficient in law. He required Brewer to answer or demur. Brewer, still protesting that the court was without jurisdiction over him, demurred. He assigned such lack of jurisdiction as one of the grounds for his demurrer. Upon further consideration the court below came to the conclusion that the objection was well taken. The bill as to Brewer was accordingly dismissed.

[1] This suit is a controversy between citizens of different states. It is therefore one to which the judicial power of the United States may extend. The particular court in which the case was brought was created by statute, and may not exercise any jurisdiction except that which the statute gives it. The act of Congress provides that when the jurisdiction is founded, as it is here, solely on the fact that the action is between citizens of different states, the suit shall be brought only in the district of the residence of either the plaintiff or the de-

fendant. Neither the buyer nor Brewer was a resident of the Eastern District of North Carolina. It is true that this provision confers a privilege upon the defendant. He may waive it if he chooses. If the controversy is one between citizens of different states, he may consent to be sued in any district. Brewer, however, has never waived his objection to being sued in the Eastern District of North Carolina.

[2] There are some exceptions to the statutory limitation of jurisdiction above cited. One of these is that created by section 8, Act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513) 4 Anno. Stat. 380, § 57; Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 152]).

Complainant contends that this suit is within the terms of that section. At first the learned judge below was of such opinion. Upon further reflection he came to the opposite conclusion. By its terms it is limited to suits to enforce any legal or equitable lien or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where the suit is brought. In the opinion below it is said:

"Assuming the allegations in the bill to be true, it is apparent that complainant is entitled to no such relief against Brewer. His purpose is to have a decree made rescinding the contract of purchase, divest himself of the legal title, and receive from Bonsal the purchase money. If he should succeed in his purpose, he would have no title to the land upon which Brewer's claim to a one-twentieth interest could be a cloud. The only decree which he could ask would be to revest Bonsal with the legal title. If this be done, and complainant recover the amount paid by him, nineteen-twentieths of the entire purchase money, the relation which Brewer would have to the title, revested in Bonsal, would in no manner concern complainant. If he should fail in his suit, he would hold the legal title in the same plight and estate as at present. Brewer's equity to call for a conveyance of one-twentieth interest would be, not a cloud, but a perfect equity, which in a proper proceeding a court of equity would enforce by an appropriate decree. It seems clear, therefore, that such relief as that suggested in any aspect of the case can be afforded against Brewer."

He refers to *Jones v. Gould* (C. C.) 141 Fed. 698, and to *Nelson v. Husted* (C. C.) 182 Fed. 921.

In the conclusion thus stated we concur. The bill as against Brewer was properly dismissed. If without his presence before the court the suit is still maintainable against the seller, the bill may be amended by striking out the allegations that his interest in the land and rights constitutes a cloud upon the title to them and by eliminating the prayer for relief as against him. The learned judge below was, however, of opinion that the Supreme Court of Errors and Appeals of Virginia was right in holding that Brewer was an indispensable party to the cause and that no decree could be made against the seller, unless Brewer was also before the court. The seller had on this ground demurred to the bill. His demurrer was sustained, and the bill finally dismissed. The buyer thereupon took his appeal.

[3] The discussion as to who are necessary and who are only proper parties to a suit in equity bulks large in chancery reports and text-books. Some of the distinctions made are both fine and technical. It may be that some of the rules laid down in such authorities are still

more or less binding force in the equity courts of some of the states. Nearly 90 years ago they were declared inapplicable to the courts of the United States. *Elmendorf v. Taylor*, 10 Wheat. 165, 6 L. Ed. 289. In that case it was contended that a tenant in common ought not to be permitted to sue in equity without making his cotenants parties to the suit. The court, speaking through the mouth of Chief Justice Marshall, said:

"This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all the parties concerned in interest shall be brought before them that the matter in controversy may be finally settled. This equitable rule, however, is framed by the court itself and is subject to its discretion. * * * Being introduced by the court itself for the purposes of justice, (it) is susceptible of modification for the promotion of those purposes. * * * The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such party be a resident of some other state, ought not prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

It does not follow that the objection that an indispensable party is absent can never be made in the United States courts in any case in which such party cannot be brought in without his consent which he will not give, or in any case in which the making him a party will oust the jurisdiction of the court. Such a defense can be successfully made and frequently is. *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *California v. Southern Pacific Co.*, 157 U. S. 239, 14 Sup. Ct. 1138, 38 L. Ed. 702.

[4] When it is sustained, however, it is not for any technical reason, but upon the much broader ground that no court can adjudicate directly upon a person's rights without the party being actually or constructively before the court. *Mallow v. Hinde*, *supra*. The only absolutely indispensable party in the federal courts is one who has such an interest in the controversy or subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 82 Fed. 124, 27 C. C. A. 73; *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30.

It may tend to clearness if this rule be read in terms of the concrete case before us. So read, the buyer has no right to a final decree against the seller which will in a legal sense affect the interests of Brewer, because such a decree would pass upon Brewer's rights without his being before the court to defend them. Nor can the buyer ask for any decree against the seller which, if it does not also adjudicate the rights of Brewer against the seller, will or may work injustice to the latter. In inquiring whether legal injury will result either to the seller or to Brewer from any final decree which may be passed upon the case as

it now stands, we must assume the truth of all the well-pleaded allegations of fact found in the bill. All that the buyer wants from the seller is \$38,000. He asks nothing from Brewer. Whether the seller is or is not required to pay such sum of money to the buyer is not in a legal sense any concern of Brewer. It is true that the bill says that Brewer, while in a relation of trust and confidence to the buyer, was an active party in a scheme by which the latter was defrauded. Before the buyer can obtain the relief he seeks he must prove his allegations. Such a decree as he asks will, if passed, necessarily imply that in the judgment of the court he has done so. In that sense Brewer will be affected by any such decree as that which the buyer demands. That is, however, not such an interest in the outcome of litigation as would make him an indispensable party to it. That alone might not even suffice to constitute him a proper party. Some men, when such charges are made against them, feel themselves so deeply concerned that they will seek the first possible opportunity to face their accuser. There are others who do not. The law does not compel any one so situated to do so, nor does it leave other men's rights dependent upon what course he sees fit to take in the matter. The interest which Brewer is supposed to have in the outcome of this litigation is of a more material sort. The buyer has no right to his \$38,000, unless the contract is rescinded. It is contended that such rescission would or might be unjust to Brewer. If the contract be rescinded, the buyer will give the seller what the seller gave him. Now, what did the seller give the buyer? The legal title to all the land and rights, and an equitable title to an undivided nineteen-twentieths of it. The buyer can certainly return both this legal and this equitable title to the seller without in anywise affecting the rights or interests of Brewer. It, of course, must be conceded that in a court of equity one who has an equitable interest is an indispensable party to the same extent as he would be if his interests were legal. *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429. But it is no less certain that a tenant in common of the legal title may sue in equity with relation to his undivided interest without necessarily joining his cotenants. *Elmendorf v. Taylor*, *supra*; *Cameron v. M'Roberts*, 3 Wheat. 591, 4 L. Ed. 467. If the contract be rescinded, Brewer will have retained his equitable one-twentieth precisely as he has it now.

[5] It is contended that Brewer's equitable interest in the land is not necessarily limited to one-twentieth, but that he may be entitled, upon paying an additional \$3,000, to increase his equitable holding to a one-eighth. This contention appeared to the Supreme Court of Errors and Appeals of Virginia to be sound. In spite of the sincere and unfeigned respect we have for that learned and able tribunal, we cannot concur in this view. Had the bill simply stated that Brewer had agreed to take and had taken an equitable one-twentieth, and had said nothing more, this particular objection could not have been made. Does it make any difference whether the bill was silent as to his contingent right to an eighth or said that he once had had such a right, but had renounced and extinguished it before suit brought? In either event, upon demurrer the allegations of the bill must be taken as true. If we are wrong, it would seem to follow that every one who had ever

had any interest in any property must be joined in every subsequent suit concerning it, for it would be as true in every such case as in this that the allegations of the plaintiff as to how that interest had been extinguished, or that it had been extinguished at all, might be false.

We are therefore of opinion that, if the buyer shall prove his charges, a final decree may be passed which will not affect any interests of Brewer. It remains to inquire whether such decree would leave the controversy in such a situation that its final determination might work injustice to the seller. It is urged that it will, or at least may, because such rescission as the buyer can now make will restore to the seller only nineteen-twentieths of the land and rights, and will therefore not be a complete rescission. Such contention assumes that the contract which is sought to be rescinded was a contract for the transfer of all the land and rights for \$40,000 to the buyer and Brewer in a common interest. The transaction took that form. That was what the buyer at the time thought it was; but, if the allegations of the bill are true, that was what it was not. Instead of the buyer and Brewer being parties on the same side dealing with the seller on the other, the actual facts were that the seller and Brewer were joint conspirators in inducing the buyer to pay the seller \$38,000 for nineteen-twentieths of the property.

A court of equity always tears the mask from fraud. It deals with controversies before it not in accordance with the form given to them by chicanery and deceit, but as they in fact were. It follows that the real contract, and all the contract that was actually made between the seller and the buyer, may be completely rescinded so that each of those parties will get back everything which passed from one to the other. With the rights, if any such there be, between the seller and Brewer, the buyer has no concern. He did not create such rights in any other sense than as an unconscious tool in the scheme which they had jointly devised for his undoing.

The objection to the jurisdiction of the court which we are now considering is that made by the seller. His complaint is that any decree which may be passed will work injustice to him, unless Brewer be before the court. It is the only objection to the jurisdiction which he is entitled to urge. He has no concern with any harm which may come to Brewer unless as a result he himself will or may be injured. It is for the court of its own motion to make sure that if it decrees it will not directly affect the interest of any one not before it.

If the allegations of the bill are true, we have already pointed out that there will be no difficulty in so framing the decree as to give complete relief to the buyer without affecting Brewer's rights. What we have said is sufficient to show that in our view the bill as to the seller should not have been dismissed. We may add that, if there were any difficulties in dealing separately with the interests of the seller and of Brewer, such a difficulty was not created by the buyer, but by the seller. One who wrongfully mixes his goods with those of another must stand the loss. Such case has some analogy to that at bar.

We have assumed that the seller really is, as he says, fearful that he will suffer injury if in the absence of Brewer the case be proceeded with as against him. If so, it must be because he feels that the interests of himself and of Brewer are or may become adverse. If his ap-

prehension is genuine, he would naturally be anxious to have Brewer before the court. He would avoid all entangling alliance with him. The record shows that he employed in the court below and at this bar the same counsel who had entered his special appearance for Brewer and had succeeded in securing the dismissal of the bill as against the latter. The exceptional ability, experience, and high standing of that counsel makes it certain that he would not appear in the same case for two parties whose interests were, or in his judgment might become, antagonistic. We have reached our conclusion independent of this circumstance and of anything which it may suggest.

Sound reasons of public policy sometimes require courts to think and decide in an artificial atmosphere. Judges may not always draw inferences which naturally suggest themselves to all other men. It may be that such reasons apply to this special phase of the case before us. We do not therefore base our conclusions in whole or in part upon it.

In all that we have said it must be remembered that we have assumed that what is charged in the bill is true merely because on demurrer we are bound to make such assumption. We know not what the facts may be shown to be when the case comes up for final hearing. The plaintiff may then fail to sustain every one of the serious charges of his bill. It is possible that all of them may be positively disproved. We have been dealing in this case not with the actual buyer or the actual Brewer, but with the buyer and the Brewer as the plaintiff has pictured them in his bill.

It follows from what has been said that the order of the court below sustaining the demurrer and dismissing the bill as to Bonsal must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MCCORMICK v. OKLAHOMA CITY et al.

(Circuit Court of Appeals, Eighth Circuit. February 22, 1913.)

No. 3,690.

1. SPECIFIC PERFORMANCE (§ 128*)—NATURE OF RELIEF—PERFORMANCE OF WORK—ALLOWANCE OF DAMAGES.

Where, after the filing of a bill by a municipal contractor against a city to compel specific performance of an alleged contract and for an injunction to restrain the performance of a contract made with a competitor, the work contracted for had been completed, so that no decree for specific performance or for an injunction could be granted, equity nevertheless had jurisdiction, if complainant was entitled to recover, to allow damages under the prayer for general equitable relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

2. MUNICIPAL CORPORATIONS (§ 335*)—PUBLIC IMPROVEMENTS—BIDS—WRITTEN CONTRACT—NECESSITY.

Where a city, on advertising for bids for a municipal improvement, both in the specifications and in the advertisement stated that the successful bidder must enter into a written contract to perform the work, and complainant knew from past experience that he would be required

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to enter into a written contract according to an adopted form in case his bid was accepted, a mere vote of the city council to accept one of complainant's bids and award a contract to him, which was thereafter reconsidered, no written contract ever having been executed, was insufficient to show the execution of a contract for the work between the city and complainant pursuant to his bid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 860, 861, 863; Dec. Dig. § 335.*]

Appeal from the Circuit Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by David McCormick against the City of Oklahoma City and others. Decree for defendants, and complainant appeals. Affirmed.

B. F. Burwell, of Oklahoma City, Okl. (John Devereux, of Guthrie, Okl., and Burwell, Crockett & Johnson, of Oklahoma City, Okl., on the brief), for appellant.

J. W. Johnson, of Oklahoma City, Okl. (George A. Matlack and G. A. Paul, both of Oklahoma City, Okl., on the brief), for appellees.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

SMITH, Circuit Judge. The city of Oklahoma City is, and has been since a time prior to the happening of the matters complained of, a municipal corporation in the state of Oklahoma, and as such has had under certain conditions authority to pave and improve its streets and alleys, including intersections, at the cost of the adjacent property owners. The law provided for a resolution in such cases by the city council to proceed with the improvements, containing such matter as would enable the engineer to prepare the necessary plans and specifications, and continued:

"Said resolution shall set forth any such reasonable terms and conditions as the mayor and council shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and the mayor and council shall, by said resolution, provide that the contractor shall execute to the city a good and sufficient bond, in an amount to be stated in such resolution, conditioned for the full and faithful execution of the work and performance of the contract and for the protection of the city and all property owners interested against any loss or damage by reason of the negligence or improper execution of the work, and may require a bond in an amount to be stated in such resolution for the maintenance in good condition of such improvement for a period of not less than five years from the time of its completion, or both, in the discretion of the mayor and council.

"Said resolution shall also direct the city clerk to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvement. * * * At the time and place specified in such notice, the mayor and council shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder."

Section 725, Snyder's Compiled Laws of Oklahoma.

The law also provided for an appraisalment and apportionment of the benefits and the assessment of the adjacent property therewith, payable in ten annual installments, and for the issuance of improvement bonds to be paid from such assessments; that they should be sold at not less than par, and "which bond or bonds shall in no event

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

become a liability of the city issuing the same." Section 726, Snyder's Compiled Laws of Oklahoma.

October 19, 1908, the mayor and city council adopted a resolution, substantially as provided by law, providing for the improvement of 18 of its streets, and in said resolution was the following:

"It is further resolved, that all the work done and material furnished shall be in strict conformity to the plans and specifications of the city engineer therefor and of the proper quality and tests; that the contractor to whom a contract shall be awarded for the construction of such improvements shall execute to the city a good and sufficient bond in a sum equal to 20 per cent. of the contract price, conditioned for the faithful performance of the work and the execution of the contract and for the protection of the said city and all property owners against any and all loss or damage by reason of neglect or improper execution of the work; and the said contractor shall also execute good and sufficient bond in a sum of 10 per cent. of the contract price, conditioned for the maintenance of such work in a street of good repair for a period of not less than five years from the date of the completion and acceptance of such work.

"Be it further resolved, that the city clerk of said city be and he is hereby authorized and directed to advertise for sealed bids for furnishing the materials and performing the work necessary to and for the improvement of such streets in the manner required by law, each bid to be accompanied by certified check in the sum of 3 per cent. of the amount of the bid, to be forfeited to the city in case the successful bidder fails to enter into the contract and give the required bond within the required time."

The specifications thus referred to contained the following:

"All bids for work to be performed under this contract shall be accompanied by a certified check for 3 per cent. of bid dollars (\$.....), and in case of failure on the part of the successful bidder to enter into contract within twenty (20) days after notice of acceptance of such bid, said check to become the property of the city of Oklahoma City, as liquidated damages for failure to enter into such contract. Upon execution of said contract within said twenty (20) days, said check to be returned to the bidder furnishing it."

October 21 to 31, 1908, the city clerk advertised for bids on this work. In his advertisement was the following:

"Each bid must be accompanied by certified check in the sum of three per cent. (3 per cent.) of the amount bid, to be forfeited to the city in case the successful bidder fails to enter into a contract and give the required bond within the required time. Contractor will be required to give bond in the sum of twenty per cent. (20 per cent.) of the contract price, for the faithful performance of said work and the holding of the city harmless from any and all damages which might occur. Bids will be received from both a five (5) year and ten (10) year guaranty. Also the contractor will be required to give a bond in the sum of ten per cent. (10 per cent.) of the contract price as a guaranty of keeping the pavement in a state of good repair for a period of five (5) years if bids are accepted on a five (5) year guaranty, and in a state of good repair for a period of ten (10) years if bids are accepted on a ten (10) year guaranty. The contractor shall receive for the above work street improvement bonds at par value against the abutting property according to House Bill No. 231, approved April 17, 1908.

"No proposition will be considered on any street which does not contain a bid upon every item included in the estimate of the city engineer for such street.

"Council reserves the right to reject any or all bids."

In response to these advertisements Mr. David McCormick, the R. F. Conway Company, and others made bids. Both McCormick

and the Conway Company bid on a five and ten year guaranty. On November 2, 1908, the bids were opened by the city council. McCormick was the lowest bidder on a ten-year guaranty and the R. F. Conway Company was the lowest bidder on a five-year guaranty. At a meeting on November 4th the council by a unanimous vote rejected all bids on a five-year guaranty. The council then decided to take up the bids street by street, and that contracts be awarded the lowest and best bidder, and adjourned to 2:30 p. m. A motion was then made to reconsider the action in the forenoon to take up the bids street by street, and that contract be awarded to the lowest and best bidder, and this motion was lost. Thereupon the bids were taken up street by street, and as to each substantially the following appears:

"Moved by Mr. McWilliams, seconded by Mr. McDavie, that the bid of David McCormick, being the lowest and best bid, be accepted, and he be awarded the contract for the paving of the above-described street. Motion carried."

Thereupon:

"Moved by Mr. Helm, seconded by Mr. Workman, that the action of the council in awarding contracts for asphalt paving at this meeting be rescinded. Motion lost."

On November 9, 1908, the following proceedings are recorded:

"Moved by Mr. Highley, seconded by Mr. Helm, that the council reconsider the action taken at meeting held November 4, 1908, 'in rejecting all bids for asphalt pavement based on five year guaranty.' Motion carried."

"Moved by Mr. Highley, seconded by Mr. Corder, that the council reconsider the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving."

The council adjourned to November 10th, and then to the 11th, when the city attorney reported that in his opinion:

"Any time before the contracts are signed up by the city and the contractor, that the council had the right to rescind its action in awarding said contracts."

Judge Burwell appeared before the council and spoke against the motion, and Judge Harris spoke in favor of the same. Thereupon the motion to rescind the action taken at the meeting held November 4, 1908, in awarding contracts for all asphalt paving carried by a vote of six to four. Later Judge Burwell presented 18 contracts of David McCormick for paving the streets formerly awarded him and demanded that they be accepted by the council. Thereupon the council took up the bids under the five-year guaranty, and, finding that in the aggregate the bids of the R. F. Conway Company were some \$11,000 below those of David McCormick, awarded contracts to it. The R. F. Conway Company presented its bonds and contracts, and the council ordered they be approved and accepted.

The city had a form of printed and written contract which was used both by the plaintiff and the R. F. Conway Company in the preparation of their 36 contracts. These contracts contained numerous provisions not in the advertisements, plans, and specifica-

tions, the bids, and their acceptance. These contracts all contained the following provision:

"This contract is entered into subject to the approval or rejection of the council of the City of Oklahoma City, and it shall not bind either party until so approved and confirmed, and is subject to all city ordinances now in force relating to such matters."

The plaintiff is president of the Parker-Washington Company and as such had made similar contracts with the same city to an amount exceeding \$250,000. If he knew that such contracts would be expected, he agreed thereto prior to tendering the 18 contracts in question. If he did not understand that by his bid he was agreeing to such contracts as he knew from past experience the city would demand, then there was no meeting of the minds of the parties. If he did so understand, he knew that the contract contained the provision that:

"It shall not bind either party until so approved and confirmed."

On November 16th Mr. McCormick brought suit in the state district court for Oklahoma county against the mayor of Oklahoma City and others, and obtained a temporary restraining order. The R. F. Conway Company were upon leave of court made defendants. December 4th a demurrer was sustained to the petition, and on December 5th plaintiff was granted 20 days to file amended petition, and on December 23d 15 days additional were granted him, and on January 25, 1909, 10 days additional were granted to file an amended petition. On the same day the action was dismissed, but on January 27th it was reinstated, and the suit was still pending after this suit was brought.

The bill sets up the facts, alleges the contract was completed between the plaintiff and the city, and prays a decree of specific performance of its alleged contract, a temporary and possibly a permanent injunction, and for general equitable relief. The defendants in answer allege that all that took place between the plaintiff and parties defendant constituted only preliminary negotiations, and deny there was ever any completed contract. Upon full hearing the court dismissed the proceedings, and David McCormick appeals.

[1] Since the filing of the bill the contracts have all been completely performed by the R. F. Conway Company, and of course a decree for specific performance is now out of the question, and an injunction is likewise impossible. Mr. McCormick insists that, notwithstanding this fact, if the court should now find in his favor, it could assess his damages under the prayer for general equitable relief. *Omaha Horse Railroad Co. v. Cable Tramway Co.* (C. C.) 32 Fed. 727; *Milkman v. Ordway*, 106 Mass. 232; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509, 15 N. E. 282; *Van Allen v. N. Y. Elevated Railroad Co.*, 144 N. Y. 174, 38 N. E. 997; *Holland v. Anderson*, 38 Mo. 55, 58; *Lewis et al. v. Town of North Kingstown*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724.

It thus becomes important to determine whether the plaintiff had a valid and completed contract or not. It appears that the city had,

by its specifications, advertisement for bids, and contracts prepared for such cases, provided expressly for a written contract. The question here is not, therefore, whether in the absence of these requirements there would have been a contract, or the right to maintain an action of mandamus, but was the city bound the moment it voted to award the contract to McCormick, or was it necessary, in the absence of a waiver, to give him notice of the award and to prepare and sign a written contract?

Appellant has argued at length upon the distinction between the governmental or public functions of a city and its property and business powers. This distinction was pointed out with care by this court in *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, and it will be conceded for the purposes of this case that in awarding these contracts the city of Oklahoma City was acting in the exercise of its business powers.

It is not important to consider the numerous authorities cited that ordinarily the award, at least with notice, would have concluded a contract with Mr. McCormick. Neither is it important to determine whether he had the right to a writ of mandamus or other writ to compel execution of a contract if suit were promptly brought.

[2] The question is whether the plaintiff had such a contract as that an action for specific performance or an injunction would lie, in view of the fact that the specifications, advertisement for bids, and contract prepared and regularly used by the city expressly contemplated a formal written contract. Judge Dillon says:

"After the opening of the bids, the ascertainment of the lowest or most favorable bidder and the adoption of a resolution that the contract be awarded to him does not make a completed contract between the municipality and the bidder, when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies." *Dillon on Municipal Corporations* (5th Ed.) 810.

And it is stated in the *American and English Encyclopedia of Law*:

"Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done; and this is true, although all the terms of the contract have been agreed upon." 7 *Am. & Eng. Enc. of Law* (2d Ed.) 140.

"A vote accepting a bid is not a contract, where a provision is distinctly made for the future execution of a formal contract." 20 *Am. & Eng. Enc. of Law* (2d Ed.) 1170.

And in *Cyc.* it is said:

"Where parties are merely negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Thus, where they intend that their verbal negotiations shall be reduced to writing as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed." 9 *Cyc.* 280.

These authorities are sustained by *Jersey City Water Commissioners v. Brown*, 32 N. J. Law, 504; *State v. Noyes*, 25 Nev. 31, 56 Pac. 946; *Eads v. Carondelet*, 42 Mo. 113; *Starkey v. Minneapolis*, 19 Minn. 203 (Gil. 166); *Mississippi & Dominion Steamship Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Congdon v. Darcy*, 46 Vt. 478;

Mann v. Rochester, 29 Ind. App. 12, 63 N. E. 874; Edge Moor Bridge Works v. Bristol County, 170 Mass. 528, 49 N. E. 918; Dunham v. Boston, 12 Allen (Mass.) 375; Hamilton v. Chopard, 9 Wash. 352, 37 Pac. 472; State ex rel. Cleveland Trinidad Paving Co. v. Board of Public Service of Columbus, 81 Ohio St. 218, 90 N. E. 389. In the last case, where there was no notification by the council to the bidder, it was held that it did not constitute an agreement.

Of course, the distinction must be borne in mind between the enforcement of an executory and an executed contract. If, with the acquiescence of the defendant, the plaintiff had gone on without a written contract, and executed the contract they were negotiating upon, and the city had received the benefits, it is probable it could not have defeated him in an action to recover the bonds.

The rule undoubtedly is that if the parties have completed their negotiations, and reached an entire basis of agreement, and one party, with the knowledge and acquiescence of the other, has gone on and performed the contract in whole or in part, without the formal reduction of the contract to writing, the other party will be held to have waived the execution of the written contract. Argenti v. San Francisco, 16 Cal. 256; Ft. Madison v. Moore, 109 Iowa, 476, 80 N. W. 527; Beckwith v. City of New York, 121 App. Div. 462, 106 N. Y. Supp. 175. And especially is this true where a property owner is resisting an assessment under such proceedings. Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501. We shall therefore assume that where parties have fully agreed upon a contract, but have simply decided to reduce it to writing as evidence, the contract may be enforced, especially where it has been executed in whole or in part by the party seeking its enforcement, with the knowledge and acquiescence of the other party, notwithstanding the failure to reduce it to writing. But if the parties have stipulated in effect that the contract shall only be in force from the time it is reduced to writing and executed, there is no completed contract until it is put in writing as agreed.

It is claimed that Mr. McCormick was present at the meeting of November 4, 1908, and knew of the action of the council in awarding him the contracts. This court is in grave doubt whether the mere presence of an interested party during the public deliberations of such a legislative body as the city council would serve to make an award binding upon the city until it saw fit to notify him that it had accepted the proposition; but it is not necessary to pass upon this question, as the court is of the opinion that, the city of Oklahoma City having expressly provided by its specifications and advertisement that the contract must be reduced to writing, and Mr. McCormick having known from past experience what would be expected in the way of a written contract, the city was not bound, in the absence of the execution of such a contract, to proceed further with the plaintiff, and the decree of the Circuit Court in dismissing his bill was correct.

It is therefore ordered and adjudged that it be affirmed.

ROONEY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1913.)

No. 2,107.

1. INDICTMENT AND INFORMATION (§ 129*)—OFFENSES—JOINDER—ELECTION.

Rev. St. § 1024 (Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 161 [U. S. Comp. St. 1901, p. 720]), provides that when there are several charges against any person for the same act or transaction, or for two or more connected acts or transactions or two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, the whole may be joined in one indictment in separate counts. *Held*, that where counts of an indictment for feloniously introducing intoxicating liquors into the Indian country charged accused, in one count, with aiding, inciting, and abetting another to commit the crime, and in another count with being a principal in the commission of the same crime, they were properly joined and the court properly declined to compel the government to elect on which it would rely for a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414-418; Dec. Dig. § 129.*]

2. CRIMINAL LAW (§ 1149*)—INDICTMENT AND INFORMATION (§ 132*)—WRIT OF ERROR—MOTION TO COMPEL ELECTION—DISCRETION—REVIEW.

A motion to compel the government to elect between counts of an indictment is addressed to the discretion of the trial court, and the denial thereof is not reviewable on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. § 1149;* Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132;* Assault and Battery, Cent. Dig. § 114.]

3. CRIMINAL LAW (§ 80*)—PRINCIPALS AND ACCESSORIES—AIDING AND ABETTING.

Under Penal Code, § 332 (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1686]), providing that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal, where accused was charged in different counts of an indictment, first, with aiding, inciting, and abetting another to feloniously introduce intoxicating liquors into the Indian country, and in another count with being a principal in the commission of the same crime, and it appeared that accused ordered and directed his codefendant to procure and bring in the liquor, acquittal of the latter was no objection to a conviction of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384; Dec. Dig. § 80.*]

4. CRIMINAL LAW (§ 80*)—FELONIES—PRINCIPAL AND ACCESSORY.

In the absence of statute abolishing the distinction between principal and accessory in felonies, all who are present, aiding and abetting when a felony is committed, are principals either in the first or second degree, and, if in the second degree, may be arraigned and tried before the principal in the first degree, and may be convicted, though the party charged as the principal in the first degree is acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384; Dec. Dig. § 80.*]

In Error to the Circuit Court of the United States for the District of Oregon; Robert S. Bean, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stewart Rooney was convicted of feloniously introducing liquor into the Indian country, and he brings error. Affirmed.

Indictment for violation of provisions of Act Jan. 30, 1897, c. 109, 29 Stat. 506, entitled: "An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes."

The plaintiff in error was jointly indicted with one Vincent Wontock for unlawfully and feloniously introducing intoxicating liquor into the Indian country in violation of the provisions of Act Jan. 30, 1897, c. 109, 29 Stat. 506, prohibiting the sale of intoxicating drinks to Indians. The facts upon which the indictment was founded were as follows: On the evening of the 14th of April, 1911, the plaintiff in error, Stewart Rooney, an Indian, together with other Indians, was engaged in a gambling game at the home of William Metcalf, situated on the Siletz Indian reservation, in Lincoln county, Or. There was also present one Vincent Wontock, a white boy who was in the employ of Rooney as a laborer. At said time and place Rooney, the plaintiff in error, solicited Noble Felix, one of the other Indians who was there present, to contribute to a fund for the purchase of whisky. Another Indian, Clayborn Arden, and Rooney, also contributed to the fund. The money thus collected was turned over to Wontock by Rooney, with instructions or directions to go to Toledo (situated outside of the reservation and about nine miles distant), and buy some whisky for him, Rooney, and also for the Indians Noble Felix and Clayborn Arden. Wontock then borrowed a horse from Noble Felix, rode to Toledo, and returned to the reservation about 4 o'clock on the following morning, bringing with him three bottles of whisky. The whisky was distributed in Metcalf's barn, Rooney himself taking one, Noble Felix another, and Clayborn Arden the third. At the trial of the case there was introduced in evidence a bottle containing whisky which had been taken from Clayborn Arden by William Metcalf while he was asleep at the Metcalf residence.

The indictment, as originally filed, contained three counts. At the close of its case, the government, by its attorney, moved the court to nolle prosequi the second count of the indictment; whereupon the court made the order requested and withdrew the second count from the consideration of the jury.

The first count of the indictment charged: "That Vincent Wontock on or about the 15th day of April, 1911, at Siletz, in the state and district of Oregon, and within the jurisdiction of this court, did unlawfully and feloniously introduce into the Indian country, to wit, in and onto the Siletz Indian reservation, intoxicating liquor, to wit, two bottles of whisky, without having theretofore obtained authority in writing from the War Department, and that Stewart Rooney on or about the 15th day of April, 1911, at Siletz, in the state and district of Oregon, and within the jurisdiction of this court, was then and there at the commission of said felony feloniously present aiding, inciting and abetting the said Vincent Wontock therein; and for the commission of said felony the said Stewart Rooney on or about the 15th day of April, 1911, at Siletz, in the state and district of Oregon, and within the jurisdiction of this court, did feloniously counsel, aid, incite, and procure the said Vincent Wontock to commit, in the manner and form aforesaid, the said felony, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The third count of the indictment charged: "That Vincent Wontock and Stewart Rooney on or about the 15th day of April, 1911, at Siletz, in the state and district of Oregon, and within the jurisdiction of this court, did unlawfully and feloniously introduce into the Indian country, to wit, in and onto the Siletz Indian reservation, intoxicating liquor, to wit, two bottles of whisky, without having theretofore obtained authority in writing from the War Department, or from any officer hereunto duly authorized by the War Department, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

At the close of the testimony the defendants, and each of them, by their attorney, moved the court to require the government to elect upon which count it relied for conviction upon the testimony offered. The motion was denied.

The jury returned a verdict finding the defendant Stewart Rooney guilty, and Vincent Wontock not guilty as charged.

M. O. Wilkins, of Portland, Or., for plaintiff in error.

John McCourt, U. S. Atty., and Walter H. Evans, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignment of errors raises two points:

First. That the court erred in overruling the motion made by the defendant to require the government to elect upon which count of the indictment it would rely.

Second. That the conviction of the plaintiff in error cannot stand after the jury had found Wontock not guilty.

[1] 1. In the first count of the indictment Vincent Wontock is charged as principal, and Stewart Rooney as aiding, inciting, and abetting the said Vincent Wontock in the commission of the crime. In the third count of the indictment both Wontock and Rooney are charged as principals.

Section 1024, R. S. (Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 161 [U. S. Comp. St. 1901, p. 720]), provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated."

We are of opinion that the action of the court below in refusing to require the United States to elect upon which count of the indictment it would rely for conviction was without error. The charges against the plaintiff in error clearly come within the class of charges mentioned in the section above set forth. It would, indeed, be difficult to conceive of two charges more closely connected, and the joinder of which would be more proper, within the meaning of the section, than the charges against Rooney set forth in the indictment in this case. Both charges are based on the same transaction and on the same array of facts. Had the motion of the plaintiff in error to require the government to elect upon which count it relied for conviction been granted, his position before the jury would have remained unchanged. The failure of the trial judge to grant the motion did not place him at a disadvantage, nor were his rights in any way prejudiced or jeopardized. That the question was one which rested solely in the discretion of the court is well settled.

[2] In *McGregor v. United States*, 134 Fed. 187, 194, 69 C. C. A. 477, 484, the motion to quash the indictment for alleged duplicity was based on the fact that some of the counts charged that the defendants conspired to defraud the United States, and other of the counts charged that the defendants, being officers and agents, or officers and clerks, violated certain sections of the Revised Statutes by receiving money

from an alleged co-conspirator for procuring, or aiding to procure, a contract mentioned in the counts relating to the conspiracy. The court said:

"The offenses charged were, as has been shown, directly connected together, and it was quite apparent to the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the court, and are not reviewable on writ of error. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454."

In the case of *Dolan et al. v. United States*, 133 Fed. 440, 446, 69 C. C. A. 274, 280, ten indictments had been found and returned against all four of the defendants, based upon certain sections of the Revised Statutes. These indictments were identical in language, except that each one dealt with a separate person whom it was charged that the defendants aided and abetted in violating the provisions of said sections. Each of the indictments contained ten separate counts. The counts were all based upon the same transaction but were varied in their language to fit different offenses under the sections alleged to have been violated. The assignment of error challenged the order of the court consolidating the ten indictments on motion of the government, and against the objection of the defendants. The court said:

"The indictments present charges against the defendants which appear to be for 'the same act or transaction,' or, at least, 'for two or more acts or transactions connected together,' and certainly 'for two or more acts or transactions of the same class of crimes or offenses.' It is contended, however, by counsel for the defendants, that all these early provisions of section 1024 are limited and qualified by the clause, 'which may be properly joined,' and that we must look to the common law to ascertain whether the joinder is proper or not. We do not accept this construction of the statute. Section 1024 (U. S. Comp. St. 1901, p. 720) was intended to abrogate the technical rules of the common law on the subject with which it deals. The clause, 'which may be properly joined,' simply vests in the trial court a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding the same would be permitted by one or more of the clauses mentioned in the first part of the section. There are often circumstances which would render a uniting of several offenses unjust to the defendant, and, as the old cases put it, 'confound him in the making of his defense.' Whenever such a situation arises, the trial court will protect the defendant's right to a fair trial. 'Whether the joinder was calculated to embarrass the prisoner, and therefore the offenses not "properly joined" within the meaning of the statute, was a question to be determined by the judge, in his discretion, on a motion to quash or to compel an election.' *United States v. Bennett*, Fed. Cas. No. 14,572."

In *Gardes v. United States*, 87 Fed. 172, 176, 30 C. C. A. 596, 600, the court, in construing section 1024 of the Revised Statutes, said:

"The trial judge gets nearer to the case than judges of the appellate court can get. He is especially in a better position to judge of the sound exercise of this discretion than the appellate court can ordinarily reach. Therefore his exercise of this discretion should not be disturbed in cases where it is not clear that it was improvidently exercised."

[3] 2. Can the conviction of the plaintiff in error stand after the jury had found Wontock not guilty? The arguments of counsel for the plaintiff in error in support of this proposition are based upon

the erroneous assumption that Rooney was charged and convicted as accessory, and that Wontock was charged and acquitted as principal. Section 332 of the federal Penal Code of 1910 provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Act March 4, 1909, c. 321, 35 Stat. 1152 (U. S. Comp. St. Supp. 1911, p. 1686).

This section is partly taken from sections 5323 and 5427 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3619, 3670), but is enlarged and made of general application. In it there is no distinction made between misdemeanors and felonies, and it is applicable alike to both classes of offenses. The doctrine at common law was that as to misdemeanors all persons who aided and abetted, or who commanded, advised, or encouraged another to commit an offense, were principals, and could be indicted, tried, and convicted as such (4 Bl. Com. 35; *United States v. Hartwell*, 26 Fed. Cas. 196; *United States v. Williams*, 28 Fed. Cas. 645); but this doctrine did not apply to felonies. The effect of the section under consideration is to abolish the distinction between principals and accessories in offenses defined in the laws of the United States, whether the same be felonies or misdemeanors. Prior to the enactment of section 332 of the federal Penal Code, similar statutes had been adopted in many of the states, and the section under consideration is a recognition by Congress that the old distinction between principals and accessories which pertained to felonies is generally abrogated, and that a charge against one formerly known as an accessory is good against him as principal.

In *Rosencranz v. United States*, 155 Fed. 38, 43, 83 C. C. A. 634, 639, the court in construing a statute of Alaska abolishing the distinction between principals and accessories in felonies, said:

"Where a statute has done away with former distinctions between principal and accessory before the fact, * * * a charge against one formerly known as an accessory is good against him as principal, and he must answer to the proofs whether they disclose that he was present and did the overt act, or, not being present, aided and abetted the doing of it in a way to make himself liable as principal."

[4] Even in the absence of a statute abolishing distinction between principal and accessory in felonies, the rule is well settled that all who are present aiding and abetting when a felony is committed are principals either in the first or second degree, and, if in the second degree, they may be arraigned and tried before the principal in the first degree, and that they may be convicted, even though the party charged as principal in the first degree is acquitted. *United States v. Hartwell*, 26 Fed. Cas. 198.

In *State v. Bogue*, 52 Kan. 79, 86, 34 Pac. 411, 412, the court said:

"It may be conceded that at common law the acquittal of the principal acquitted the accessory also, and that the conviction of the principal must precede or accompany that of one charged as an accessory. * * * Section 115 of the Criminal Code provides: 'Any person who counsels, aids or abets in the commission of any offense, may be charged, tried and convicted in the same manner as if he were principal.' The evident purpose of the Legislature of our own and other states where similar statutes have been enacted was to do away with those subtle distinctions of the common law between

principals in the first and second degree and accessories before the fact, and to permit the trial of participants in the crime, independently of each other, so that each should suffer punishment for his own guilt, and without being dependent on the result of the prosecutions against others. Of course, if the crime be committed through the instrumentality of another, the acts of such instrument essential to establish the guilt of the person on trial must be shown. The statute does not in any manner enlarge or diminish the essential elements of criminality. It merely does away with a somewhat arbitrary nomenclature which has come down from English jurisprudence, and has been found to be a serious stumbling block in the administration of criminal justice. We think a guilty accessory may be punished, even though the principal escape."

In *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476, the court said:

"The circumstance that the principal offender, through failure of proof or caprice of the jury, had been convicted of a lower grade, or even acquitted before the aider or abettor was put on trial, cannot affect the question of the guilt or innocence of the latter. The degree of the guilt of the aider and abettor, as well as the question whether he is guilty at all, is to be determined solely by the evidence in the case."

In *State v. Smith*, 100 Iowa, 1, 69 N. W. 269, the Supreme Court of Iowa, referring to a statute of that state abolishing distinction between accessories before the fact and principals, said:

"The effect of this provision is to make the offense of one who at common law would have been an accessory before the fact substantive, and so far independent that he may be indicted, tried, and punished, and as a principal, without regard to the prosecution of the person who at common law would have been the principal. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part he had in it, and does not depend upon the degree of another's guilt."

At common law, under the facts in the case at bar, the plaintiff in error could have been indicted, tried, and convicted as principal in the second degree, or as accessory before the fact, or as accessory after the fact. Section 332 of the federal Penal Code abolishes the distinction between principals and accessories, and makes them all principals. The indictment in this case charges the plaintiff in error as principal (jointly with Wontock) in both counts 1 and 3—the former by virtue of section 332 of the federal Penal Code, and the latter by virtue of the language employed. The jury found the plaintiff in error guilty as charged. His acquittal or conviction was in no wise dependent upon the acquittal or conviction of his codefendant Wontock; and the fact that the latter was acquitted cannot affect his guilt.

The judgment of the court below is affirmed.

KAISER v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1913.)

No. 3,823.

1. CARRIERS (§ 327*)—INJURY TO PASSENGERS—APPROACHING ACCOMMODATION TRAIN—RAILROAD YARD—CONTRIBUTORY NEGLIGENCE.

Plaintiff and a companion started to walk through a railroad yard to an accommodation train which they intended to take. As they walked they turned and observed an engine between 200 and 300 feet to the rear

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

approaching at the rate of 6 or 8 miles an hour. They left the track along which they were walking, crossed over two or three others to the south, and continued their course beside one of the latter tracks. The engine also switched over to that track, and as they continued to walk in a path along the side of the rail without looking again the engine came up, and plaintiff was struck and injured by the overhanging cross-beam. It was a bright, clear morning, and there were no obstructions to the view along the track in either direction, and the clearance between the tracks at the point gave ample room for pedestrians. *Held*, that plaintiff was negligent as a matter of law, and could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 327.*]

2. CARRIERS (§ 339*)—INJURY TO PASSENGERS—APPROACHING TRAIN—RAILROAD YARD—CONCURRING OR SUCCEEDING NEGLIGENCE.

Defendant's failure to ring the bell or blow the whistle was at most concurring or succeeding negligence which failed to prevent the natural consequences of the plaintiff's carelessness, and was therefore not of itself actionable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353; Dec. Dig. § 339.*]

In Error to the District Court of the United States for the District of North Dakota; James D. Elliott, Judge.

Action by Charles Kaiser against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. L. Knauf, of Jamestown, N. D. (John Knauf, of Jamestown, N. D., on the brief), for plaintiff in error.

C. W. Bunn, of St. Paul, Minn., and Watson & Young, of Fargo, N. D., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. Plaintiff, a traveling salesman, brought suit against the defendant railway company to recover damages laid at \$26,300 for personal injuries sustained while walking through defendant's yards at Dickinson, N. D., for the purpose of boarding one of defendant's trains for South Heart, in the same state. This train, described as a local freight, carried a single coach for the accommodation of passengers. It was made up and customarily stood before departure in the yard of the company at a point between three and four blocks west of the passenger station. It was reached by passing, for a portion of the way at least, along and across the tracks of this yard used by defendant for the general purposes of its business, and thus described by plaintiff in his petition:

"A regular railway yard consisting of main tracks and many side and passing tracks, all of which side tracks extend and are used in an easterly and westerly direction, and are used for switching cars, making up trains, passing of trains, loading of passengers and freight trains, and for general railway purposes."

Plaintiff lived at Dickinson, was entirely familiar with the surroundings, and it had been his custom to take this train, under the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conditions, every Tuesday morning for more than a year next preceding the accident. Between the tracks in this switching yard repeated travel by railway employes and others had worn the surface smooth and hard, until it resembled a path, and it is referred to as such in the testimony. It was upon this path, so called, alongside one of the tracks, that plaintiff was walking when he was struck in the back by the overhang of a switch engine as it passed, and sustained the injuries complained of. He was accompanied in his walk by a friend named Costello. After covering a part of the distance between the station and train, they looked back and saw an engine approaching on the track on which they were then walking; thereupon, they left this track, crossed two or three others to the south, and continued their course beside, but not between, the rails of one of the latter tracks. At the time they saw the engine behind them it was distant 250 or 300 feet, and coming toward them; from this point, to the place of the accident—a distance of 150 or 200 feet—they did not again look behind them, nor did they take any precaution to detect the possible approach of danger. The plaintiff says he listened; that his hearing was good, his ears free from covering; and that he heard no engine approaching, no bell ringing, nor whistle blowing. Mr. Costello in his testimony describes the situation more in detail:

"Q. When you say you both looked back just before you crossed over, you meant by that you looked back at the same point you spoke of before, about opposite the icehouse? A. That was the last time we looked back. We looked back to see if the rest of the boys were coming.

"Q. As you walked along down that morning, after you had looked to the east, did you listen? A. Did we listen?

"Q. Yes? A. No; we didn't listen.

"Q. How? A. Did we listen?

"Q. Yes? A. No; we never thought of listening—no occasion for listening.

"Q. Did you hear anything approaching you at all? A. No."

The yard at this point presented the usual maze of lead tracks and switches. By one of the latter the engine was transferred from the track upon which it was seen approaching, by the plaintiff and his companion, to that beside which the two men were walking. It was a bright, clear morning, and there were no buildings or other obstacles obstructing the view along the tracks in either direction. The clearance between the tracks at the point where plaintiff was walking was the usual one in yards of this nature, giving ample room for pedestrians. Costello was slightly in advance of plaintiff, but farther from the track, and was untouched by the same engine as it passed. At the close of plaintiff's evidence the court, upon motion, directed a verdict in favor of the defendant, upon the ground that plaintiff's own negligence not only contributed to, but was the primary and efficient cause of his injury, and judgment was entered accordingly. This is the only error assigned for review.

[1] In this petition plaintiff charged but two acts of negligence: First, that defendant ran its locomotive at great and excessive speed; second, that it failed to give warning of the engine's approach by ringing the bell or blowing the whistle. The former charge is expressly disproved, because it is shown that the engine was running at a very low

rate of speed—not more than 6 or 8 miles an hour according to the testimony of Costello—and, further, that it was stopped, upon call, within 18 feet of the point of contact. No evidence of excessive speed was offered. The second charge is left to be inferred because several witnesses testified that they did not hear such a bell or whistle. None are shown to have been paying express attention, and some are affirmatively shown to have been paying no attention to this particular feature. This is especially true of the plaintiff and his companion. No charge is made in the pleadings that the defendant was negligent in providing a dangerous approach for boarding its train; but, even though it be assumed that some degree of negligence is imputable to the defendant, nevertheless we agree with the trial court that the plaintiff was not entitled to recover upon the record here presented.

Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the court to instruct the jury that plaintiff cannot recover. As frequently held, and generally understood, every railroad track is a constant warning of danger from the powerful machines that traverse it; and such danger is intensified when plaintiff was, as he knew, in the midst of a network of tracks and switches, where there was continuous movement backward and forward, and where switching from one track to another was constantly to be expected. Plaintiff had already seen this same engine moving in his direction but 200 or 300 feet behind; he knew, or should have known, that the various tracks were connected by intercommunicating switches, and the duty of observation and caution, in the midst of such surrounding, was a continuing one. That he was a prospective passenger, and therefore rightfully upon the company's property, can make no difference. The rule applies to trespasser and licensee alike. Neither is absolved from the exercise of care to avoid known impending danger commensurate with the imminence of that danger. Here the plaintiff, although aware of the approach of an engine in a yard used for switching in the breaking and making of trains, deliberately turned his back upon it, and invited the injury which he speedily suffered. He was not between the rails of the track, but upon a path beside the track, which afforded ample space within which to walk without injury from passing engines and cars. His companion and others were passed by this same engine without injury. The plaintiff heedlessly walked so close to the rails that he came within reach of the usual overhang or crossbeam. Here, again, his negligence is apparent, and was the primary and efficient cause of the injury.

[2] The failure to ring the bell or blow the whistle of the engine was, at most, concurring or succeeding negligence, which failed to prevent the natural consequences of plaintiff's carelessness, but was not of itself such negligence as would render defendant liable. Ordinary care required that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of engines or trains can excuse his failure to exercise such care. The plaintiff had been long and constantly familiar with the conditions there existing. There is no claim that defendant's servants saw him and ran him down wantonly and reck-

lessly. He was walking, not upon, but beside the track, and presumed to be conscious of his situation and mindful of his safety. This, and other courts, have dealt so fully and conclusively with every principle of law here presented for consideration, that further elaboration is felt to be unnecessary. *Missouri Pacific Ry. Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115, 28 L. R. A. 181; *Garlich v. Northern Pac. Ry. Co.*, 67 C. C. A. 237, 131 Fed. 837; *St. Louis & S. F. R. Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Hart v. Northern Pac. Ry. Co.*, 116 C. C. A. 12, 196 Fed. 180.

The judgment must be affirmed; and it is so ordered.

ILLINOIS CENT. R. CO. v. EGAN.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1913.)

No. 3,878.

1. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—INVITED ERROR.

Where defendant procured a removal of the cause on the ground that it was not one arising under the federal Employer's Liability Act, but that it arose under the statutes of Iowa and continued such insistence at every stage of the proceeding until the close of the trial, it is not entitled to claim for the first time on writ of error that the trial court erred in sustaining such position and in refusing to remand the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. APPEAL AND ERROR (§ 247*)—REVIEW—THEORY OF CAUSE.

It is not permissible for one who tries his case on one theory to change his position in the appellate court and ask for a reversal on an inconsistent theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1426-1431; Dec. Dig. § 247.*]

3. APPEAL AND ERROR (§ 927*)—MOTION FOR PEREMPTORY INSTRUCTION—DENIAL—REVIEW.

On review of an order denying a motion for a peremptory instruction at the close of the evidence, the evidence must be given the strongest probative force in favor of the party against whom the instruction is asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

4. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a railroad engineer while making repairs under his engine by his train being struck and moved forward by another train in the rear, evidence held to require submission to the jury of the question of the negligence of the engineer of such latter train in moving the same against the cars of decedent's train without an understanding between the train crews and without proper signals.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

5. TRIAL (§ 260*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse a requested charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. MASTER AND SERVANT (§ 295*)—DEATH OF SERVANT—RAILROADS—ENGINEERS—ASSUMED RISK.

In an action for death of a railroad engineer negligently killed by another train moving his train forward while he was making repairs underneath his engine, an instruction that he entered defendant's employ fully appreciating that his work was dangerous and knowing the risks naturally and necessarily incident to such employment, and therefore waived the right to recover for injury received which resulted from any act which was naturally incident to such employment, was erroneous as in effect relieving the railroad company of all liability for negligence provided the servant injured or killed had worked for a sufficient length of time in such employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Henrietta Egan, administratrix of the estate of William J. Egan, deceased, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff, defendant in error, instituted this action as administratrix of the estate of her deceased husband in the district court of Black Hawk county, state of Iowa, on August 18, 1911, and upon petition of the defendant the cause was removed to the Circuit Court for the Northern District of Iowa upon the ground of diversity of citizenship. In the Circuit Court the plaintiff filed a motion to remand the cause to the state court upon the ground that the complaint showed on its face that the action was one arising under the national Employer's Liability Act, and therefore was not removable. The defendant claimed that the petition failing to show that the decedent was at the time of the injury employed on a train engaged in interstate commerce, the cause of action was not one arising under the national Employer's Liability Act but one under the state statutes of Iowa where the accident occurred. This contention of the defendant was by the court sustained, the motion to remand overruled, and the cause tried under the state statute without any objections on the part of the defendant.

The complaint as amended alleges that on September 28, 1910, the decedent was engaged as a locomotive engineer for the defendant, and while employed in operating a locomotive attached to a train of cars operated by defendant, and while so engaged, a locomotive and train of cars operated by other servants of the defendant negligently collided with the train on which plaintiff's intestate was engaged in the discharge of his duties, injuring him so seriously that he died soon thereafter from the injuries inflicted. The particular act of negligence charged is that while the locomotive of which the decedent had charge and control, with the cars attached thereto, was standing upon the main line of the company's track, and while he was engaged under his engine in making necessary repairs, it being his duty to make them, the defendant, through its engineer in charge of another train, owned by it and operated on the same track, was moved backwards with great force and violence, and without any signal or notice to said decedent or to the other employés of his said train, in such a rapid, violent, and reckless manner that his engine and cars were pushed forward a distance of about 60 feet, whereby he was run over by said locomotive upon which he was en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gaged at work and his body and legs crushed and severed, from which injuries he died shortly thereafter.

The amendment to the petition charges the negligent act to have been "that said engine and cars were so moved backward and brought into collision with the cars attached to the train upon which plaintiff's intestate was employed at the time, without the knowledge of decedent or the other employes on his train, and without warning to them of such movement, as was the custom at Manchester, where the accident occurred, under like circumstances."

The answer denies negligence and pleads assumption of risk and contributory negligence. A trial was had to a jury and a verdict for plaintiff returned.

F. H. Helsell, of Ft. Dodge, Iowa (George W. Dawson, of Waterloo, Iowa, and Blewett Lee and W. S. Horton, both of Chicago, Ill., and Helsell & Helsell, of Ft. Dodge, Iowa, on the brief), for plaintiff in error.

D. J. Lenehan, of Dubuque, Iowa (George W. Kiesel and L. G. Hurd, both of Dubuque, Iowa, and H. B. Boies, of Waterloo, Iowa, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] It is claimed in this court for the first time that the court below erred in holding that this cause is not one arising under the national Employer's Liability Act but under the state statutes of Iowa. Whether this was error it is unnecessary to determine in this action, as this objection was not made by the defendant in the court below, but, on the contrary, it insisted at every stage of the proceeding, from the time the motion to remand was filed until the close of the trial, that the cause was not one arising under the act of Congress but under the Iowa statutes. Therefore, even if it was error, which we do not decide, the defendant having invited it, and induced the court to commit it, it cannot now be heard to complain. *New York Elevated R. R. Co. v. Fifth National Bank*, 135 U. S. 432, 441, 10 Sup. Ct. 743, 34 L. Ed. 231; *Walton v. Chicago, etc., Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225; *Chase v. Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Mechanics' Insurance Co. v. C. A. Hoover Distilling Co.*, 182 Fed. 590, 593, 105 C. C. A. 128, 131, 31 L. R. A. (N. S.) 873.

[2] Nor is it permissible for one who tries his case upon one theory to change his position in the appellate court and ask for a reversal upon another and inconsistent theory. *New York, etc., Ry. Co. v. Estill*, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; *Lesser Cotton Co. v. St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 142, 52 C. C. A. 95, 104; *Chicago, etc., Ry. Co. v. Voelker*, 126 Fed. 522, 529, 65 C. C. A. 226, 233, 70 L. R. A. 264; *Missouri, etc., Ry. Co. v. Wilhoit*, 160 Fed. 440, 443, 87 C. C. A. 401, 404.

[3] A motion for a peremptory instruction having been made by the defendant at the close of the evidence, which was overruled and properly excepted to, necessitates a review of the evidence to determine whether there was substantial evidence justifying the submission of the case to the jury. As on motions of this kind the evidence must be given the strongest probative force in favor of the party

against whom the instruction is asked, we find, upon an examination of the evidence, that there is substantial evidence to warrant the finding, under proper instructions, of the following facts:

[4] Plaintiff's intestate had for 10 years or more been in the employ of the defendant as fireman and locomotive engineer; at the time of the accident he was in charge of a locomotive and freight train of 16 cars running between Waterloo, Iowa, and Dubuque, Iowa; the train was in charge of Mr. Kelley as conductor, and Mr. Cooling, one of the brakemen who had charge of the train in the absence of the conductor; that when the train arrived at Manchester, Iowa, the engine was cut off for the purpose of doing some switching; the conductor left the train to get his lunch, and the brakeman, Cooling, was left in charge of the train; about noon of that day a freight train from Cedar Rapids, Iowa, another branch of the same railroad, had come into the yards at Manchester and was also engaged in switching after Egan's train came into the yards, and immediately preceding the accident was on the other side of the street crossing. There is substantial evidence to show that when two or more freight trains were in the yards at Manchester engaged in switching at the same time, each of the train crews assisted the other in getting out cars which were to go into the other train; that this was done by prearrangement between the crews of the two trains and by the use of ordinary signals; the conductors, or the persons in charge of the trains, would agree in advance of the movement of either train, after they had been placed in position to be exchanged, which one should back down and take or deliver cars to the other, and when so arranged the backing and coupling would be done under the usual rules as to signals. At the time of the accident Egan's engine, which headed east, had attached to it several cars extending westerly to or near a public street crossing in the city of Manchester. The cars attached to Egan's engine had been backed down on this track for the purpose of delivering several of these cars to the engine of the Cedar Rapids train; the brakeman of Egan's train rode down on these cars and got off on the south side of the cars proceeding westerly for the purpose of ascertaining from the engineer of the Cedar Rapids engine whether he was ready and whether they would back up to Egan's train or Egan should back up to his train. Before Egan's train reached Manchester it was discovered that there was something wrong with the shaker bar of the furnace which did not permit of efficient steam making; a bolt connecting the grate bar with the shaker bar being loose. When the engine stopped in Manchester, Egan took his wrench and went down between the engine and tender to fasten his loose bolt while his fireman remained in the cab; it being the engineer's duty to keep his engine in working order and to make these small repairs. While making these repairs, without any notice by signal or otherwise, and without waiting for any understanding with the crew of Egan's train which of the trains should deliver or get the cars, and without any signal from any member of the crew, the engineer of the Cedar Rapids train, Marsh, backed his engine and cars attached to it over the street crossing and

against the cars attached to Egan's engine so that they moved from 30 to 40 feet and Egan was injured as before stated.

If the jury, as the evidence warranted, did find that it was the duty of the engineer of the Cedar Rapids train not to move his train for the purpose of taking cars from Egan's train without an understanding and without giving the proper signals, he was clearly guilty of negligence, and it was the duty of the court to submit that question to the jury under proper instructions.

No exceptions were taken to the charge of the court, and we have carefully examined it and find no prejudicial error therein.

[5] The defendant asked certain instructions, but as most of them were covered by the charge it was unnecessary to repeat them. Those which were refused were clearly erroneous. The principal one which was refused was instruction No. 11, and it fails to state the law correctly.

[6] That instruction was:

"There is a defense claimed on the part of the defendant that said W. J. Egan entered into the employment of the defendant as an engineer, fully knowing and appreciating the facts that said employment was dangerous, and notwithstanding that dangers were connected with such employment, and notwithstanding the fact that he appreciated and knew such dangers incident to such employment, he remained in the employ of the said defendant, and thereby assumed the risks that were naturally and necessarily incident to such employment, and thereby waived any right of recovery for any injury received, which resulted from any act which was naturally incident to said employment and because thereof the defendant urges that the plaintiff may not recover in this case. In this connection you are told that it appears without contradiction that said Egan at the time of the injury and for some time before had been in the employment of the defendant as a railroad engineer, and you are told that if you find from the evidence that he, knowing and appreciating the dangers that were incident to such employment, remained in the service of the defendant, that as a matter of law by such actions he waived the right of recovery because of injuries received, if such injuries were the natural and necessary results due to the dangers incident to such employment, and if you further find that the injury in this case was due to the usual and ordinary acts naturally to be expected as incident to the said employment of said Egan, then the plaintiff may not recover in this case."

It practically states that if an employé of a railroad is long enough in its employ as an engineer and knew and appreciated the dangers which were incident to such employment, and still remained in the service of the defendant, he waived the right to recover, and he thereby assumed the risk. This is certainly not the law, for, if it were, there never could be a recovery by an employé of a railroad company. It would relieve railroad companies of all liability for negligence no matter how gross. *Crotty v. Chicago Great Western Ry. Co.*, 169 Fed. 593, 95 C. C. A. 91; *Chicago, etc., Ry. Co. v. Donovan*, 160 Fed. 826, 87 C. C. A. 600. There was no error in refusing to give it.

There being no error in the record, the judgment is affirmed.

DE KLOTZ v. BROUSSARD.†

(Circuit Court of Appeals, Eighth Circuit. February 21, 1913.)

No. 3,779.

FRAUD (§ 30*)—PERSONS LIABLE—PROMOTERS OF CORPORATION.

Where plaintiff purchased from the receiver of a corporation a claim against defendant for unpaid stock which defendant had been induced to buy by the fraudulent representations of promoters, but plaintiff, though interested in the corporation, had not been one of the promoters, and had not aided or assisted them in inducing defendant to subscribe either by false representations or by concealing from him that the promoters were to obtain a secret advantage by purchasing certain lands at a specified price, plaintiff was not liable for the promoter's deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 35; Dec. Dig. § 30.*]

Acts of corporators and promoters, see notes to *Yelser v. United States Board & Paper Co.*, 46 C. C. A. 576; *El Cajon Portland Cement Co. v. Robert F. Wentz Engineering Co.*, 92 C. C. A. 450.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action by J. E. Broussard against Frank De Klotz. From a judgment in favor of plaintiff on defendant's counterclaim, he brings error. Affirmed.

J. E. Broussard, the defendant in error, hereinafter called the plaintiff, instituted an action against the plaintiff in error, referred to herein as the defendant, to recover a balance of \$11,426.95 with interest alleged to be due on an alleged stock subscription to the Jefferson County Rice Company, a corporation created under the laws of the state of Texas, which claim the plaintiff had purchased from the receiver appointed by a district court of the state of Texas in proceedings to wind up the corporation, and which was duly assigned to him. To that petition an answer was filed, but as the judgment was in favor of the defendant on this cause of action, from which no appeal has been taken to this court, it is unnecessary to refer to these pleadings more fully.

The defendant filed with his answer a counterclaim in which he claimed \$20,000 damages from the plaintiff, alleging that the plaintiff, as a promoter of the Jefferson County Rice Company, assisted in inducing the defendant, by fraudulent representations, to invest in the stock of that corporation. A reply to the counterclaim was filed by the plaintiff, pleading the five-year statute of limitation, and denying that he was one of the promoters of the Jefferson County Rice Company, or that he had anything to do with the organization or capitalization of the corporation, but that he and two other persons, being the owners of certain lands in Jefferson county, Tex., entered into a contract to sell the same to B. D. Hurd, B. C. Mason, and A. H. McVey for the sum of \$110,000 in money and one-third of all the profits the vendees might make by the resale of said lands; that the vendees sold the land to the corporation for \$186,400, which entitled the vendors to one-third of the \$76,400 profit made, and for which they took stock in the corporation.

A trial was had to a jury and upon the completion of the evidence both parties moved the court for a peremptory instruction in their favor on both causes of action. The court thereupon instructed the jury to return a verdict in favor of the defendant on the original cause of action, and in favor of the plaintiff, the defendant in error, on the counterclaim. The defendant alone moved his cause of action as set out in the counterclaim to this court by writ of error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 15, 1913.

I. N. Flickinger, of Council Bluffs, Iowa (E. H. McVey, of Kansas City, Mo., on the brief), for plaintiff in error.

Ralph L. Read, of Des Moines, Iowa (Read & Read, of Des Moines, Iowa, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and W. H. MUNGER and TRIEBER, District Judges.

TRIEBER, District Judge (after stating the facts as above). Without setting out the evidence in detail, a careful examination thereof establishes the following facts:

The plaintiff and his associates were the owners in 1899 and for several years prior thereto of 10,421 acres of land abutting on a fresh water stream known as Taylor's bayou in Jefferson county, Tex., a part of which had been cultivated by them in previous years in raising rice. That early in 1899 B. D. Hurd of Des Moines, Iowa, and S. M. Scott of Kansas City, Mo., obtained an option from the owners to purchase these lands at a price of \$13 per acre, but owing to the fact that in 1899 salt water impregnated the waters of Taylor's bayou, which furnished the water for the cultivation of the rice fields and injured the rice crop, the option was permitted to lapse. Mr. Scott thereupon severed his connection with the deal and notified the defendant, whom he had sought to interest in the enterprise, of his withdrawal, stating, as his reason therefor, that the salt water had impregnated the waters in the bayou, the waters of which were necessary for the successful cultivation of rice on these lands.

Subsequently Mr. Hurd and Mr. A. H. McVey, who also resided in Des Moines, Iowa, obtained a new option at the same price of \$13 per acre, but they failed to raise the money required by the option and permitted it to lapse. Thereupon they secured a new option, whereby they were to pay \$9.50 per acre in money and in addition thereto one-third of the profits, provided the cash payment and the profits would net the vendors \$13 per acre. This option was finally taken up and a contract entered into between the parties whereby it was agreed that in consideration of \$185,000 the owners would sell these lands and convey them by good and satisfactory warranty deed to such person or persons as the parties who held the option should designate. The consideration was to be paid as follows: Fifteen thousand dollars in cash upon the delivery of the deeds of title to said lands; the remainder of said purchase price was to be divided into eight equal annual installments, and to be evidenced by as many notes as the parties of the first part may desire and designate; each note was to be made payable at the First National Bank of Beaumont, Tex., with 7 per cent. interest per annum payable annually, the notes to contain a clause providing for the payment by the makers thereof of an additional sum of 10 per cent. of the amount of the principal and interest of said notes as attorney's fee if it became necessary to institute suit for the collection of said notes or any sum remaining due thereon, but no suit was to be brought unless said notes or a part thereof shall have been in default 30 days, and if the default continues for 6 months, then all notes remaining unpaid shall

become due at the option of the vendors. As security the vendors were to retain a vendor's lien, which, under the laws of Texas, was equivalent to a mortgage. The defendant subscribed for \$20,000 of the stock of the Jefferson County Rice Company at the solicitation of Hurd and McVey, but principally Hurd, upon condition that he, De Klotz, was to be one of the directors of the corporation. The plaintiff had nothing to do with the subscription, never solicited the defendant to make it, and made no representations to him whatever, De Klotz relying entirely upon Hurd, McVey, and Mason.

In the year 1900 the defendant visited the lands and learned of the crop failure in 1899 by reason of the salt water, but it was then believed by all that this was caused by extraordinarily high water, and could be prevented by the outlay of a comparatively small sum of money, but in 1901, by reason of the construction of the Port Arthur Canal, which intersected Taylor's bayou, its waters became impregnated with salt water and made rice planting on these lands practically impossible thereafter.

In view of the conclusions reached, it is unnecessary to determine the effect of the Iowa statute of limitations, as in our opinion there is no evidence whatever to justify a finding that Broussard either directly or indirectly made any false representations to De Klotz. It is neither charged in the counterclaim nor is there any substantial evidence justifying its submission to the jury that there was any conspiracy between the plaintiff and the other parties who had secured the option to perpetrate a fraud on the subscribers to the stock of the corporation which was to be formed by the vendees. All the evidence tends to show that the plaintiff and his associates would not sell the lands unless they would receive \$13 per acre, and that the provision of the contract wherein the consideration to be paid was placed at \$185,000 was made at the request of the vendees; that the defendant in the entire transaction relied on the purchasers of the option, who were his friends and associates in several business transactions.

Had the plaintiff been one of the promoters, or had he in any wise aided or assisted the other parties in inducing the defendant to make the subscription either by false representations or concealing from him the fact that they were to obtain a secret advantage by purchasing the lands at a less price than represented, he would no doubt be liable for the deceit if the action was not barred by limitation, for the law is well settled as stated in the headnote in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 204, 20 Sup. Ct. 311, 319 (44 L. Ed. 423):

"Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors who will act honestly in the interests of the shareholders, and are precluded from taking a secret advantage of the other shareholders."

Mr. Justice Brown, who delivered the opinion of the court in that case, said:

"A promoter is one who 'brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the

machinery which leads to the formation of the corporation itself.' Or, as defined by the English statute of 7 and 8 Vict. c. 110, § 3, 'every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company' becoming fully incorporated. He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. * * * The promoter is the agent of the corporation, and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders. Accordingly it has been held that if persons start a company, and induce others to subscribe for shares, for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or suppression of the truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for any loss which it has suffered."

The evidence fails to show that Broussard committed any act which influenced the defendant in making the subscription, nor was he guilty of any fraud. The court below committed no error in peremptorily instructing the jury that the defendant was not entitled to recover on his counterclaim.

The judgment of the court below must be affirmed.

JONES et al. v. MISSOURI-EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1913.)

No. 3,624.

1. CORPORATIONS (§ 584*)—CONSOLIDATION—MINORITY STOCKHOLDERS—BREACH OF TRUST—CHARACTER OF STOCK.

Where, in a suit to rescind a consolidation of certain corporations, the court, on a prior appeal, had held that complainants were entitled to relief, and that they should be decreed either a rescission of the contract of consolidation, or the value of their shares of the property of the corporation on the basis of value immediately after the consolidation as enhanced thereby, it was no objection to a decree, fixing the proportion of the property of the consolidated company, that it should be apportioned to the stock of the merged corporation in which complainants were interested, that the difference in the value of the preferred and common stock of that corporation was not considered; that question being determinable after the share of the value of the consolidated corporation's assets, assignable to the merged company, had been determined.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584.*]

2. CORPORATIONS (§ 584*)—CONSOLIDATION—RESCISSION—RIGHTS OF STOCKHOLDERS—ATTORNEY'S FEES.

Where, in a suit by minority stockholders of a merged corporation for rescission of the consolidation, it was held that they were entitled either to a rescission of the consolidation contract, or the value of their shares of the property of their corporation immediately after the consolidation as enhanced thereby, and the intrinsic value of the consolidated company's property at that time was not clearly established, the court, over defendant's objection, would not deprive either party of the opportunity to present evidence on the question of value by awarding a decree against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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defendant fixing the value of complainant's shares to be taken over at a specified sum and rendering judgment for that sum, together with necessary expenses and fees to complainants' attorney

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584.*]

On rehearing. Denied.

For former opinion, see 117 C. C. A. 442, 199 Fed. 64.

Robert & Robert, of St. Louis, Mo., D. T. Bomar, of Ft. Worth, Tex., Elencious Smith, of Los Angeles, Cal., and W. B. & Ford W. Thompson, of St. Louis, Mo., for appellants.

H. S. Priest, Benjamin Schnurmacher, and Theodore Rassieur, all of St. Louis, Mo., for appellees.

PER CURIAM. This is a suit by a minority stockholder of the Edison Company, on behalf of himself and others similarly situated, to avoid the consolidation of that company with the Union Company No. 1 into Union Company No. 2, and to restore its property to it, or to compel payment to the complainants of the value of their stock, on the ground that the property of the Edison Company has been transferred to the consolidated company by its directors and a majority of its stockholders by fraud and a breach of trust. The bill was sustained in the face of a demurrer in *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631. A decree for the complainant after a hearing was directed in *Jones v. Missouri-Edison Electric Co.* (C. C. A.) 199 Fed. 64, 70, to the effect that the complainants were entitled to a rehabilitation of the Edison Company, or to the value of their stock on the basis of the value of their shares of the value of the property of the Edison Company immediately after the consolidation.

A motion for a rehearing of some of the questions has been presented. Counsel for the defendant argue: (1) That the minority stockholders are not entitled to this value of their stock, because this is not a suit for the rescission of the consolidation. But this court decided in 144 Fed. at page 778, 75 C. C. A. at page 644, that it was such a suit, and that the court below had jurisdiction herein to grant to the complainants rescission of the contract of consolidation, or the value of their shares of the property of their corporation. (2) That the complainants are not entitled to the value of their stock on the basis of the value of their shares of the property of their corporation immediately after the consolidation as enhanced by that consolidation. But this court decided that they would be entitled to the value of their stock on that basis in 144 Fed. at page 779, 75 C. C. A. at page 645, because trustees who violate their duty may not profit thereby. *Ervin v. Oregon Ry. & Navigation Co.* (C. C.) 27 Fed. 625, 633. To these conclusions this court adheres.

From the study of the record the conclusion was reached that in estimating the complainants' share of the value of the property of the Edison Company immediately after the consolidation 43 per cent. of the value of the property of Union Company No. 2 at that time

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

should be assigned to the Edison Company and 57 per cent. thereof to Union Company No. 1. Counsel for the defendants argue that this gives too large a share to the Edison Company. The ratio found was the result of a study of the record in this case and of careful reflection upon all the considerations it presents, many of which were not recited in the opinion. The opinion does, however, state these reasons for that conclusion: (1) That the master found that the property of Union Company No. 1, aside from the Ashley Street plant, and the property of the Edison Company were about equal in value at the time of the consolidation, and that tends to indicate an assignment of 50 per cent. of the value of the property of the consolidated company to each; (2) that the earnings of the Edison Company for the year ending August 31, 1903, were \$794,842.91, the cost of operation \$393,394.42, or 49½ per cent. of the gross earnings, leaving net earnings of \$401,448.49, while the income of Union Company No. 1 for the same year was \$562,265.29 and its operating expenses \$278,359, or 49½ per cent. of its gross receipts, leaving net earnings of \$283,906.29, net earnings less than those of the Edison Company by \$117,542.20, a fact that tends to show that at least 50 per cent. of the value of the property of the consolidated company might justly be assigned to the Edison Company; (3) that at the time of the consolidation the Ashley Street plant was in the early stages of construction, and that its value was practically all prospective, that as a single unit it had no franchise, no good will, no customers, that the Union Company No. 1 was unable to negotiate its bonds, and hence to complete the construction of that plant and make it operative, until it obtained and pledged the property of the Edison Company to secure them, and that a large share of the value of that plant ought to have been assigned to the Edison Company, instead of assigning it all to the Union Company No. 1; and (4) that on January 1, 1904, about four months after the completion of the consolidation, the defendants, in opening their account books, appraised and stated the value of the property of the Edison Company to be tangible assets \$2,905,142.97, intangible assets, good will, and franchises \$3,005,168.20, total \$5,910,311.17, the value of the property of Union Company No. 1 to be tangible assets, including the Ashley Street plant, \$3,436,442.04, intangible assets, franchises, and good will \$4,495,935.02, of which \$2,075,000 was credited to the Ashley Street plant, which had neither business nor customers, total \$7,932,377.06, and that the bonded indebtedness of the Edison Company and of the Union Company No. 1 was about \$4,000,000 each, and that upon this basis 43 per cent. of the value of the property of the consolidated company should be assigned to the Edison Company and 57 per cent. thereof to the Union Company No. 2. Counsel call attention to the facts, which are here conceded, that the figures set forth in this fourth reason do not warrant the conclusion there drawn, because in the computation of the percentages the indebtedness of each of the companies was ignored, and the computation was based upon the gross values, when it should have been founded upon the net values of the properties of the companies. They also contend that in stat-

ing these values the quick assets were omitted, the liabilities were inaccurately stated, and there were such errors and omissions that the true statement of the values and liabilities of the properties of the companies that were consolidated, based upon the statement in the account books of Union Company No. 2 on January 1, 1904, would have shown the value of the property of Union Company No. 1 to have been \$5,986,815.57, its liabilities to have been \$4,312,890.84, its net worth to have been \$1,673,924.43, the value of the property of the Union Company No. 1 to have been \$8,623,106.64, its liabilities to have been \$4,374,508.77, and its net worth to have been \$4,248,597.87, and upon this basis a comparison of the net values of the two companies would show that only 28 per cent. of the property of the consolidated company should be assigned to the Edison Company, and 72 per cent. should be attributed to the Union Company No. 1. Let all this be conceded. The court said, however, in its opinion, and upon a re-examination of the case it is confirmed in that view, that the Ashley Street plant as a single unit had no franchise, good will, or customers, and that a large share of its value was attributable to the property of the Edison Company which was pledged by the consolidated company to secure the bonds issued to aid in its construction. In the \$8,623,106.64 just stated as the value of the property of Union Company No. 1, there are \$2,420,935.92 for the value of the good will and franchise of the Imperial Company, to which the Union Company No. 1 had succeeded, and \$2,075,000 more for the value of the good will and franchise of the Ashley Street plant. Neither the argument of counsel, nor a re-examination of the record, has persuaded that this \$2,075,000 was the fair value of the franchises and good will of that plant, or that this appraisal of their value was even nearly proportionate to the appraisal of the franchises and good will of the Edison Company at \$3,005,168.20. We are confirmed in this view by the fact that in the year ending August 31, 1903, the Ashley Street plant had produced nothing, while the Edison property had earned \$794,394.42 gross and \$401,448.49 net. Indeed, upon a re-examination of the case the court is persuaded that the appraisal of the value of the franchises and good will of the Union Company No. 1 was out of all just proportion to the appraisal of the value of the franchises and good will of the Edison Company. If, now, due allowance be made for this unfair appraisal of the franchises and good will, and for the conclusion, which we still think just, that a large share of the value of the Ashley Street plant ought to have been credited to the Edison Company, instead of crediting it all to Union Company No. 1, the assignment of 43 per cent. of the value of the property of the consolidated company to the Edison Company and 57 per cent. of it to the Union Company No. 1 does not appear to be either unjust or unreasonable in the light of the statement of the relative values of these properties in the books of the consolidated company on January 1, 1904.

And when a broad and comprehensive view of the record is taken, when it is perceived, in addition to the considerations just stated, that the master found that the value of the property of the Edison Com-

pany was about equal to that of the Union Company No. 1, and that the gross earnings of the former company for the year ending August 31, 1903, were \$232,577.62 more and its net earnings were \$117,542.20 more than those of the latter, and that the cost of its operation was the same percentage of its gross earnings as was the latter's, and when all the phases of the record, which are too numerous to review here, are thoughtfully considered, the conclusion is still forced in upon our minds that 43 per cent. of the value of the property of the consolidated company is not more than a just share to assign to the Edison Company.

[1] In answer to the objection to the decree that the difference in the value of the preferred stock and the common stock of the Edison Company has not been considered, it is sufficient to say that when the value of the property of Union Company No. 2 immediately after the consolidation and the adjudged share of that value assignable to the Edison Company have been determined, there will be time and opportunity to consider the respective shares of the value attributable to the Edison property justly assignable to the preferred stock and the common stock of that company and the relative values thereof. The motion for rehearing is denied.

[2] Counsel for the complainants have presented a motion to modify the opinion so as to direct the rendition of a decree against the defendant for \$125 and interest thereon from September 9, 1903, on account of each share of the preferred stock of the Edison Company which the complainants hold. But in the face of objection by the defendants the intrinsic value of the property of the consolidated company immediately after the consolidation is not so clearly established that either party ought to be foreclosed of an opportunity to present evidence upon that subject before that value is adjudicated. Nor is this the time to fix the recovery the original complainant in this suit and his counsel should receive for the necessary expenses and reasonable attorney's fees incurred or paid in securing a favorable decree. They may doubtless eventually have payment of these out of the fund recovered for the complainants in this suit before it is distributed to them, and the complainants may now recover of the defendants the costs of the suit to be taxed. Further action upon these matters, however, must be deferred until the value of the property of the consolidated company immediately after the consolidation is found, and the value of the shares of stock of the complainant is adjudged.

Let the direction for a decree found in the opinion already rendered stand unchanged.

PARKER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 1, 1913.)

No. 40.

1. CRIMINAL LAW (§ 434*)—EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF CORPORATION.

Where, in a prosecution for wrongful use of the mails in furtherance of a scheme to defraud in the sale of corporate stock by false representations, defendant made representations as to the corporations in question, the truth of which could only be determined by the corporate books and records, and part of one of the books contained a summary of defendant's own reports, the books were admissible on the issue of the truth of such representations, regardless of the fact that defendant's participation in the scheme occurred a long distance from the place where the books were kept and he had no part in their keeping.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 434.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES—INTENT—LIMITATION.

Where, in a prosecution for use of the mails in furtherance of a scheme to defraud in the sale of stock in a corporation projecting a wireless telegraph, there being evidence that the affairs of a prior company were so interwoven with those of the company in question that proof of defendant's relations with such former company directly tended to establish his participation in the fraudulent scheme in connection with the latter, such evidence was admissible to prove the offense alleged, and it was not error for the court to omit to limit it to the question of intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. POST OFFICE (§ 49*)—MISUSE OF MAILS—EVIDENCE—GOOD FAITH.

In a prosecution for a misuse of the mails in furtherance of a scheme to defraud in a sale of corporate stock by misrepresentations, evidence of a conversation between defendant and the chairman of the executive committee of the corporation, concerning the company's earnings subsequent to the making of the representations alleged to be false, was inadmissible on the issue of defendant's good faith.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

4. CRIMINAL LAW (§ 444*)—DOCUMENTARY EVIDENCE—PRELIMINARY PROOF.

In a prosecution for misuse of the mails in furtherance of a scheme to defraud in the sale of corporate stock, the rejection of bulletins and letters from the corporation's western manager concerning the Pacific Coast business was not error in the absence of a foundation properly laid for its admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.*]

5. POST OFFICE (§ 50*)—QUESTION FOR JURY—MISUSE OF MAILS—SCHEME TO DEFRAUD.

In a prosecution for misuse of the mails in furtherance of a scheme to defraud in the sale of stock of a corporation by misrepresentations, evidence held sufficient to justify a submission of the case to the jury as against defendant P.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89; Dec. Dig. § 50.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Southern District of New York; James L. Martin, Judge.

George H. Parker and Christopher C. Wilson and others were convicted of using the mails in furtherance of a scheme to defraud, and with conspiring to commit an offense against the United States. Conviction as to defendants other than Parker and affirmed, and he prosecutes a separate writ of error. Affirmed.

T. B. Hardin and J. S. Hess, both of New York City, for plaintiff in error.

Henry A. Wise, U. S. Atty., of New York City (G. H. Dorr, A. I. Smith, Jr., and R. Stephenson, all of New York City, of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The opinion of this court in *Wilson v. United States*, 190 Fed. 427, 111 C. C. A. 231, contains a review of the facts in this case and an extended examination of most of the questions of law raised in the present assignment of errors. We shall therefore upon this writ of error confine ourselves to considering whether the principles laid down in our former opinion are applicable to this defendant and whether any new assignments of error are well founded. In so doing, we may conveniently follow the questions stated in the defendant's brief.

[1] The first question is whether the trial court erred in receiving in evidence as against the defendant Parker the books of account, records, and compilations from the books of the United Company and of its agent the Loan Company.

We approved the admission of this documentary evidence in the *Wilson Case* and fail to see why the principles there laid down are not controlling here. The only substantial difference between the situation of Parker and that of the other defendants was, as stated in his brief, that "he was thousands of miles away" from the place where the books were kept. This difference would have been important had the question been only as to his actual knowledge of their contents. But the books were offered upon another ground and were admissible even if this defendant had no actual knowledge of what they contained. He made representations as to the corporations in question, the truth of which could only be determined by the corporate books and records. Consequently such books and records were properly admitted to show the falsity of the statements. Other facts and circumstances were relied upon to establish the defendant's guilty knowledge.¹ We think that the rulings in the *Wilson Case* are applicable and determinative upon this question.

[2] The second question is whether there was error in receiving evidence relating to the defendant Parker's connection with the De Forest Company.

¹ The entire contents of the "little book," which the defendant particularly refers to, do not appear to have been admitted as against the defendant Parker. The part of this book, however, which contains a summary of the defendant's own reports, was, we think, properly received.

With respect to this question the defendant Parker stands in the same situation as the other defendants, and we found no error in the Wilson Case in the admission of this testimony. This defendant, however, contends that the testimony should have been excluded under the recent decision of this court in *Marshall v. United States*, 197 Fed. 511, 117 C. C. A. 65, which limited the reception of proof of the commission of similar offenses upon the question of intent. In our opinion, however, that decision has no bearing here. The affairs of the De Forest Company were so interwoven with those of the United Company that proof of the defendant's relations with the former went directly to establish his liability for the fraudulent scheme in connection with the latter. It was not a case of proving a "similar offense."

[3] The third question is whether there was error in refusing to permit the defendant Parker to testify concerning a conversation with one Allen, chairman of the executive committee of the United Company, concerning the earnings of the company.

If the conversation referred to had taken place *before* the defendant made representations concerning the affairs of the Wireless Company, it might have been admissible upon the question of good faith. But, apparently, the testimony was offered to affect previous representations and was properly excluded. A man's good faith a year ago is not determined by that which he finds out to-day.

The fourth question is whether there was error in rejecting evidence offered by the defendant of the bulletins and letters from the manager at Seattle concerning the Pacific Coast business.

[4] No proper foundation appears to have been laid for the admission of this documentary evidence and we fail to see that it would have materially tended to establish the truth of the representations made by the defendant. In any event, the rejecting of this evidence cannot be said to have constituted material prejudicial error.

The fifth question is whether the trial court properly rejected a package of papers containing correspondence between the New York office of the United Company and the Loan Company of Denver. We find no error in this ruling. The papers were offered informally and the court ruled that any papers which were addressed to the defendant should be admitted. We think that this was all that the defendant was entitled to. Certainly the record is quite insufficient to base a claim of prejudicial error upon.

The final substantial question raised by the defendant Parker is whether there was sufficient evidence to justify the trial court in submitting the case to the jury.

[5] We think it unnecessary to review the evidence in detail and shall confine ourselves to indicating a few instances where we think the proof was quite sufficient to warrant the jury in finding that the defendant knowingly circulated false statements. Take, for example, his statement about the profits of installing apparatus on ships after he had been told by Wilson that the company lost money on each ship equipped. So the statements placing the value of \$14,000,000 on the old De Forest stock after the resolution and circulars of the Wireless Company had shown that it had no value. So his statement

that the United Company "absolutely owned the Marconi system." These are merely illustrative. As to them and as to the manifold statements of condition, resources, and profits which the defendant Parker made, we are satisfied that the case properly went to the jury. It was for the jury in considering the question of guilty knowledge, to weigh the fact that this defendant was widely separated from the others. He told his story of ignorance and lack of knowledge upon the stand and the jury did not believe him. He cannot now complain.

Most of the other assignments of error were examined in the Wilson Case. As to those which were not, it is sufficient to say that we have examined them and are of the opinion that they disclose no reversible error. In particular we are satisfied that the court below had jurisdiction as to the defendant Parker.

The judgment of the Circuit Court is affirmed.

NEW YORK CENT. & H. R. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 177.

1. CARRIERS (§ 37*)—TRANSPORTATION OF ANIMALS—TWENTY-EGHT HOUR LAW—VIOLATION BY CONNECTING CARRIER—KNOWLEDGE—BURDEN OF PROOF.

Where defendant carrier received certain horses from a connecting carrier, which had kept them confined for a period longer than that permitted by the Twenty-Eight Hour Law (Act Cong. June 29, 1906, c. 3594, §§ 1, 3, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]), and continued the transportation to destination without unloading, knowledge of the connecting carrier's default would be imputed to defendant. In the absence of evidence from it that it made reasonable inquiry and could not ascertain the fact, and that it continued the transportation in good faith.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

2. CARRIERS (§ 37*)—TRANSPORTATION OF ANIMALS—TWENTY-EGHT HOUR LAW—VIOLATION—DEFENDANT'S DUTY.

Where defendant's line, part of the route over which certain horses were transported by connecting carriers, involved only a distance of seven miles, from a junction point to destination, defendant having received the horses with knowledge that they had already been confined for a period longer than that permitted by the Twenty-Eight Hour Law (Act Cong. June 29, 1906, c. 3594, §§ 1, 3, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]), it was its duty to transport them to destination as quickly as possible.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

3. EVIDENCE (§ 574*)—OPINIONS—EXPERTS—REASONABLE TIME.

Where a terminal carrier, receiving horses for transportation to destination, a distance of only seven miles, with knowledge that they had already been confined for a period longer than that authorized by the Twenty-Eight Hour Law (Act Cong. June 29, 1906, c. 3594, §§ 1, 3, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]), used 3 hours and 35 minutes to move the cars to destination, evidence of the opinion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of two freight conductors that, in view of the condition of the belt line in getting ready for grade crossing improvements, the time actually occupied was reasonable, was insufficient to rebut the prima facie case that such period was unreasonable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

4. CARRIERS (§ 37*)—TRANSPORTATION OF ANIMALS—TWENTY- EIGHT HOUR LAW—CONNECTING CARRIERS—PUNISHMENT OF ONE—EFFECT.

Where a connecting carrier, after having confined certain horses for a period longer than permitted by the Twenty-Eight Hour Law (Act Cong. June 29, 1906, c. 3594, §§ 1, 3, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]), delivered them to defendant for transportation to destination, and defendant did not transport the horses to destination as quickly as possible, the fact that a judgment was recovered for a penalty against the connecting carrier for violating such act was no bar to an action to recover a similar penalty against defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Liability of carrier for failure to feed, water, and rest live stock and for violation of Twenty-Eight Hour Law, see note to *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 435.]

In Error to the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Action by the United States against the New York Central & Hudson River Railroad Company to recover a penalty for violation of the Twenty-Eight Hour Law (Act Cong. June 29, 1906, c. 3594, §§ 1, 3, 34 Stat. 607, 608 [U. S. Comp. St. Supp. 1911, pp. 1341, 1342]). Judgment for the United States, and defendant brings error. Affirmed.

Hoyt & Spratt, of Buffalo, N. Y. (A. L. Becker, of Buffalo, N. Y., of counsel), for plaintiff in error.

J. L. O'Brian, of Buffalo, N. Y., U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. Two cars loaded with horses were shipped from Girard, Kan., consigned to shippers' order at the defendant's stockyard in East Buffalo. The routing was via the St. Louis & San Francisco Railroad Company to Kansas City, thence by the Wabash Railroad Company through Missouri, Indiana, Iowa, Michigan, and Canada, to Black Rock, Buffalo, where the cars were received by the defendant to be transported to destination, a distance of seven miles. The Wabash Company did not unload the horses for food, water, and rest between Peru, Ind., and Black Rock, a period of 38 hours and 55 minutes. The defendant occupied 3 hours and 35 minutes in transporting the cars to destination in East Buffalo.

The United States instituted these two actions to recover of the defendant a penalty of \$500 for each car for violation of Act June 29, 1906, 34 Stat. 607, sections 1 and 3 of which read:

"Section 1. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District of Columbia into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, shall confine the same in cars, boats, or vessels, of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours."

"Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: Provided, that when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply."

U. S. Comp. St. Supp. 1911, pp. 1341, 1342.

The complaint alleged the foregoing facts, and also that the defendant was not prevented from complying with the act by storm or other accidental and unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, but knowingly and willfully failed to unload the horses in transit as aforesaid.

The defendant filed answers, which alleged that it received the cars at Black Rock from its connecting carrier, the Wabash Railroad Company, without knowing the time the horses had been confined, and transported them within the usual and reasonable time to destination in East Buffalo; also that, if there were any violation of law, it was committed by the Wabash Railroad Company, which had been sued by the United States and fined, which judgment duly satisfied it pleaded in bar of the action.

At the trial a jury was duly waived and the cause submitted to the court. The parties stipulated that the facts stated in the complaint were true; also that the time of confinement of the horses had been extended from 28 to 36 hours, the defendant reserving the right to show that when it received the cars it did not know that the horses had been confined longer than the law allowed; also to prove that, if it had refused to transport the cars, they would have had to go back to Michigan, a trip taking from 15 to 20 hours, before the horses could have been unloaded because, being carried in bond, they could

not be unloaded in Canada; also to prove that the usual time for transporting live stock from Black Rock to the stockyards was from 1½ hours to 5 hours, depending upon circumstances.

[1] The first question is: Did the defendant act knowingly in the transportation of the cars; that is, did it know when the horses had been last unloaded? Relying, no doubt, upon the proposition that the burden of proof lay upon the government, the defendant gave no evidence at all upon the subject. But we think it was bound to make reasonable inquiry as to this fact. The humane purpose of the law would be frequently frustrated if the government were compelled to prove facts directly and often exclusively within the knowledge of the carrier. When the government had proved that the time had long elapsed within which the horses should have been unloaded, knowledge of that fact was properly imputed by Judge Hazel to the defendant, in the absence of any evidence from it that it had made reasonable inquiry and could not ascertain the fact.

[2, 3] The next question is: Did the defendant act willfully in the premises; that is, unnecessarily disregard the provisions and purpose of the law? Obviously it did the best thing for the horses in taking them to the stockyard in East Buffalo. The time it could properly use in so doing would depend upon whether the period of confinement had or had not expired. Knowledge of the fact that it had expired being imputed to the defendant, it was bound to transport them as quickly as possible. Prima facie 3 hours and 35 minutes was an unreasonable time to move the cars seven miles. The only testimony the defendant offered upon the subject was the opinion of two freight conductors that, in view of the condition of the belt line in getting ready for grade crossing improvements, the time actually occupied was reasonable. This was entirely insufficient. The facts should have been stated, so that the court might determine whether the time was reasonable or not.

[4] The judgment recovered against the Wabash Railroad Company is not a bar. The fact that it has been punished for its own delinquency furnishes no defense to the defendant if it was subsequently delinquent, as the court has rightly found. *United States v. Lehigh Valley R. R. Co.* (C. C.) 184 Fed. 971, affirmed by this court 187 Fed. 1006, 109 C. C. A. 211.

The judgment is affirmed.

ILLINOIS CENT. R. CO. v. NELSON,

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,843.

1. MASTER AND SERVANT (§ 296*)—OPERATION OF FEDERAL EMPLOYER'S LIABILITY ACT—RAILROADS.

Where a railroad brakeman, with knowledge that switching was being done on intervening tracks, after obtaining ice with which to cool hot boxes on his train, started to cross the tracks without looking or listening for moving cars, and was struck and injured by a car, defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant was entitled to concrete instructions submitting plaintiff's contributory negligence to the jury, to the effect that one going on or near a railroad track was bound at his peril to make diligent use of his senses of sight and hearing in order to detect the approach of trains, and a disregard of such duty and a stepping on the track without looking or listening would be negligence, and if plaintiff had reason to believe that trains might be approaching, the fact that he was an employé did not release him from the necessity of exercising reasonable care under the circumstances for his own safety, and that he had no right to rely wholly on the railroad company to protect him from passing trains; a mere general definition of negligence being insufficient, and this notwithstanding contributory negligence, under the circumstances, would not bar recovery, but was only admissible under the Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]), in mitigation of damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

2. COMMERCE (§ 27*)—INTERSTATE COMMERCE—EMPLOYER'S LIABILITY ACT—APPLICATION.

Where a brakeman at the time of his injury, while crossing certain tracks in a railroad yard, was approaching an interstate train, on which he was employed, with ice intended for use thereon, his right of action for injuries was governed solely by the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]), which superseded the state statute relating to the liability of employers for injuries to their servants.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by William H. Nelson against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

F. H. Helsell, of Ft. Dodge, Iowa (Helsell & Helsell, of Ft. Dodge, Iowa, Grimm & Trewin, of Cedar Rapids, Iowa, and Blewett Lee and W. S. Horton, both of Chicago, Ill., on the brief), for plaintiff in error.

M. J. Wade, of Iowa City, Iowa (Wade, Dutcher & Davis, of Iowa City, Iowa, Ely & Bush, of Davenport, Iowa, and V. L. Belt, of Waterloo, Iowa, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and WM. H. MUNGER and TRIEBER, District Judges.

WM. H. MUNGER, District Judge. [1] The plaintiff (defendant in error) was in the employ of the defendant (plaintiff in error) as a brakeman. In the forenoon of January 1, 1911, he went to his train in the yards at Waterloo, Iowa, to assume his duties on that train. After reaching the train, which stood on track No. 4 in the yards, he discovered a couple of hot boxes, and went from there to the north to the icehouse of the company, to obtain a cake of ice, to be used in cooling the boxes and to take upon the train for a like purpose, in so doing crossing tracks 5, 6, 7, and 8. Returning from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the icehouse with his ice, tracks 8 and 7 having standing cars on them, he threw his ice through under the cars and climbed over the drawbar; reaching track 6, there was an opening between cars of about 10 feet, through which he passed, and then turned eastward, without looking or listening for any moving cars, though he knew that switching was being done there. After proceeding between tracks 6 and 5 a distance of about 15 or 20 feet, he was struck by a car and received the injuries complained of. He alleges that, at or about the point where he was struck by the car, the defendant negligently permitted an accumulation of cinders, ice, and snow between said tracks several inches in height and about 10 feet in length; that he slipped upon this pile of cinders, covered with ice and snow, and, because of such slipping, was struck by the car in question. The train upon which he was employed the evidence clearly shows to have been engaged at the time in interstate commerce. He, being a brakeman upon said train, was an employé engaged in interstate commerce, and the act of Congress known as the "Employer's Liability Act" (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]), governs and determines the rights of the parties. Plaintiff recovered a judgment, and defendant has brought the case to this court for review.

As before stated, plaintiff was aware of the movement of engines and cars in the yards. He crossed the several tracks, turned towards the east, did not stop or look or listen to ascertain whether any cars were approaching towards him, and proceeded to the eastward some 15 or 20 feet, when struck by the car in question, moving at the rate of about 4 miles per hour. After the close of all of the evidence, the defendant requested, among others, the following instructions:

"Instruction 12: Any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains; and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening, he is guilty of negligence."

"Instruction 20: When the plaintiff came around the car across the track No. 6, if you find from the evidence that he turned directly in an easterly direction to go down to his train, and did not look or listen for any train or car that might be approaching within the distance in which he was at that time at any place between the track, such failure to look or listen would be negligence on his part."

"Instruction 39: A person approaching, or going upon or near, a railroad track upon which trains are in the habit of running, is bound by law to stop, and look, and listen for approaching trains, providing that he has any reason to believe that there may be such approaching; and the fact that he was an employé did not release him from the necessity of exercising reasonable care under the circumstances for his own safety. He had no right to rely wholly upon the railroad company for protection from passing trains or cars."

The court refused to give these instructions, to which ruling defendant duly excepted. The only instructions given by the court, respecting the contributory negligence of the plaintiff, was as follows:

"Bear in mind, now, the situation: The plaintiff seeks to recover of the defendant because of its negligence. The burden of proof, therefore, rests

upon him to establish the negligence of the company. The defendant, as one of its defenses, says that the plaintiff himself was guilty of negligence. The burden of proof, therefore, rests upon the company to show, by a fair preponderance of the credible evidence that the plaintiff was guilty of negligence; and unless it has done so, and unless you so find, of course, you must find that the plaintiff himself was not negligent in the way in which he did that work."

The court also defined negligence as follows:

"I may say to you in a general way that negligence consists in doing that which a person of ordinary prudence and care would not do under the circumstances of a particular or given situation, or in omitting to do something that such a person would do under those circumstances. Now you know, and everybody knows, that acts under certain circumstances—acts of a person under certain circumstances—might not be negligence under those particular circumstances which would be under other and different circumstances."

The law, as thus stated by the court, was clearly correct; but we think the defendant was entitled to a more concrete instruction as to plaintiff's contributory negligence, and under the evidence was entitled to the foregoing requested instructions. *Davis v. Chicago, R. I. & P. Ry. Co.*, 159 Fed. 10, 88 C. C. A. 488, 6 L. R. A. (N. S.) 424; *Chicago, R. I. & P. Ry. Co. v. Baldwin*, 164 Fed. 826, 90 C. C. A. 630; *Chicago, M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309; *Northern Pac. R. R. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. True it is that the plaintiff's contributory negligence was not a bar to the action; but it was the duty of the jury to consider such contributory negligence, if any, in fixing the measure of damages. The court instructed the jury in that respect as follows:

"Now, if you find that the plaintiff is entitled to recover, if he has shown by the requisite preponderance of the evidence that the defendant was negligent, and if you should find that the defendant has shown that the plaintiff himself was guilty of negligence, then what is your duty? You will first find the entire amount of damage that the plaintiff has sustained, irrespective of the negligence of the plaintiff—determine from the evidence before you the entire amount of his damages. Then, if you find that the plaintiff has been guilty of negligence, you will determine in what proportion his negligence contributed to produce that injury, and as you find that proportion, by the testimony, you will reduce the amount of his recovery accordingly."

Thus, while the court told the jury that, in determining the amount of damages, they should consider the negligence of the plaintiff, if proven, and diminish his damages in the proportion that the same contributed to the injury, the court failed to give a concrete definition of contributory negligence rendered applicable by the testimony.

Other errors are assigned, which it is unnecessary to pass upon at this time, as they probably will not arise upon another hearing.

[2] Some exceptions have been taken to the ruling of the court as to whether the before-mentioned act of Congress was applicable, or whether the case was governed by the state statute, relative to employer's liability. As we have said, the evidence clearly establishes that the train upon which plaintiff was to perform his work was, at the time, engaged in interstate commerce, and that plaintiff himself was en-

gaged in interstate commerce. Hence, the act of Congress supercedes the state statute, and was alone applicable.

For the refusal to give the foregoing requested instructions, the judgment is reversed, and a new trial granted.

UNITED STATES v. NORTHWESTERN DEVELOPMENT CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1913.)

No. 2,100.

1. APPEAL AND ERROR (§ 4*)—PROPER MODE OF REVIEW—APPEAL OR WRIT OF ERROR.

Every judgment and order in an action is of the character of the principal action, and, if such action is at law, is reviewable on writ of error and not by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 4.*]

2. APPEAL AND ERROR (§ 143*)—RIGHT OF REVIEW—INTERVENER.

Where a complaint in intervention in an action at law is dismissed by the final judgment of the court on the ground that it does not state a cause of action, the intervener may review such judgment on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 921; Dec. Dig. § 143.*]

3. LICENSES (§ 32*)—LICENSE TAX ON RAILROADS IN ALASKA—RECOVERY BY CIVIL ACTION.

Act March 3, 1899, c. 429, 30 Stat. 1336, § 460, as amended by Act June 6, 1900, c. 786, 31 Stat. 321, provides that any corporation operating a railroad in Alaska shall obtain a license and pay an annual license tax. Section 461 makes any corporation operating a railroad without obtaining such license guilty of a misdemeanor and subject to a fine equal to the license tax for the first offense, and section 474 provides the method of procedure for the enforcement of the penalty. *Held*, that such method is exclusive and that the United States cannot maintain a civil action against a railroad company to recover the amount of such license tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 66; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murane, Judge.

Action at law by the Northwestern Development Company against the Seward Peninsula Railway Company; the United States, intervener. From a judgment dismissing the petition of intervention, the United States brings error. Affirmed.

The Northwestern Development Company, plaintiff in the court below, defendant in error here, brought suit against the Seward Peninsula Railway Company to recover the sum of \$51,300.72, alleged to have been due to plaintiff from the defendant. Upon filing the complaint an attachment was issued which was levied upon all the property of the defendant within the jurisdiction of the court. Thereafter the writ of attachment was returned, and the defendant, after having been served with summons, defaulted. The United States attorney thereafter filed a petition of intervention on behalf of the United States, alleging that there was due from the defendant to the United States the sum of \$12,400 as unpaid license taxes for operating a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

railroad in said district; and that the indebtedness of the defendant to the plaintiff was inferior in time and right to the indebtedness of the defendant to the United States. The petition prayed that the amount of the license taxes should be declared a lien upon all the defendant's property, and that such lien be declared superior to any right or claim of the plaintiff; that an injunction pendente lite issue restraining the plaintiff from securing or entering any judgment in the premises until the rights of the United States in such property be fixed and determined by the court; and that the United States have judgment against the defendant for the sum of \$42,400. The plaintiff moved the court to strike from the files and dismiss the petition in intervention. This motion was granted and judgment entered in favor of the plaintiff in the sum of \$52,121.53, and the attached property of the defendant ordered sold to satisfy the judgment.

The United States has brought the record here upon writ of error.

B. S. Rodey, U. S. Atty., and N. H. Castle, Asst. U. S. Atty., both of Nome, Alaska (Elmer E. Todd, of Seattle, Wash., of counsel), for the United States.

William H. Gorham, of Seattle, Wash., for defendant in error Northwestern Development Co.

Ira D. Orton, of Seattle, Wash., for defendant in error Seward Peninsula Ry. Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The defendant in error moves to dismiss the writ of error on the ground that the complaint in intervention filed by the United States in the court below is in the nature of a bill in equity, and that the action of the trial court with respect to such complaint was an exercise of its equity powers, and was, in substance, a final decree on the equity side of the court, and that such action and final decree cannot be reviewed in this court upon writ of error.

[1] The principal action was at law, and, under a well-established rule, every judgment and order of a court is the character of the principal action.

"The character of the principal suit gives color to every judgment and decree pronounced in that case." *Nashville Ry. & Light Co. v. Bunn*, 168 Fed. 862, 94 C. C. A. 274.

"Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit." *Rouse v. Letcher*, 156 U. S. 47, 50, 15 Sup. Ct. 266, 268 (39 L. Ed. 341).

"The exercise of the power of disposition by a Circuit Court of the United States over such an intervention is the exercise of the power invoked at the institution of the main suit." *Gregory v. Vanee*, 160 U. S. 643, 16 Sup. Ct. 431, 40 L. Ed. 566.

[2] It is further objected that, the court having dismissed the complaint in intervention, the complaining intervener had no standing in court as a party to the action and was without capacity to except to the entry of judgment or to sue out a writ of error to review the judgment.

The objection cannot be sustained.

The order dismissing the complaint an intervention was a judgment upon the merits incorporated into the final judgment in the

case determining that the petition in intervention did "not state facts sufficient to constitute a cause of action in intervention or any cause of action." The trial court having made the intervening complainant a party to the final judgment upon the merits, the latter has clearly the right to seek its review by a writ of error. Furthermore, the action on the part of the plaintiff had for its purpose the appropriation of all the defendant's property, or so much of it as was necessary to satisfy plaintiff's debt. The intervening complainant claimed a superior right to have its debt satisfied out of this property. If it had such a right, the denial of the right to intervene was a practical denial of all relief to the petitioner. In such a case a writ of error will lie. *Credits Commutation Co. v. United States*, 91 Fed. 570, 573, 34 C. C. A. 12; s. c., 177 U. S. 311, 315, 20 Sup. Ct. 636, 44 L. Ed. 782.

The motion to dismiss the writ of error must therefore be denied.

[3] Whether the complaint in intervention states facts sufficient to constitute a cause of action depends upon the question whether the license tax due the United States could be recovered in a civil action. Section 460 of the Act of March 3, 1899, c. 429, as amended by the Act of June 6, 1900 (31 Stat. 321, 330, 331) provides:

"That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit, * * * railroads, one hundred dollars per mile per annum on each mile operated."

Section 461 of the act provides:

"That any person, corporation, or company doing or attempting to do business in violation of the provisions of the foregoing section, or without having first paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade, or occupation; and for the second offense, a fine equal to double the amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months: Provided, that each day business is done or attempted to be done in violation of the preceding section shall constitute a separate and distinct offense."

Section 474 of the act provides the method of procedure for the enforcement of the license tax:

"That prosecutions for violations of the provisions of this act shall be on information filed in the district court or any subdivision thereof, or before a United States commissioner, by the United States marshal, or any deputy marshal, or by the district attorney or any of his assistants. Or such prosecution may be by and through indictment by grand jury, and it shall be the duty of either of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the grand jury."

In *United States v. Jourden*, 193 Fed. 986, 113 C. C. A. 606, this court held that this procedure was exclusive, and that a civil suit would not lie for selling liquors at wholesale. The procedure against a railroad company for failure to pay its license tax is the same as against a wholesale liquor dealer, and, while the operation of a railroad differs

in many particulars from that of carrying on the business of a wholesale liquor business, there is no difference in the method provided in the statute for the enforcement of the license tax.

We must therefore hold, under the authority of *United States v. Jourden*, *supra*, that the trial court was right in dismissing the complaint in intervention.

The judgment of the court below is affirmed.

UNITED STATES v. SEWARD PENINSULA RY. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1913.)

No. 2,101.

LICENSES (§ 31*)—LICENSE TAX ON OCCUPATION—LIEN.

In the absence of a statute so providing, the United States has no lien for a license tax imposed on a corporation in a territory, nor can it maintain a suit in the nature of a creditor's bill to fasten a lien on the property of the corporation on the ground of its insolvency without first establishing its claim by a judgment at law.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 65; Dec. Dig. § 31.*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murane, Judge.

Suit in equity by the United States against the Seward Peninsula Railway Company, the Trust Company of America, the Northwestern Development Company, and the Pioneer Mining Company. Decree for defendants, and complainant appeals. Affirmed.

Action to declare a license tax imposed by statute upon the operation of a railroad a lien upon the property owned by the railroad company; that an injunction issue to restrain the defendants the Northwestern Development Company and the Seward Peninsula Railway Company from taking further action in an action at law then pending; and that a receiver be appointed to administer the affairs of the company pending the decision of the case.

B. S. Rodey, U. S. Atty., and N. H. Castle, Asst. U. S. Atty., both of Nome, Alaska (Elmer E. Todd, of Seattle, Wash., of counsel), for the United States.

Ira D. Orton, of Seattle, Wash., and F. E. Fuller, G. J. Lomen, and O. D. Cochran, all of Nome, Alaska, for appellees.

William H. Gorham, of Seattle, Wash., for appellee Northwestern Development Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The United States, immediately after filing its petition for leave to intervene in the action at law just decided, filed in the same court its bill in equity against the defendants, the Seward Peninsula Railway Company, the Trust Company of America, holding a mortgage on the property of the railway company, the Northwestern Development Company, plaintiff in the common-law ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion, and the Pioneer Mining Company, lessee of the property and engaged in operating all or some portion of the property.

The indebtedness alleged in the action at law is repeated substantially in the bill of complaint. It is alleged further that, because of the sovereign relation of the complainant to the property, there is a lien in its favor upon all of the property, plant, and equipment of the defendant for said license tax; and that such lien is prior and superior to all rights, claims, demands, and equities whatsoever or any or either of said Northwestern Development Company or other defendants. Various acts of conspiracy are charged against the defendants, said acts of conspiracy having for their alleged object the defrauding of the plaintiff out of the license tax due from the railroad company to the complainant. It is also alleged that the railroad company is insolvent; that the aggregate of its property at a fair valuation is not of sufficient amount to pay its debts; that a receiver should be appointed to take over the property of the railroad company and an injunction pendente lite issue restraining the parties in the common-law action from taking further action in that case.

Upon an order to show cause all the defendants appeared and demurred to the bill of complaint. The court sustained the demurrer on the ground that the bill of complaint did not state facts sufficient to constitute a cause of action. Thereupon the court dismissed the bill.

The case is here upon appeal.

We are not aware of any statute or rule of law giving the United States a lien for a license tax in a district or territory by reason of its sovereignty. The act of Congress of May 14, 1898, c. 299, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575), granting right of way for railroads in Alaska, makes no such provision. Section 8 of the act provides that the "right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad * * * as indicated by the map of location except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof."

There is no allegation in the bill of complaint making this provision of the statute applicable to plaintiff's right of action, and there is certainly nothing in the provision or in the general scope of the statute to make a license tax due the United States a lien upon the property of the railroad company. The charge of a conspiracy on the part of the defendants to defraud the plaintiff out of its license tax is not sufficient to give the plaintiff an equitable lien for the tax, nor does the charge that the defendant railroad company has become insolvent create such a lien.

The bill of complaint is in the nature of a creditor's bill. To the bill in that aspect there is the objection that it cannot be maintained until the United States has established its claim by the judgment of a court of competent jurisdiction. The demand as presented is a mere legal claim upon which the defendant is entitled to a jury trial. 6 Pomeroy's Equity Jurisprudence, § 882; Wait on Fraudulent Conveyances & Creditors' Bills, § 73; Smith v. Railroad Co., 99 U. S. 398,

401, 25 L. Ed. 437; *Cates v. Allen*, 149 U. S. 451, 457, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. As we have seen, in the common-law action the United States has not only not reduced its claim to a judgment, but could not do so in such an action. The procedure provided by statute being exclusive, that procedure must be followed to enforce the payment of the tax.

The decree of the court below is affirmed.

McCARTHY et al. v. CENTRAL DREDGING CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913. On Reargument on Question of Costs, April 15, 1913.)

No. 27.

1. SHIPPING (§ 76*)—CONTRACT FOR SERVICES IN RAISING SUNKEN VESSEL—SUIT FOR BREACH.

Evidence considered, in a suit to recover for services, including those of a diver, rendered in attempting to raise a sunken scow, under a contract for per diem compensation, in which a cross-libel was filed for damages because of the alleged failure of the diver to properly perform the work he undertook to do, which rendered it ineffective, and held to in part sustain the claim of each party, and to entitle libelants to recover for a part of the services, which were properly performed, and respondent to recover damages sustained through the negligent performance of other portions of the work.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 323-325, 327-331; Dec. Dig. § 76.*]

2. DAMAGES (§ 123*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where, in such case, respondent abandoned the attempt to raise the scow by pumping it out, which failed only because the diver failed to properly stop a hole in the hull, and adopted a new and more expensive method, it was not entitled to recover as damages the cost of raising the vessel by the latter method, but not to exceed the cost of employing another diver, who might have corrected the fault and rendered the work done effective.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320-325; Dec. Dig. § 123.*]

Appeal from the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suit in admiralty by Jeremiah J. McCarthy and James J. McCarthy against the Central Dredging Company, with cross-libel. Decree for libelants, and respondent appeals. Reversed.

For opinion below, see 191 Fed. 670.

The libel was brought to recover compensation, at an agreed price of \$35 per day, for the services of a diver, and \$26, the agreed value of certain material supplied in connection with the diver's work. The cross-libel was for damages alleged to have been sustained by respondent in consequence of the diver failing properly to perform the work he undertook to do.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

R. M. Calfee, of Cleveland, Ohio (Calfee & Fogg, of Cleveland, Ohio, of counsel), for appellant.

J. B. Richards, of Buffalo, N. Y. (Brown, Ely & Richards, of Buffalo, N. Y., of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] Respondent's mud scow was sunk in 22 feet of water in Buffalo creek, and libelants made a contract to furnish a diver in their employ, one Marr, and to assist him in his work. The rate agreed upon was \$35 per day. Marr and one of the McCarthys proceeded to the locality, and by direction of respondent the former descended and knocked out the dogs, which released the pockets of the scow, which had sunk fully loaded. He also aided in sweeping a cable underneath the scow, and then left for the day. An effort was made to lift the sunken craft with dredges, but it was unsuccessful. A few days afterwards McCarthy and Marr, with their pumps and diving outfit, returned to the scow. In the meantime a carpenter, who did some diving, had been down and reported that the deck on the upstream end had been crushed in. Marr was directed there as the place of damage. It was the intention of the respondent to raise the scow by pumping, an operation which made it necessary first to patch up all holes, so that, when the pump sucked out the water which had filled the air spaces, other water would not run in to take its place. Marr reported the conditions which he found, and set to work building over and patching up the broken end. A well was also built up from the other end, so that a pump could work. Marr looked and felt over the deck and sides of the scow, and reported that there were no more holes. A 6-inch pump was installed and set to work. It proved very unsatisfactory and kept continually breaking down. So it was discontinued until a few days later, when a powerful 12-inch pump was procured and set to work with the 6-inch one. No lowering of the water in the well being observed, Marr again went down, and came up, saying he had located a hole in the deck near the well. He supplied himself with a plank 44 inches by 10 inches and a strip of canvas, went down, and nailed them over the hole. Upon coming up he reported that all holes were stopped so far as he could find. The pumps were driven for some minutes more, but they made no impression on the water in the well. Respondent thereupon, believing there was some hole in the bottom which could not be got at, sent away the pumps and gave up the attempt to raise her in that way. Subsequently she was raised by jacks, and when her decks came up to the surface of the water it was discovered that the hole near the well had not been entirely covered by the plank. It further appeared that there were no holes in the scow's sides, pockets, or bottom, and that she was sound and tight, except for the deck holes.

Raising by jacks is a more expensive process than raising with a pump, and the cross-libel sought to recover the difference of cost between the two methods as the damages alleged to have been sustained from Marr's imperfect work. The first day's work, knocking out the dogs, was properly done, and the \$35 earned. The next job, building

up the broken ends, was we think sufficiently well done to earn per diem for the eight days it took, and to recover for the materials used. One of the experts disclosed an easier and perhaps a better way; but there is not enough to condemn Marr's method. Moreover, he disclosed his method, and no one objected to it. According to his method he did a workmanlike job. The evidence does not satisfy us that there was any leak through it sufficient to neutralize the big pump. All experiments with the small pump may be disregarded. It was continually breaking down and unfit for service. This brings us to the last day.

We are satisfied that Marr did not do his work, patching the hole near the well, in a workmanlike manner, and did not earn the \$35. Buffalo creek is very muddy, and it is difficult to detect anything by sight at a depth of 9 feet, where the deck lay, and there was much mud on the deck. If it were a question of failing to discover a hole under these circumstances, the situation might be different. But he did find a hole, and knew it was a large one, since he provided himself with a piece of plank 44 by 10 inches to nail over it. It seems to us that it would have taken a very little time and trouble to shovel off the mud sufficiently to allow the diver to feel around the edges, and thus determine the exact size and shape of the hole, and, these once known, it would have been an easy job to cover it completely.

Judge Hazel evidently accepted the story of Marr and McCarthy, who by request of respondent were present when the scow was raised by jacks, that the uncovered part of the hole was trifling in extent—"about 10 inches where you could get your fingers in." We do not agree with him. It is well established that there were no holes, except in the deck, and, if there were only this small leakage at the hole, the 12-inch pump would very quickly have shown results in the well. The plank was fastened diagonally across the hole. Maybe it was not put on exactly as shown in the diagram submitted by respondent; but we are sure it was not put on as it should have been, and therefore left a space sufficient to neutralize the action of the 12-inch pump.

[2] We are further of the opinion that libelants are bound to compensate the owner of the scow for the negligence of the diver in failing properly to cover the hole. This would be the amount it would have cost (with perhaps some allowance for delay) to send another diver down to go over the work. It is not claimed that libelants intentionally misled the owner, and the owner had no right, after a few minutes pumping and no further investigation, to abandon that method of raising the vessel and hold the libelant responsible for the large expense of raising the vessel in a different way. If, when the pump failed to work, the diver had been sent down again, the trouble might readily have been found and remedied. Or if another diver had been sent down, the same result might have followed. Certainly, if libelants had been told that, if any defects were found in Marr's work when the vessel came up, a claim would be made that they were liable to pay the expense of raising her in another way, they would have insisted (and we think they would have the right to insist) upon further investigation and experiment.

The decree is reversed, with costs to respondent of this appeal, and cause remanded, with instructions to decree in conformity with this opinion.

On Reargument on the Question of Costs.

PER CURIAM. The respondent was wholly defeated in the court below, it being held that negligent workmanship on the part of libelant was not proved. Respondent prevailed in this court, it being held that libelant was negligent and that respondent was entitled to counterclaim for such damages as it could prove resulted from such negligence. That being so, it would be unfair to compel it to bear the entire cost of the appeal, in which it prevailed on the main question. Respondent, however, did not succeed in convincing this court that it was entitled to the measure of damages it contended for, and the record, briefs, and arguments were longer than they would have been, had it not endeavored to sustain an unreasonably large claim for damages. To that extent its appeal was unsuccessful.

Under these circumstances, it would seem fair to give appellant one-half costs of appeal. The mandate may be recalled and amended accordingly.

BOSTON & M. R. CO. v. MILLER.

(Circuit Court of Appeals, Second Circuit. March 10, 1913.)

No. 196.

1. CARRIERS (§ 315*)—DEATH OF PASSENGER—PROXIMATE CAUSE.

Where defendant railroad company contracted to carry intestate to D., its failure to stop there in violation of its contract could not be held the proximate cause of decedent's death by being thrown from the car as the train passed D.; and hence it was essential, to sustain a recovery, that plaintiff's administrator prove an allegation of the declaration that decedent went on the platform as the train was slackening speed, and was thrown therefrom by the sudden jerking of the train as it proceeded forward when the brakes were released.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.*]

2. CARRIERS (§ 321*)—DEATH OF PASSENGER—TRIAL—INSTRUCTIONS.

Where, in an action for the death of a passenger by his being thrown from the platform by an alleged sudden jerk of the train, which failed to stop at his destination, after he had gone to the platform prepared to alight, defendant was entitled to the requested charge that, to entitle plaintiff to recover, the jury must be satisfied by the fair balance of the evidence that his intestate's injury was occasioned, as alleged in the declaration, by his being violently thrown from the car on which he was standing; and there being no concession that there was such a sudden jerk, the court erred in refusing the request on the ground that defendant practically concedes that, unless decedent was guilty of contributory negligence, defendant is liable, because it did not operate the train as it was bound to do under the decedent's transportation contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. APPEAL AND ERROR (§ 274*)—PRESENTATION OF ERROR TO TRIAL COURT.

Defendant's request being inconsistent with the alleged concession stated by the court, defendant's exception to the refusal of the request was sufficient to entitle it to a reversal for the error in refusal of the request, without further calling the court's attention to its misstatement of plaintiff's position.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631-1645; Dec. Dig. § 274.*]

In Error to the District Court of the United States for the District of Vermont; James L. Martin, Judge.

Action by Adin F. Miller, as administrator, etc., of J. Arms Miller, deceased, for wrongful death, against the Boston & Maine Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John G. Sargent, of Ludlow, Vt., and Wm. B. C. Stickney, of Rutland, Vt., for plaintiff in error.

Clarke C. Fitts, Hermon E. Eddy, and Harold E. Whitney, all of Brattleboro, Vt., for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. [1] It was the duty of the defendant under its contract with the plaintiff's intestate to stop its train at Dummerston station. The defendant failed in the performance of this duty and became responsible for all damages occasioned thereby, as for example, delay and expense. But that the deceased would be thrown from the train was not the natural and probable consequence of the failure to stop. Such failure in itself was not the proximate cause of the accident. Something more was necessary. This was recognized by the plaintiff in framing his declaration. Each count alleges the breach of contractual obligation and then goes on to charge in slightly varying language that the defendant slowed its train as if to stop at the station and then suddenly and violently started it up and so threw the plaintiff's intestate from the platform and killed him. The defense pleaded was a general denial.

It appears from the record that upon the trial evidence was offered by the plaintiff in support of his allegations to the effect that the train did slacken its speed at Dummerston station and then after the deceased had gone upon the platform, started with a jerking motion. So it appears, on the other hand, that the defendant "claimed and the defendant's evidence tended to show that there was no irregular motion or sudden jerk of the train after the brakes were released at Dummerston."

Thus upon the pleadings and the evidence the question was presented for the jury whether the defendant, in addition to breaking its contract with the plaintiff's intestate, so negligently operated its train as to lead him into a place of danger and then throw him off.

[2] The defendant requested the court to charge the jury as follows:

"That to entitle the plaintiff to recover the jury must be satisfied by a fair balance of evidence that the plaintiff's intestate's injury was occasioned as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged in the declaration by reason of the plaintiff's intestate being violently thrown from the car upon which he was standing."

This request was a proper one. The plaintiff *was* bound to establish the averments of his declaration that his intestate was injured by being thrown from the train. The trial judge apparently recognized that the request was proper but said:

"The reason why I don't comply with that request is that the defendant practically concedes that unless the deceased was guilty of contributory negligence, the defendant company is liable because they did not operate that train as they were in duty bound to do under the contract."

The defendant excepted to this refusal "and to the charge as given relating to the subject-matter of said requests."

Deciding this case upon the record—as we must—we are constrained to hold that the trial judge erred in his refusal to charge as requested. No concession appears anywhere that the defendant was negligent as charged in the declaration. The only concession shown is that the defendant did not dispute that it failed to stop the train at Dummerston according to its contract. But, as already pointed out, it also claimed that there was no sudden jerk of the train. In other words we can find nothing in the record to show that the defendant intended to abandon one of the theories upon which it had apparently defended the case, viz.: that while it had broken its contract with the deceased, such breach did not cause the injury, and to rely altogether upon the defense of contributory negligence.

[3] The remaining inquiry is whether this error calls for a reversal of the judgment. We agree with the defendant in error that, as a general rule, where a judge makes a statement in his charge as to concessions made by the parties upon the trial, any party who claims that his position has been misstated, should immediately call the matter to the attention of the judge so that a correction can be made. Thus in the present case if the request in question had not been made we might not regard as showing reversible error the statement in the first part of the charge which apparently went unchallenged, that the defendant had practically conceded its negligence. But the request made was entirely inconsistent with the concession stated by the judge in denying it and the defendant thereupon excepted not only to the denial but to that which was said in making it. It would undoubtedly have been better if the defendant had then specifically pointed out that the court misunderstood its position but in view of the request and the character of the exception, we cannot say that it was obliged to do more to protect its rights. And that the error was prejudicial is obvious because it permitted a verdict against the defendant without proof that its negligence caused the accident.

This error alone makes a reversal necessary and we are not required to examine at length the other assignments. But as a new trial will follow, it is proper to say that we have carefully examined the record and are of the opinion that the evidence presented was sufficient to warrant the submission of the questions of negligence and contributory negligence to the jury.

The judgment of the District Court is reversed.

CLEGG v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1913.)

No. 3,857.

1. CARRIERS (§ 218*)—INJURY TO LIVE STOCK—NOTICE—CONDITION OF CLAIM.

A provision in a live stock bill of lading covering an interstate shipment that it should be a condition precedent to the recovery of any damage for delay, loss, or injury to the stock that the shipper should give notice in writing of the claim therefor to some general officer or nearest station agent of the carrier, or to the agent at destination or some general agent of the delivering line, before the stock is removed from the point of shipment or place of destination and mingled with other stock, such notification to be served within one day after the delivery of the stock at destination, and that a failure to fully comply with such provisions should be a bar to the recovery of any and all such claims, was a reasonable and valid provision, and a failure to comply therewith fatal to the shipper's claim.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

2. CARRIERS (§ 218*)—INTERSTATE TRANSPORTATION—LIVE STOCK BILL OF LADING—CARRIER'S AGENT—AUTHORITY TO WAIVE PROVISIONS.

A provision of a live stock bill of lading covering an interstate shipment that no agent of the carrier had authority to waive, modify, or amend any of the provisions of the contract was valid; and hence the action of the carrier's general claim agent in merely negotiating with plaintiff for the settlement of his claim did not constitute a waiver of a provision in the bill requiring service of notice of claim on some general officer or station agent of the delivering carrier within one day after delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

3. CARRIERS (§ 32*)—TRANSPORTATION OF LIVE STOCK—INTERSTATE SHIPMENT—AGREEMENT TO EXPEDITE TRANSPORTATION.

Where an interstate carrier had not established and published a rate for special expedition in the transportation of cattle to market, an oral agreement to expedite a shipment for which the regular established rate for ordinary transportation was charged was void as a discrimination, in violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 1309), and therefore unenforceable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Thomas J. Clegg against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Martin, Charles E. Bush, and John Y. Murry, all of Tulsa, Okl., for plaintiff in error.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, Okl., for defendant in error.

Before SANBORN, Circuit Judge, and Wm. H. MUNGER and TRIEBER, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wm. H. MUNGER, District Judge. This action was brought to recover damages by reason of the delay of the defendant in delivering at the National Stockyards in the state of Illinois certain cattle shipped by the plaintiff over the railroad of defendant from the station at Drace, in the county of Noble, Okl. Plaintiff, in his petition, set forth 20 causes of action. The first cause of action alleged:

"That on the 29th day of July, 1907, at the defendant's station of Drace, in Noble county, Oklahoma Territory, the plaintiff delivered to the defendant, as a common carrier as aforesaid, and the defendant then and there received from the plaintiff, one hundred and eleven (111) head of fine fat beef cattle, of the value of fifty (\$50.00) dollars per head; and the defendant thereupon agreed that it would safely, securely, and expeditiously carry and convey from said station of Drace to the National Stockyards, in the state of Illinois, said cattle, and deliver the same to the plaintiff's agents at the said National Stockyards in time to be marketed at said last-named place on the 31st day of July, 1907. All for reasonable hire and reward to said defendant in that behalf paid and agreed to be paid by plaintiff. That the defendant by the exercise of reasonable diligence and care could have delivered said cattle to this plaintiff at the said National Stockyards on the said 31st day of July, 1907, but instead of so doing the defendant negligently delayed said shipment until the 1st day of August, 1907. That by reason of said delay in said shipment said cattle were caused to shrink. * * * That by reason of the premises plaintiff was damaged in the sum of two hundred and twenty-two and 86/100 (\$222.86) dollars."

It was stipulated by the parties that the other 19 causes of action were similar and need not be printed in the record, but that the judgment, based upon the pleadings relative to the first cause of action, should govern as to the remaining 19 causes of action.

The answer of the defendant set up that the shipment was under and by virtue of a certain printed and written contract, which it set forth, and which contained, among other things, a provision that the shipment in question was under a limited liability contract accepted by plaintiff in consideration of receiving a lower rate of freight. The eleventh clause of the contract provided:

"That as a condition precedent to a recovery for any damages for delay, loss, or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivering of such stock at destination, to the end that such claim shall be fully and fairly investigated, and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

The contract further contained the following provision:

"No agent of this company has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do."

The answer set up that the notice provided for in the contract was not given within the time required. Plaintiff, in its reply, sought to avoid these provisions of the contract, and the failure to give the no-

tice as stipulated, by pleading that one J. E. Leith, who was the general freight claim agent of the defendant, with full authority to handle, deal with, and adjust all claims against the defendant arising from the handling of live stock and freight, received notice of plaintiff's claim without objection as to the time of presentation, or the manner and form thereof, and that he negotiated with the plaintiff, both orally and in writing, on the subject of said claim; that by reason thereof the defendant waived the terms of the eleventh paragraph of said contract. A general demurrer was sustained to this reply, and judgment thereafter entered for defendant on the pleadings. Plaintiff brings the case here by writ of error.

[1, 2] We are clearly of the opinion that the eleventh provision in the contract above quoted, relative to giving notice, was a valid one, and the failure to give the notice fatal to plaintiff's right to recover. *Cau v. Texas & Pac. Ry. Co.*, 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; *Hart v. Penn. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Arthur v. Texas & Pac. Ry. Co.*, 139 Fed. 127, 71 C. C. A. 391; *St. Louis & S. F. R. Co. v. Phillips*, 17 Okl. 264, 87 Pac. 470; *Railway Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261. The provision in the contract that no agent of the company had any authority to waive, modify or amend any of the provisions of the contract was also a valid provision, and the action of Leith, the general freight claim agent of the defendant, in simply negotiating with the plaintiff, was not a waiver of that provision of the contract. *Assurance Co. v. Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761; *Ry. Co. v. Kirkham*, supra.

[3] The shipment in question was an interstate commerce shipment, and the parties could make no valid oral agreement with reference to expediting the shipment, unless regular rates had been established and published for special expediting, and no claim was made that any such rate had been established and published. In *Chicago & Alton Ry. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, it was held that to agree with a particular shipper to expedite a shipment at regular rates, where no rate has been published for the special expediting, was a discrimination, and as such a violation of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 1309), and that relief on such a contract would be denied; that the broad purpose of the Commerce Act, to compel the establishment of reasonable rates and uniform application, will not be defeated by sanctioning special contracts, giving special advantages to particular shippers; that to guarantee a particular connection and transportation by a particular train amounts to giving a preference, when not open to all, and provided for in the published tariffs, and under the Elkins Act is an illegal discrimination.

Such being the law, the judgment of the court below was right, and is affirmed.

TEMPLE v. SHAW et al.

SHAW et al. v. TEMPLE.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1913. On Petition for Rehearing, March 25, 1913.)

Nos. 2,367, 2,403.

COVENANTS (§ 28*)—WARRANTY—CONSTRUCTION—JOINT OR SEVERAL.

Where, in an action for breach of warranty of title, it was admitted that the title of the defendants came from a source other than that of certain grantors, who were nonresidents, and that defendants received one-half of the purchase price of the land, to which the title was claimed to have failed, and the nonresidents received the other half, that the fee-simple title to an undivided one-half was in the nonresidents jointly, an undivided one-fourth in defendant B., and the other one-fourth in two other grantors jointly, except as divested by adverse possession, a warranty of such grantors was severable, and not joint.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 27, 28; Dec. Dig. § 28.*]

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by T. L. L. Temple against Carey Shaw and others. A judgment was rendered in favor of defendants, and both parties bring error. Affirmed, and rehearing denied.

Geo. C. Greer and F. D. Minor, both of Beaumont, Tex., for plaintiff.

L. A. Carlton and John G. Logue, both of Houston, Tex., for defendants.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. Both writs of error are sued out in the same case and to reverse the same judgment. On consideration of the transcripts and briefs, we find no reversible error in the rulings and judgment of the trial judge.

It follows that in each of the above entitled and numbered cases the judgment is affirmed, with costs.

On Petition for Rehearing.

While the suit is one on a joint warranty of title to recover for a defective title to a limited portion of the lands conveyed, the judicial admission by the plaintiff in the court below—

"that the title of the defendants in this suit came from a source different from that of Evelyn C. Howard, Mrs. Anna R. B. Miller, and Samuel B. Foard, alleged in the plaintiff's petition in this case as nonresidents of the state of Texas, and out of the jurisdiction of this court, and the further admission of the plaintiff that the defendants in this suit received one-half of the purchase price of the 280 acres to which title is alleged by plaintiff to have failed, and the said nonresidents, Evelyn C. Howard, Anna R. B. Miller, and Samuel B. Foard, received the other one-half part of said purchase money, and the further admission that the fee-simple title to said land

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was on May 17, 1905, an undivided one-half in the said Evelyn C. Howard, Anna R. B. Miller, and Samuel B. Foard jointly, an undivided one-fourth in the defendant, Mrs. Hattie Byars, and an undivided one-fourth in Carey Shaw and Friench Simpson, jointly, except in so far as same might have been divested out of them by the adverse possession of one Henry Smith"

—warranted the trial judge to construe the contract of warranty as severable and not joint.

The petition for rehearing is denied.

NELSON v. BAY S. S. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1913.)

No. 2,343.

COLLISION (§ 85*)—STEAM VESSEL IN FOG—FAULT.

A steamer passing down from Mobile to the bay in the daytime in a fog and near the west shore came into collision with a schooner coming up in tow alongside a launch. The steamer was proceeding at half speed, about four miles an hour, and had a lookout, and kept sounding fog signals, and she did not see or hear the other vessels until they were within about 75 feet, and then at once reversed. Held insufficient to show that the steamer was at fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 166, 169; Dec. Dig. § 85.*]

Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry P. Toulmin, Judge.

Suit in admiralty by Frank Nelson, as owner of the fishing schooner Marietta, against the Bay Steamship Company, claimant of the steamer James A. Carney. From a decree in favor of respondent, dismissing the libel (192 Fed. 216), libellant appeals. Affirmed.

Foster K. Hale, Jr., and T. M. Stevens, both of Mobile, Ala., for appellant.

Palmer Pillans, of Mobile, Ala., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. From a consideration of the evidence in the transcript, we conclude that the steamboat James A. Carney was without fault in the collision with the schooner Marietta and the gasoline launch Gertrude, and therefore we concur with the District Judge in his opinion and decree.

Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

CARBORUNDUM CO. v. ELECTRIC SMELTING & ALUMINUM CO.

ELECTRIC SMELTING & ALUMINUM CO. v. CARBORUNDUM CO.

(Circuit Court of Appeals, Third Circuit. March 15, 1913.)

No. 1,494.

1. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC SMELTING PROCESS.

The Cowles patent, No. 319,795, for a process of smelting ores or metalliferous compounds by an electric current, giving it the liberal construction to which it is entitled, *held* infringed.

2. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

On an accounting for profits, and not for damages, for infringement of a process patent, where profits to the infringer are impossible, save through his infringement, he must be treated as a trustee *ex maleficio*, and can withhold none of his gains from the patentee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

3. PATENTS (§ 318*)—INFRINGEMENT—RECOVERY OF PROFITS.

On an accounting for profits, the fact that the owner of the patent has not used the thing patented is immaterial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

4. PATENTS (§ 283*)—INFRINGEMENT—LIABILITY FOR PROFITS—PROCESS PATENTS.

Where a valid process patent has been granted and applied by the patentee to the production of an article, though not on a commercial scale, but there has been no abandonment by him of the right to apply the process to the production of the article on such scale, and the article can be produced only by the use of that process, an infringer who so uses it is not relieved from liability in whole or in part by obtaining a later patent on the product.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 440-450, 452; Dec. Dig. § 283.*]

5. PATENTS (§ 318*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Taxes and insurance premiums paid by an infringer are not usually allowable to him on an accounting for profits, but are so allowable where they were paid on a plant devoted solely to the infringing business, the entire profits of which have been awarded to the patent owner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

Accounting by infringer for profits, see note to *Breckill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

Young, District Judge, dissenting in part.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Joseph Buffington, Judge.

Suit in equity by the Electric Smelting & Aluminum Company against the Carborundum Company. From the final decree, both parties appeal. Reversed.

See, also, 83 Fed. 492; 102 Fed. 618, 42 C. C. A. 537; 189 Fed. 710.

Francis C. McMillin, of Cleveland, Ohio, for plaintiff Electric Smelting & Aluminum Co.

Marshall A. Christy, of Pittsburgh, Pa., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GRAY, Circuit Judge, and BRADFORD and YOUNG, District Judges.

BRADFORD, District Judge. These appeals have been taken from a final decree of the Circuit Court of the United States for the Western District of Pennsylvania made February 21, 1911, confirming the report of a master on an accounting of profits for patent infringement ordered by that court, in this case December 7, 1900. 189 Fed. 710. The original suit for infringement was brought by the Electric Smelting and Aluminum Company, hereinafter called the complainant, against The Carborundum Company, hereinafter called the defendant, for infringement of three United States patents, No. 319,795 for "Processes for Smelting Ores by the Electric Current," No. 319,945 for "Electric Smelting Furnaces," and No. 335,058 for "Electric Furnaces and Method of Operating the Same." The two first named patents were issued to Eugene H. Cowles and Alfred H. Cowles June 9, 1885, and the last named patent to Alfred H. Cowles January 26, 1886, and all of these patents were assigned to the complainant. At the final hearing in the Circuit Court the charge of infringement of patent No. 335,058 was abandoned, and that court held that neither of the other two patents had been infringed. 83 Fed. 492. On appeal to this court the decree of the Circuit Court was in May, 1900, affirmed as to patent No. 319,945, but reversed as to patent No. 319,795; it being held by this court that claims 1, 2 and 4 of the last named patent had been infringed by the defendant, and the case was referred by the court below pursuant to the decree of this court to a master for an accounting of profits derived by the defendant from the infringement. The defendant thereafter and while the case was in the hands of the master adopted, January 1, 1901, what it claimed to be a different and non-infringing process, and in the language of its counsel, "did it almost on the instant," and claimed that it was not bound to account for any profits derived from its manufacture and sale of carborundum after December 31, 1900, as at that time it discontinued using the process held to have been infringed. This claim the complainant denies, contending that the alleged new process was a clear infringement of patent No. 319,795. The master decided in December, 1906, that the alleged new process was not an infringement of that patent, limited the accounting to December 31, 1900, and made an award of \$22,411.62 in favor of the complainant, all of which was confirmed by the court below. Before taking up the question of the sufficiency of the sum awarded to the complainant as profits during the accounting period up to and including December 31, 1900, we shall briefly consider whether the defendant was not thereafter guilty of infringement of the complainant's process for which it should have been compelled to account.

[1] We think the court below was in error in holding that the process employed by the defendant from and including January 1, 1901, to June 9, 1902, the date of the expiration of patent No. 319,795, was not an infringement of that patent, and that the complainant was not entitled to profits gained by the defendant from the use of that process during that period. This court in and by its decree in 1900 reversed

the decree of the court below and decided that claims 1, 2 and 4 of that patent were valid and had been infringed by the defendant. These claims are as follows:

"1. The method of generating heat for metallurgical operations herein described, which consists in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore to be treated by the process being brought into contact with the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass, and the operation can be performed solely by means of electrical energy.

"2. The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of carbon to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the carbon and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass.

"3. The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of a reducing agent to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass."

The claims of the patent should be liberally construed for reasons heretofore given by this court in this suit, as follows:

"On careful examination we have failed to find in any patent, publication or other matter alleged as an anticipation or as showing the prior art, a practical process for metallurgical or analogous operations involving the use of a discrete body of conductive but resistant material rendered incandescent by the passage of an electric current and mixed or otherwise in contact with the material to be treated. This is the broad, underlying idea of the process patent in suit, and is well covered by its claims. The Messrs. Cowles were the first to invent and use this process and the patent must be sustained. It is a meritorious one and its claims are entitled to considerable liberality of construction."

This court has declared in this case in relation to the core used by the defendant:

"The use of the central core of resistance material is within the process of the appellant under claims 1, 2 and 4. These claims require merely contact in contradistinction to a mixture between the resistance material and material to be treated, and it is immaterial whether, under those claims the body of resistance material assumes the form of a central core or any other shape, so long as it is in contact with the material to be treated, is discrete, granular or pulverized in its composition, is rendered incandescent through the passage of electric current through its mass or over its area, and thereby affords the heat to effect the desired end."

And further:

"If claims 1, 2 and 4 are broad enough to include actual contact of any kind between the two materials, the resistance material forming part of the electric circuit may be in contact with the material to be treated, whether in the form of a core or several cores, or of strata, or in any other form, to secure the most effective operation of the process under varying condi-

tions involving the nature of the material to be treated, amount of the charge," etc.

And in the description of the patent it is stated:

"The scope of this invention is not limited by the degree of granulation, as that may vary with the conditions of the case, and with a large furnace and a powerful current the size of the carbon particles may pass beyond what is ordinarily understood by the term 'granular' and be in fact pieces of carbon of considerable size."

The defendant in its alleged new process employed a block core consisting of a number of blocks of electric-light carbon, each thirty-two inches long and four by four inches in thickness. They are arranged in "zig-zag" fashion and the ends of each two blocks forming a V rest upon a carbon block from twelve to fourteen inches long and four by four inches in thickness, called a connector block. A large quantity of fine granular or pulverized carbon, or graphite, is disposed between the carbon blocks and around their ends on the connector blocks, and also a large quantity of granular or crushed coke is disposed at each end of the furnace to convey the electric current to and from the electrodes to the block core, that core being in electrical connection with the electrodes at each end of the furnace. Notwithstanding the difference in the arrangement of the resistance material we are satisfied on the evidence that the alleged new process practiced by the defendant since December 31, 1900, is the process, the use of which by the defendant this court held to infringe claims 1, 2 and 4 of patent No. 319,795; the mere mechanical difference in the form and arrangement of the core not serving to affect or change the nature of the process or to shield the defendant from responsibility. The defendant must, therefore, be required to account to the complainant for all profits gained by the former from its manufacture of carborundum under the alleged new process, and its sale, from and including January 1, 1901, to June 9, 1902.

The sum of \$22,411.62 awarded to the complainant by the court below as the amount of profits it was entitled to receive from the defendant on the accounting up to and including December 31, 1900, was ascertained by the master in the following manner: He found from the evidence including the testimony of expert accountants on both sides that the total net profits of the defendant during the accounting period from its carborundum operations and operations including the use of carborundum, after deduction by the defendant of certain items of expense, amounted to \$78,635.18. The items of expense above referred to were \$7,477.09 paid by the defendant for taxes, \$8,305.35 paid by the defendant for insurance, and \$10,108.12 charged on its books for depreciation, aggregating \$25,890.56. The master found that the above three items had been improperly deducted from the profits so made by the defendant during the accounting period and added their sum to the \$78,635.18, making the total net profits \$104,525.74. To the disallowance by the court below of the above three items the defendant has assigned error. After disallowing the above items claimed by the defendant the master deducted from the \$104,525.74, representing total profits, 49.55% thereof, or \$50,792.51 for "profit properly belonging to the invention of the defendant of the

product, carborundum itself," and "the profit belonging to the invention of defendant of the bonding material, that under the evidence made the great bulk of the sales of carborundum possible by the defendant company." After deducting from the total profits the above sum of \$50,792.51 the master apportioned to the complainant, but subject to further deduction, the remaining 50.45%, amounting to \$52,733.23. This apportionment was arrived at by ascertaining that the cost of the entire output of the defendant's business during the period of infringement was \$469,665, and that the cost of making carborundum, including its cleaning, crushing, grading and preparation for sale, was \$236,944.53, or 50.45% of the total cost of the defendant's output, and by assuming that "each dollar of expenditure by the defendant earned an equal amount of profit." He then proceeded to deduct from the above sum of \$52,733.23 15% thereof as representing the difference between the "whole cost of carborundum production" and the "furnace cost," being \$7,909.99, leaving a balance, subject to further deduction, of \$44,823.24 as "the part of the profits to which the use of complainant's process in the production of carborundum contributed, after consideration of the foregoing elements as entering into that profit." The master next proceeded to deduct one-half of the above sum of \$44,823.24 as the amount of the supposed contribution to the defendant's profits through its ownership of an Acheson patent and its re-issue for carborundum granted subsequent to the issuance of patent No. 319,795 in suit, and awarded to the complainant the remaining half, namely, \$22,411.62 as the total amount it was entitled to receive under the accounting ordered by the court below pursuant to the decree of this court, together with the costs of accounting. The master allowed interest on the above sum so awarded to the complainant from the confirmation of his report. And the court below in its decree of February 21, 1911, confirming the master's report ordered that the defendant recover of the complainant "the costs of the taking of proofs before the master with respect to the charge of infringement by it, subsequent to December 31, 1900, and that the defendant have execution therefor," and further ordered that "the fees and expenses of the master, to be hereafter fixed, be equally divided between the parties * * * and execution to issue therefor."

The complainant contends that in addition to such sum as may be decreed to it for profits made by the defendant from its infringement of patent No. 319,795 during the period from December 31, 1900, to June 9, 1902, the complainant is entitled to recover from the defendant the above sum of \$104,525.74 without deduction. This contention is based upon two grounds: First, that whatever profit there is or has been in the defendant's business has been derived solely through its infringement of the complainant's process, and, secondly, that, if it be assumed that the first ground is untenable, there has been such negligence on the part of the defendant in failing to keep accounts showing the amount of profit derived by it from the infringement, that the complainant is entitled to recover the total profits of the defendant's business. The first of these grounds we think is well taken. It clearly appears from the evidence that the business of the defendant is based upon and practically confined to the manufacture and sale of

carborundum in one form or another. As stated by the court below in its opinion (189 Fed. 710) as to a proper form of decree to be made under the decision of this court on final hearing (102 Fed. 618, 42 C. A. 537):

"The respondent has a large plant built and adapted for the manufacture of carborundum. The machinery and apparatus were likewise built for that special work. It is respondent's sole business, and in that article and its various applications they have built up a large trade and extensive use."

The making of wheels, cloth, paper, etc., covered in whole or in part with carborundum is wholly subsidiary or incidental to its advantageous sale. Admittedly it would be impossible for the defendant without its wrongful use of the complainant's process to carry on its carborundum operations. Not only could it earn no profits, but its business would cease to exist; for no other process for the manufacture of carborundum than that of the complainant has been disclosed.

Much has been said on the subject of the Acheson process and product patents No. 492,767 of February 28, 1893, and re-issue No. 11,473 of February 26, 1895, for "Improvements in the Production of Artificial Crystalline Carbonaceous Materials." In the description in both of these patents Acheson states:

"My invention consists in the various processes and products of said processes substantially as hereinafter more particularly set forth. * * * I do not limit myself to any of the particulars set forth, as I intend to cover and claim broadly the new crystalline carbonaceous materials whether produced by the particular processes or methods set forth, or by any substantially equivalent methods, and for all purposes to which it may be applied."

And his claims were as broad as his statement of invention. It is contended in substance by the defendant that the patent in suit, while covering the process of manufacturing carborundum, does not cover the article itself; that Acheson was the original inventor and discoverer of the article; that the defendant as his assignee has a monopoly in that article however or wherever or by whomsoever produced in this country; and therefore that the carborundum sold by the defendant in the conduct of its business, although manufactured in defiance of the patent in suit, must be treated as a contribution by the defendant towards profits realized and be considered on the accounting in question.

[2] A valid process patent, though for a process only, confers on the patentee a right to exclude all others from using such process for the attainment of its object. Others may secure the desired result, if they can, by the employment of a different process, if open to them, but they cannot without the leave or license of the patent owner use the patented process with impunity. And on an accounting for profits, and not for damages, in a case of infringement, where profits to the infringer are impossible save through his infringement, he must be treated as a trustee *ex maleficio* and can withhold none of his gains from the patentee. The fact that in such a case the patent is not for the product, but only for the process, is wholly immaterial; for the infringer will not be permitted by a court of equity to take advantage

of his own wrong, but will be held accountable as a trustee of the profits.

It is well settled that, in the case of mechanical inventions, where the infringed patent covers a mere improvement upon mechanism before known and open to the defendant to use, the complainant can recover only the excess of such profits as have been realized through the use of the improvement over what the defendant might have made by the use of such mechanism without such improvement. But it is equally well settled, that where the entire commercial value of the mechanism arises from the patented improvement the owner of the patent will be entitled to recover from the infringer the total profits derived from the manufacture, use or sale of such mechanism. *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809; *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222; *Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Maimin v. Union Special Mach. Co.*, 187 Fed. 123, 109 C. C. A. 41; *Wales v. Waterbury Mfg. Co.*, 101 Fed. 126, 41 C. C. A. 250. *Manufacturing Co. v. Cowing*, supra, is strongly analogous to the present case. There the court said:

"If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market."

The above language was quoted and practically applied by this court in *Maimin v. Union Special Mach. Co.*, supra. And this rule applies although the mechanism without such patented improvement may not be wholly worthless. Nor is it proper in an account of profits in such a case to make any allowance to the defendant on account of improvements covered by patents owned and used by the defendant but of a date subsequent to the issue of the infringed patent. *Crosby Valve Co. v. Safety Valve Co.*, supra. In that case the defendant unsuccessfully sought a division of profits on the ground, among others, that it held and owned a patent for a steam safety valve; which patent, however, was subsequent to the infringed patent for a steam safety valve invented by one Richardson and acquired by the complainant. The court said:

"It appearing that the defendant's valve derived its entire value from the use of the Richardson invention covered by the patent of 1866 and that the entire value of the defendant's valve, as a marketable article, was properly and legally attributable to that invention of Richardson, the plaintiff is entitled to recover the entire profit of the manufacture and sale of the valve."

[3] Nor is the application of the rule affected in a case where profits, and not damages, are to be accounted for by the fact that the owner of the patent has not used the mechanism containing such patented improvement. *Crosby Valve Co. v. Safety Valve Co.*, supra. The principle of the foregoing cases, involving the consideration of mechanical inventions, is not without much weight in the determina-

tion of the question of profits in the case before us. We think it applies a fortiori here, as it was only through the infringement of the complainant's process, that profits were made or indeed were possible. For, as above stated, no other process than that of the complainant is disclosed under which carborundum can be manufactured.

Further, the holder of a valid process patent has a right, not only to manufacture under the patented process, but to use and sell the product, unless that product be the subject of a valid patent monopoly in favor of another person. The defendant contends that under and by virtue of the Acheson patent it has a monopoly in the product carborundum. If it had such a monopoly it would seem to follow that, save in so far as equitable considerations might produce a different result, it would have the exclusive right to use and sell carborundum, whether wrongfully manufactured by itself, or rightfully manufactured by the complainant; and in the latter case under the process patent upheld by this court as valid and meritorious, while the complainant would have the exclusive right to manufacture carborundum under its process, it would be powerless to use or sell a pound of such manufactured product. It is not perceptible that under such circumstances the process patent would have any value. A clear case should be made to justify the court in treating the defendant's product patent as operative or enforceable against the complainant and thus practically nullify the process patent so far as it covers the manufacture of carborundum. Acheson did not discover, invent or have any idea of carborundum until long after the patent in suit was granted. On final hearing, not only his patents but much evidence touching his connection with the product, were before this court when it was said:

"We have no doubt on the evidence that carborundum can be and has been produced under the process covered by any one of the claims of the process patent in suit, although not so efficiently or profitably under the method of claim 3. So long ago as 1884 the Messrs. Cowles produced it under their process with and without the use of a prepared or pre-formed central core of resistance material. It is true they did not manufacture it for commercial purposes and, failing to appreciate its importance, though aware of its abrasive qualities, applied their process to other branches of metallurgy."

And further:

"The Messrs. Cowles were the first to invent and use this process and the patent must be sustained."

It appears from the evidence that, although carborundum was not manufactured on a commercial scale before the Acheson product patent was obtained, specimens of carborundum made by the Messrs. Cowles and The Cowles Electric Smelting and Aluminum Company, the assignor of the complainant, were placed on exhibition in different parts of the country and much notoriety was given through lectures and printed publications to the incandescent feature of the patent in suit. The Messrs. Cowles, it is true, failed to appreciate the importance of the product, as above stated, and did not know it by the name of carborundum—for it had not yet been so christened—and were not familiar with its composition, but they were aware of its highly abrasive qualities. There is no evidence that the Messrs. Cowles or their

successors in the title to the process patent in suit ever intended to abandon that process so far as the manufacture of carborundum is concerned. The fact that they exhibited from time to time and in different places specimens of what is now known as carborundum strongly indicates an intention on their part not to exclude that product from the operation of the process patent. This court has decided that the process patent in suit is valid, meritorious, and entitled to considerable liberality of construction.

[4] This case presents some unusual features. Under the process patent No. 319,795 the Messrs. Cowles and The Cowles Electric Smelting and Aluminum Company had a right, fully sustained by this court, to manufacture carborundum, and they also had a right,—certainly until the Acheson patent was obtained,—though not necessarily an exclusive right, to use and sell any carborundum made by them. In fact they did make carborundum under the patented process though not on a commercial scale. As before stated, there is no evidence that they or the complainant ever abandoned the right to apply the patented process to the manufacture of that article. The Acheson patent and its re-issue, which were obtained a number of years after the patent in suit, claimed not only carborundum but also a process for the production of that article. This court has decided that the defendant in using the process claimed by Acheson used the process of the patent in suit and was guilty of infringement. It does not appear that there was any other process under which carborundum could be produced. If the Acheson patent so far as it claims the product in contradistinction to the process should be held to confer upon the defendant the exclusive right to use and sell carborundum, then, as before indicated, the complainant's process patent was held absolutely at the mercy of the defendant; for the bare right to manufacture without a right to use or sell what is manufactured is valueless. While it has repeatedly been stated that a patent may be obtained for a process in contradistinction to its product, or for a product in contradistinction to the process under which it is created, we can recall no case in which it has been held that after a valid process patent has been granted and applied to the production of an article, though not on a commercial scale, and there has been no abandonment by the patent owner of the right to apply the process to the production of the article on such scale, and such article can be produced only under that process, another person can obtain a patent conferring upon him an exclusive right, as against the holder of the process patent, to the use and sale of the article so produced and thereby wholly destroy the value to him of the process patent so far as it may be applied to the production of such article. If such a product patent can validly be obtained it would be necessary in order to avoid gross injustice to the owner of the process patent that all profits rendered possible only through the infringement of the process patent should be awarded to the latter, and to that end that the infringer should be treated as a trustee ex maleficio of the profits. Patents are not granted to serve as instrumentalities for the perpetration of fraud or the doing of injustice. They are property, but like other property must be used legitimately. We perceive no reason why the aphorism *sic utere tuo ut alienum non laedas* is not

applicable to the use of a patent as well as of other property. To permit one who holds a subsequent product patent to infringe a prior process patent, without which process the product could not be created, and then shield himself in whole or in part from liability for his wrongdoing by setting up his product patent, would not accord with the principles usually obtaining in courts of equity. Under such circumstances the least that equity demands is that the wrongdoer be compelled to disgorge his ill-gotten gains. But it is not necessary that we should in this case express an opinion upon the validity or invalidity of the Acheson product patent or its re-issue. For whether the defendant did or did not hold a valid patent for carborundum as a product is, as has appeared, immaterial to the decision of the question of profits; for profits having been rendered possible only through the infringement of patent No. 319,795 the whole amount under the doctrine of the authorities above cited must be awarded to the complainant.

In view of the conclusions reached it is also unnecessary to decide the point made by the complainant touching the alleged failure by the defendant to keep proper accounts of profits.

With respect to the item of depreciation which the defendant contends should have been allowed to it in the computation of profits we think that both the court below and the master rightly decided that this item should not be allowed to the defendant. It amounted to \$10,108.12 and represented a transaction occurring years after the termination of the accounting period and could in no way affect the accounting.

[5] Taxes and insurance premiums cannot usually be allowed in the computation of profits derived from infringement, but this case is exceptional in that the complainant is entitled to all the profits of the defendant's business realized during the accounting period. As the counsel for the defendant in his printed brief says:

"The present case, however, is entirely different. The defendant company paid its taxes on land, buildings, and machinery which had been purchased, erected and installed for the express and only purpose of carrying on the manufacture and sale of carborundum. * * * The insurance premiums were here paid for the benefit of the infringing business, and nothing else. * * * Defendant, therefore, was obliged to pay taxes and insurance premiums on property which would not have existed if it had not been for the infringing operation."

We therefore think that the court below erred in disallowing the tax and insurance items, aggregating \$15,782.44, and that the same should have been deducted from the sum of \$104,525.24, profits realized during the infringing period up to and including December 31, 1900, and that the balance, namely, \$88,743.30 should have been found due from the defendant to the complainant, together with interest thereon from February 21, 1911, in addition to the total profits derived from the manufacture and sale of carborundum by the defendant under the alleged new process from and including January 1, 1901, to June 9, 1902, the date of the expiration of the complainant's process patent, together with interest thereon.

We think the court below further erred in decreeing that the defendant recover from the complainant the costs of taking proofs before the master with respect to the charge of infringement by the defendant subsequent to December 31, 1900, and that the complainant should pay one-half of the costs of the master theretofore incurred.

The decree of the court below must be reversed, with costs to The Electric Smelting and Aluminum Company in this court and the court below, and this case remanded to the court below with directions that The Electric Smelting and Aluminum Company recover from The Carborundum Company upon a further accounting in the court below the total profits realized by the latter from its manufacture of carborundum and its sale from and including January 1, 1901, to June 9, 1902, together with legal interest thereon from the proper date; and further, that The Electric Smelting and Aluminum Company recover from The Carborundum Company the above mentioned sum of \$88,743.30, together with legal interest thereon from February 21, 1911; and that such further proceedings be had in the court below as shall dispose of this case in accordance with the views herein expressed. A decree may be prepared and submitted.

YOUNG, District Judge, concurs in the foregoing opinion so far as it finds the Carborundum Company guilty of infringement of the process patent in suit during the period from and including January 1, 1901, to June 9, 1902, but dissents from such opinion so far as it holds that the profits realized by the Carborundum Company from its infringement of said patent, together with interest and costs, should not be apportioned between the parties in accordance with the decree of the court below, but awards the total profits, interest thereon, and costs to the Electric Smelting & Aluminum Company.

DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. et al. v. FISK RUBBER CO.

(Circuit Court of Appeals, First Circuit. March 11, 1913.)

No. 995.

1. PATENTS (§ 328*)—ANTICIPATION—APPARATUS FOR MANUFACTURING PNEUMATIC TIRES.

The Thropp patent, No. 822,561, for apparatus for manufacturing tires for automobiles, is void for anticipation by an apparatus in use in Akron, Ohio, prior to the alleged invention by the patentee.

2. PATENTS (§ 312*)—ANTICIPATION—EVIDENCE.

The rule referred to that, to sustain the defense of anticipation in a patent case, by a prior use of another, where there has been a considerable lapse of time, the testimony must be clear, unequivocal and convincing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Suit in Equity by the De Laski & Thropp Circular Woven Tire Company and others against the Fisk Rubber Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 198 Fed. 125.

John P. Bartlett and E. Clarkson Seward, of New York City (Emery & Booth, of Boston, Mass., and Wm. McK. Barber and Brown & Seward, all of New York City, on the brief), for appellants.

William K. Richardson, of Boston, Mass. (William Quinby and Marcus B. May, both of Boston, Mass., on the brief), for appellee.

Before DODGE, Circuit Judge, and ALDRICH and HALE, District Judges.

HALE, District Judge. The decree from which this appeal is taken dismissed a bill brought in the District Court by the complainants, the appellants in this court, against the defendant, the appellee, alleging infringement of claims 1 and 2 of letters patent No. 822,561, to P. D. Thropp, for apparatus for manufacturing wheel tires. The District Court held these claims to be invalid by reason of anticipation. The claims are:

"1. Tire-forming apparatus comprising an annular core or mandrel, annular pressure-rings arranged to engage the clencher edges of the tire, leaving the outer body portion of the tire exposed, and means for forcing the pressure-rings into a predetermined position with respect to the core or mandrel.

"2. Tire-forming apparatus comprising an annular core or mandrel provided with an inwardly-extending rib, pressure-rings arranged to engage the clencher edges of the tire on opposite sides of the said rib, leaving the outer body portion of the tire exposed, and means for forcing the pressure-rings against the opposite sides of the rib."

The patent states that its invention relates more particularly to apparatus holding a clencher tire in position during the vulcanizing process. The invention does not consist in the process of making a tire, and does not assert any novelty in such process. The apparatus, which forms the subject of the patent, is a mold. The three elements in the patent are: First, the annular core, or mandrel, with an inwardly-extending rib; second, the pressure-rings, which are often spoken of as the "mold-sections"; third, the bolts, or means for forcing the pressure-rings against the opposite sides of the rib. The pressure-rings, to which we have alluded as the second element of the patent, engage the clencher portion of the tire, "leaving the outer body portion of the tire exposed." These words involve the feature of novelty claimed in the patent. This feature is contrasted with the closed mold-sections surrounding the entire tire, and not merely the inner or clencher portion. The specification describes the use of the open mold:

"In operation, the several elements of the tire having been placed in position on the core and the pressure-rings forced into position by the bolts, filling-rings of wedge shape in cross-section are placed against the sides of the tire above the thick edges and of the pressure-rings, and the whole is wound with a wrapping of tape, the filling-pieces serving to impart the pres-

sure of the winding tape to the sides of the tire to hold the latter in position during the vulcanizing process."

The apparatus in question is used in curing or vulcanizing the tire. In vulcanization the tire has to be subjected to great heat. By that process the rubber of the tire is changed from a soft to a solid condition. There were two methods of vulcanizing tires: In the closed-mold method the casing of the tire was built up on a circular core, and then inclosed by a two-part metallic mold, which, when drawn into place, left a space between it and the core. This space was of the exact dimensions intended for the finished tire. The tire was then "cured" or "vulcanized" in the single cure. A sort of fin was formed on the center of the tread of the tire, where the rubber flowed outward, while still soft, between the two halves of the mold. This fin was afterwards cut or rubbed off to some extent.

The other method was the so-called "open cure." It is described as consisting in building up the tire, as in the closed-mold method, on an annular core, and then wrapping it around with fabric so as to retain it in shape on the core, instead of inclosing it in a metal mold. This fabric or tape was wound spirally around the annular sheet on the core. After vulcanizing, the imprint of the wrapper is left on the outer surface of the tire; and this is thought by many to be a desirable feature.

The method just described has sometimes presented another form of operation known as the "two-cure, wrapped-tread method." Here the so-called "carcass"—the inner portion of the tire, excluding the "tread"—was first semicured in a closed mold, before the whole tire, consisting of the carcass and tread, was built up, wrapped, and given an open cure. In either the single-cure or the two-cure process the whole tire is built up on a metal core, bound with a wrapping tape, and vulcanized by open heat; and whether or not the inner portion of the tire, called the carcass, has been semicured before the wrapped-tread vulcanizing process appears to be a matter of detail in the manufacturing process. It apparently makes no difference, so far as the final curing by the wrapped-tread method is concerned, whether the method is one-cure or two-cure. The apparatus claimed by the patentee may be used in either process.

Prior to the patent in suit, the tire-forming apparatus did not leave the outer body portion of the tire exposed. The outer mold-sections, or pressure-rings, continued around the whole outer portion of the tire, completely inclosing it. The novel feature claimed by the patentee is found, as we have said, in the words, "leaving the outer body portion of the tire exposed." Mr. Livermore, an expert called by the complainant, has clearly drawn the distinction between the two kinds of molds. He was asked with reference to certain illustrations of the closed molds, and answered:

"The apparatuses referred to in the question are all examples of closed molds in which the outer mold-sections completely inclose the outer surface of the tire, including both the tread portion and the inner portion extending from the tread portion to the clencher edges or parts that are secured in the wheel rim when the tire is in use.

"These apparatuses are therefore all substantially different from the apparatus forming the subject of the Thropp patent, an important characteristic of which is that the pressure-rings or outer mold-sections inclose only the inner part of the tire body, viz., the part extending from the tread portion to the clencher edges, leaving the outer or tread portion exposed, so far as the rigid molds are concerned, but adapted to be confined and supported by a cloth wrapping, so that the apparatus of the Thropp patent produces what is known as a 'wrapped-tread' tire, as distinguished from a molded tire, produced by the apparatus referred to in the question."

It is claimed that the "open-mold" apparatus is more effective than the other, and that thereby the manufacture is conducted with more speed and economy, and produces a better quality of the product, for the reason that it avoids pinching and buckling. An important difference between the tire formed in the closed mold and the tire formed in the open mold is that the closed-mold tire has a smoothly-finished surface, while the open-mold tire bears marks of the fabric wrapper upon its tread portion. This advantage appears to appeal to manufacturers and to the public.

An added utility was obtained in the mold of the patent by the use of so-called "fillers." The specification refers to the outer edges of the pressure-rings as being quite thick, in order to make them firm; and it then alludes to the use of wedge-shaped filling-rings placed against the sides of the tire, above the thick edges of the pressure-rings, in order to "impart the pressure of the winding tape to the sides of the tire, to hold the latter in position during the vulcanizing process." These filling-rings are used with the blunt-edged pressure-rings. Mr. Livermore has said that they are not regarded as essential, and they are not mentioned in the claims in suit; but they are referred to in the specification, as preventing any tendency on the part of the tire material to flow to the points where the strain on the tire is severe. The patent shows and describes no other construction than one in which pressure-rings, having blunt upper edges and filling-pieces, are employed. Its claim 3, not in suit, is limited to this particular construction; claims 1 and 2 may cover either the construction shown in the patent itself, or one wherein the pressure-rings are reduced to a thin upper edge. The use of "fillers" becomes of some importance when we come to the question of anticipation.

In interference proceedings Thropp, the patentee, filed a sworn statement in the Patent Office on March 12, 1907, alleging that he conceived the invention, and first made a drawing of it, about February 1, 1905; that he disclosed the invention to others about March 1, 1905; that he made a full-sized working model of the invention about July 15, 1905; and that he reduced the invention to practice about July 20, 1905. We must, then, consider the date of the inventive thought of the patentee to have been February 1, 1905.

The testimony as to the state of the art at this time is quite complete. On this issue the learned judge who heard the case in the District Court said:

"It seems unnecessary upon the question of anticipation to refer specifically to devices other than the devices proved in the Akron defense, further than to say that they thoroughly established the fact that the single-cure, wrapped-tread process was familiar in the art, and therefore that the patent

in suit cannot be construed with the breadth that would be given to it if it were for the first apparatus which embodied this method of curing tires."

The whole record establishes that it was familiar knowledge in the art at this time that a clencher-edge tire could be formed, and its distinctive shape given to the edge in a closed metallic mold; that, if it were desired to imprint a fabric mark on the tread, the tire could be wrapped in fabric and cured by a single "open cure." The inventive thought of the patent in suit was involved in giving the clencher edges the exact shape conferred by a metallic mold, and, at the same time, imprinting the fabric mark on the tread. This was done by removing the outer parts of the mold-section; so that the mold would embrace only the clencher part of the tire.

On the issue of anticipation it is contended by the defendant that from January to April, 1905, B. F. Goodrich & Co., of Akron, Ohio, used commercially for the manufacture of tires a number of "open heat molds," embodying the entire construction set forth in the claims of the patent in suit. The record shows a great volume of proofs, referred to in this case as "the Akron evidence." It appears from such proofs that some weeks previous to February, 1905, drawings for molds were made by the B. F. Goodrich Company, which we shall refer to as the Goodrich Company. The original drawings, indorsed "Open Heat Mold, 4½ Baker Special," dated December 22, 1904, and "Mold for Open Heat Fillet, 4½ Baker Special," dated December 23, 1904, were identified by a draftsman, then in the employ of the Goodrich Company, who made the drawings, and wrote the numbers and dates on the drawings, and whose initials appear on them. The drawing which we have first named shows two annular pressure-rings engaging the clencher edges only, an annular core or mandrel and means for forcing the pressure-rings against the rib of the core. The second-named drawing shows a mold for making the filling-ring which was placed outside the blunt outer edges of the pressure-rings, like the filling-rings in the patent in suit. Six other drawings for different sizes, dated December 23 and December 24, 1904, were similarly identified by the same witness.

With reference to the making of the molds from these drawings, it appears from the proofs that on December 27, 1904, the Goodrich Company sent an order to J. K. Williams, president of the Williams Foundry & Machine Company, for one fillet mold, and these molds are described in the order. The original order is produced by Mr. Williams from his files. Williams also produced a similar order, of January 6, 1905, for three "open heat clencher molds" and certain fillet molds described. He also produced the company's original invoice book, wherein these two orders were entered. The entries in the invoice book are corroborated by the secretary of the company, who made them. The clerk of the Goodrich Company produced the original bills from the Williams Company for these molds—one dated January 7, 1905, paid January 13, 1905; the other dated January 20, 1905, paid January 30, 1905. He also produced the two checks of the Goodrich Company to the Williams Company in payment of those bills; the checks being severally dated January 13, 1905, and

January 30, 1905. The delivery of the molds is shown by distinct affirmative proofs. The "Mold Record Book" of the Goodrich Company is in evidence; in it all molds are entered when delivered to the Auto Tire Department. Under date of January 6, 1905, there is a record of "open heat mold, for making Goodrich clencher tire, size 36 by 4½." There are subsequent entries in January for molds for other sizes. Another mold record is kept by the assistant foreman of the Goodrich Company, who brought into court entries, in his own writing, previous to February 1, 1905, of molds for curing 36 by 4½ "Baker tires in open heat." The original cards from which the first entries were made, dated January 6, 1905, were produced by the foreman in the tire department, and are made a part of the record.

The order book of the Goodrich Company is produced, in which there appears an order from the Baker Motor Vehicle Company for four 36 by 4½ clencher cases "cure in open heat." It is indorsed on the order that they were delivered on January 10, 1905. The entry in the invoice book of the Goodrich Company indicates that this order was filled by the delivery of four tires January 10, 1905. A corresponding bill for the four Goodrich clencher tires is also produced by the purchase agent of the Baker Company. A certain witness testified that he was sent by the Goodrich Company to Cleveland with four 36 by 4½ tires, and put them on the wheels of one of the Baker Electric Company's cars. Other similar orders are also shown from the Baker Company on the books of the Goodrich Company. In regard to the actual use of the molds, the proofs bring before us the testimony of the department manager of the tire department of the Goodrich Company, under whose directions the drawings were made, that the molds made from these drawings were actually used in curing tires; that the tires were subjected to one cure; that the tread portion was covered by fabric, not by metal. The assistant foreman of the tire department testifies that the molds in question were used in making and curing tires in a "one-cure, wrapped-tread operation." He describes in detail how the molds and fillers were put together and used. It appears, also, that on account of a change in the style of tire these open heat molds were scrapped the year after, in November, 1906, and that a large number of the regular closed molds were disposed of at the same time. No proofs are offered by complainants to disprove the testimony to which we have adverted on the subject of the Goodrich anticipation.

The proofs lead us to the conclusion that the mold of the Goodrich Company was substantially the same thing as the mold covered by the patent. They disclose an absolute, independent use of such mold by the Goodrich Company. We do not undertake to refer to all the proofs which tend to establish the defense of anticipation. These proofs leave us in no doubt that all the elements of the patentee's claims in suit are found in the Goodrich mold. The concrete, visible, contemporaneous proofs in the record are conclusive on this issue. The mold is clearly a tire-forming apparatus. It is a "cut-away" or "open" mold. It has, first, the annular core with the inwardly-extending rib; second, the pressure-rings arranged to engage the

clencher edges of the tire, leaving the outer body portion of the tire exposed; third, means for forcing the pressure-rings into a predetermined position with respect to the core. We do not regard it as very material whether the Goodrich mold was employed in connection with the two-cure process or with the one-cure process; upon all the proofs, however, we are satisfied that the tires were, in fact, made in Goodrich molds for the Baker Company by a single-cure, wrapped-tread process. The Goodrich mold shows the use of filling-rings in connection with the thick edges of the pressure-rings. These filling-rings are said by the patent to be necessary for reasons which we have pointed out. Even though the filling-rings were not mentioned in claims 1 and 2 of the patent, it is clear that they were just as necessary in connection with the pressure-rings of the patent as they were with the pressure-rings employed by the Goodrich Company. We agree with the District Court that the patent in suit shows nothing patentable over the Goodrich structure, even if the complainants' pressure-rings were so constructed as to obviate the use of fillets.

It is contended in behalf of the complainant that the evidence relating to the Goodrich anticipation proves merely an abandoned experiment. We do not think so. All the proofs upon this issue lead us to the opposite conclusion. The molds were made by the Williams Company, and paid for at the full price. They were used for four months in the manufacture of open heat tires, which were delivered and paid for in the regular course of business. There is nothing to indicate any trouble with the work of the molds or any defect in the tires. The testimony tends to the clear conclusion that the molds were given a practical, commercial use; that such use was afterwards given up, and the molds themselves destroyed, because the style had changed, and from no reason justifying the conclusion that they were not practicable. In *Brush v. Condit*, 132 U. S. 39, 44, 10 Sup. Ct. 1, 33 L. Ed. 251, it appeared that a single clamp for a carbon lamp was made by one Hayes; that the Hayes clamp was run from time to time for several months, when a clutch "constructed upon a different principle" was substituted; and no other clutch was ever made. The court held that the question was whether the lamp, with the clutch, was used "merely to gratify curiosity, or for the purpose of experiment, to see whether the feeding device was successful," or whether it was put to use in the ordinary business of the mill as a complete thing; and the court held that the case was one of "public, well-known, practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism." In *United Shoe Machinery Co. v. Greenman*, 153 Fed. 283, 288, 82 C. C. A. 581, 586, this court held that the case fell within the rule of *Brush v. Condit*. Speaking for the court, Judge Colt said:

"The evidence also shows that the clutch of the Stiles-Thompson machine was not used for purposes of experiment or to gratify curiosity, or to see whether it was successful, or whether anything more was to be done to perfect it, but that it was put to use in ordinary business as a thing which was completed, and that the reason why it was only used for a short time has no bearing on the question of its practical operativeness."

In the case at bar, we have been constrained to refer with some detail to the proofs on the question of anticipation; for we recognize that it is our duty to preserve the pecuniary value of a patent for a useful invention, unless we are clearly satisfied that the alleged anticipation is supported by concrete, visible, contemporaneous proofs. In *Emerson & Norris Co. v. Simpson Bros. Corporation*, 202 Fed. 747,750, this court had the issue of anticipation before it. In the opinion of the court, handed down January 30, 1913, Judge Putnam reviewed certain cases upon this subject, and said:

"The result of all these cases is that, with reference to questions of the class which we have here, namely, the identity of structure as between what is patented and what is alleged to have anticipated it, something more than oral testimony, even of the highest character, is required where there has been a considerable lapse of time."

The cases reviewed were: *Brooks v. Sacks*, 81 Fed. 403, 407, 26 C. C. A. 456; *Westinghouse Co. v. Stanley Co.*, 133 Fed. 167, 174, 68 C. C. A. 523; *Maxwell Land Grant Case*, 121 U. S. 325, 381, 382, 7 Sup. Ct. 1015, 30 L. Ed. 949; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; *Greenwood v. Dover*, 194 Fed. 91, 114 C. C. A. 169. In *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521, this issue was presented in a case where a patentee sought by proofs to carry back the date of his inventive thought to anticipate the defendant's anticipation. The court held it incumbent upon the patentee to show by substantial proofs, to the satisfaction of the court, that the invention had priority. In the cases to which we have referred, attention has been called to the practical safeguards which are deemed necessary against the frequently mistaken memory of witnesses as to events long passed. These cases show repeated refusals to sustain the defense of anticipation, in the absence of such testimony as book entries, illustrations, purchases, bills, orders, patterns. This is the kind of evidence which Judge Putnam refers to as "concrete, visible, contemporaneous." We have pointed out that in the case at bar such proof of anticipation exists, and seems to us clear, unequivocal, and convincing.

The decree of the District Court is affirmed; and the appellee recovers the costs of this appeal.

CHADELOID CHEMICAL CO. v. JOHNSON et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,897.

1. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

A suit in equity will not lie for a past infringement of a patent, which has ceased, and where defendant does not threaten nor intend to again infringe, which fact is known to the complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-452; Dec. Dig. § 283.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 203 F.—63

2. PATENTS (§ 280*)—SUITS FOR INFRINGEMENT—GROUNDS—BREACH OF CONTRACT BY LICENSEE.

A suit in equity for infringement of a patent cannot be maintained by a licensor against a licensee because of the breach by the latter of conditions of the contract requiring him to make stated reports, pay royalties, or submit his books to inspection, which are purely matters of contract, and not of patent law.*

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. § 280.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

Suit in equity by the Chadeloid Chemical Company against Samuel C. Johnson and Herbert T. Johnson, doing business under the copartnership name of S. C. Johnson & Son. Decree for defendants, and complainant appeals. Affirmed.

Appellant filed its bill to enjoin appellees from infringing patent No. 714888, issued December 2, 1902, to Ellis, for a paint and varnish remover. The bill alleges that appellees are licensees of appellant, and that infringement of the patent was committed by appellees selling at less than the prices fixed in the license, omitting to put the patent and license marks and notices on the cans containing the remover, failing to pay royalties, refusing to make quarterly reports of amounts of sales and prices, and excluding appellant's accountant.

Attached to the bill is a copy of the license agreement. It begins with the statement that "the licensor, in consideration of the covenants hereinafter contained and upon condition that the licensee keep this agreement, hereby grants to said licensee a license to manufacture, use, and sell under [said Ellis patent] for the term of said patent unless sooner terminated as hereinafter provided." Then follow the covenants, of the violation of which appellant complains as above stated, and a provision respecting liquidated damages. In conclusion, the license agreement provides that "in case the licensee fail, for a period of 30 days after the same are due, to deliver any statement or to pay royalty as above provided for together with interest at 6 per cent. per annum from the date when it was due, or in case the licensee willfully and persistently violate the agreement as to the minimum prices at which remover made hereunder is to be sold, or in case the licensee violate or fail to observe any of the other terms, conditions, or covenants of this agreement, the licensor may at its election, without precluding any other right or remedy to which it may be entitled hereunder, and in particular without precluding its right to liquidated damages as herein provided, terminate all further rights of the licensee hereunder by sending written notice to that effect to the last known address of the licensee; but such termination of the right of the licensee hereunder shall not in any way release the licensee from any of its covenants or obligations hereunder."

In their amended answer appellees denied that they had ever sold any of the patented paint and varnish remover for less than the prices prescribed in the license agreement; averred that they had always attached the notices called for by the license agreement, except for a short time in 1909, at the end of which they again attached the notices, and since then have never threatened and do not intend to send out any remover without the notices attached to the containers, as appellant "well knew at the time of the bringing of this suit" in February, 1910, but were silent respecting their alleged failure to pay royalties, their refusal to make quarterly reports, and their exclusion of appellant's accountant.

Appellant brought on the cause for hearing upon the bill and answer. Thereupon the trial court entered a decree dismissing the bill for want of equity. And this appeal resulted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frederick S. Duncan, of New York City, for appellant.

Irving A. Fish, of Milwaukee, Wis., and Victor Elting, of Chicago, Ill., for appellees.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

BAKER, Circuit Judge (after stating the facts as above). Since, on a hearing on bill and answer, only those averments of the bill are to be deemed proven that are not destroyed by taking the answer as true, appellees never trespassed upon appellant's reservation of price control.

[1] For appellee's invasion of appellant's manufacturing control in 1909, by omitting to put notices of the patent and of the price restriction upon the containers, an action at law for damages would lie; but, injunctive relief being aimed at the prevention of continuing or threatened trespasses, and appellees having ceased to trespass and having no intention and making no threats to resume, as appellant knew before suing, a bill in equity would not be justified. *Kenicott Co. v. Bain*, 185 Fed. 520, 107 C. C. A. 626.

[2] So the only question is whether a bill for injunction to prevent infringement of a patent can be founded on the defendant's violation of covenants, in a license agreement, to pay royalties, to make reports, and to submit his books to the complainant's accountant.

There should be no difficulty in perceiving the difference between the subject-matter of a grant and the consideration which the grantee pays or promises in money or acts. Here the subject-matter of the license is described by first bounding the whole territory of the patent monopoly and then excepting the portions thereof which appellant reserved. No reservation respecting use was made. One reservation concerns the method of manufacture—putting on the notices. Another has to do with the terms of sale—the price restriction. None other is found.

The confusion that inheres in appellant's bill and in its argument on the sufficiency thereof may be resolved by considering the remedies appellant would have for violations of either or both of the aforesaid restrictions. One remedy would be under contract law. A suit could be based on appellees' covenants to obey the making and selling restrictions. The other would be under patent law. A straight, unadorned bill for infringement could be filed, and appellees put to bringing forward the license as a defense, whereupon the question would be: Was appellees' entry upon a granted or upon a reserved portion of the patent monopoly? Or appellant, in its bill, could anticipate the defense of license, and thereupon the question would be the same. As was pointed out long ago in *Victor Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58:

"Whether or not appellee covenanted to be bound (by the price restrictions)
* * * is immaterial in this case, for the suit is not upon a promise to

keep out of the reserved portion of the monopoly, but is for the trespass in entering without permission." ¹

So, in this infringement suit, if appellant could not base its cause of action upon appellees' covenants to keep out of the reservations respecting manufacture and sale, much less could it charge infringement by reason of appellee's violation of covenants which have nothing to do with determining the question of trespass upon the domain of the patentee. Appellant, in seeking charges of infringement of the patent, has been looking at the wrong end of the license contract. Instead of scrutinizing the subject-matter of the grant—the metes and bounds of the license to manufacture, use and sell embodiments of the invention—appellant has had its eye fixed upon the considerations on account of which the license was granted. This is of no avail in an infringement suit.

Appellant advances a theory that, because the considerations are stated, "in consideration of the covenants hereinafter contained and upon condition that the licensee keep this agreement," the keeping of the covenants to pay royalties, make reports, and open the books to an accountant, is a condition precedent to the continued existence of the license. If the license came into existence, and appellant concedes it did, it continues in existence until a forfeiture is effected. *Comptograph Co. v. Burroughs Adding Mach. Co.* (C. C.) 175 Fed. 787, and cases cited. The agreement gives appellant the right to enforce a forfeiture for breaches, but contains no provision that breaches shall be self-operative as forfeitures—even if such a provision could have any legal effect to that end. But, more important, if the covenants to pay royalties, make reports, and open the books, are matters of contract law, no words of the parties can make them matters of patent law. Nor can covenants that in their nature are conditions subsequent be transmuted into conditions precedent by agreement of parties.

The decree is affirmed.

J. H. SAGER CO. v. EMIL GROSSMAN CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 140.

PATENTS (§ 328*)—INVENTION—AUTOMOBILE BUFFER.

The Sager patent, No. 885,181, for an automobile buffer, is void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Suit in equity by the J. H. Sager Company against the Emil Grossman Company. From a decree holding valid and infringed the sixth

¹ See, also, *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Consolidated Middlings Purifier v. Wolf* (C. C.) 28 Fed. 814; *Washburn Mfg. Co. v. Cincinnati Barb Wire Co.* (C. C.) 42 Fed. 675; *Perry v. Noyes* (C. C.) 96 Fed. 233; *Allen v. Consolidated Fruit Jar Co.* (C. C.) 145 Fed. 948.

and seventh claims of letters patent No. 885,181, granted April 21, 1908, to James H. Sager for improvements in automobile buffers, defendant appeals. Reversed.

Offield, Towle, Graves & Offield, of Chicago, Ill., and P. B. Adams, of New York City (James R. Offield, of Chicago, Ill., of counsel), for appellant.

C. Schuyler Davis, of Rochester, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The object of the patentee was to construct an automobile buffer which is simple, efficient and easily attached. The principal purpose of the buffer is to protect the lamps, radiator and forward portion of the car from being injured and broken from a comparatively light blow upon the buffer bar and also to prevent injury to cars and other vehicles when struck by the car to which the buffer is attached. In short, the object of the invention is to interpose a spring between the car and any object with which it might collide and thus neutralize the shock of the impact. Generally speaking, this idea was as old as mechanics and it was also old as applied to motor cars.

Prior to Sager's application, a patent was issued to R. W. Harroun December 10, 1907, for an "automobile bumper" designed to accomplish the identical purpose which Sager had in view, viz., "to protect the automobile or parts thereon from damage by collision." The Harroun bumper is mounted on the car "by means of spring connection so as to absorb any shocks caused by a collision" and acts "as a cushion when it is bumped against an object." The only difference between the Harroun device and that of the patent in suit is that in the former the spring is compressed by direct action and in the latter the interposition of a lever causes the bumper to rise slightly and compress the spring in a downward direction.

A patent was granted to Edgar Thomas July 31, 1894, for a car fender designed especially for electric and cable street railway cars. The specification says:

"When the object is struck by the movable member of the fender, the force of the blow is greatly diminished by the fact that the said member is movable and also by reason of the cushioning effect of the springs or like yielding medium, so that the liability of serious injury to a person by being struck by the fender is reduced to a minimum."

It cannot be denied that if the Thomas device were inverted and applied to the front of a motor car, it would produce the same result, including the rising of the buffer, as is produced by the Sager device.

The record contains other patents having the same general purpose in view, but it is unnecessary to refer to them as they add nothing of importance to the art as disclosed by the two patents above mentioned. We have, then, in the prior art a spring buffer bar designed to protect the lamps and front portion of the automobile and to accomplish precisely the same result as Sager. The only difference being that in Sager there is a lever arm which causes the bar to rise when it meets with an obstacle while in the Harroun structure there

is simply a spring which is pushed back on a horizontal plane, the buffer bar not rising. We also have in the prior art a street car fender which, if inverted and applied to an automobile, will accomplish the same result pointed out in the Sager patent. We cannot think that it involved invention, in view of the prior art as thus disclosed, to produce the buffer bar of the patent. The only change which differentiates the Sager buffer from the Harroun buffer is the introduction of the lever which causes the bar to rise slightly when it strikes an obstacle instead of being forced directly back. As this principle was well known in mechanics and is shown specifically in the Thomas patent, we think its application to an automobile, assuming it to be an improvement, was the work of a mechanic and not of an inventor.

The District Judge relied largely, in reaching his conclusion, upon the decision in the case of *Turner Brass Works v. Appliance Manufacturing Co.*, 203 Fed. 1001, in the Northern District of Illinois, the patent in issue being the patent to Harroun above referred to. We do not know what the record disclosed in that case. The only patent mentioned in the opinion is the patent to Simmns, which was held to be unavailable. We are not at all satisfied that the decision would have been as it was if the patents before this court had been in evidence. However this may be, the question here is—Did it involve invention to make the Sager buffer, in view of the prior art in the Illinois case, plus the Thomas street car fender patent and the Harroun patent itself? For the reasons already stated we think it did not.

The decree is reversed with costs.

HURD et al. v. JAMES GOOLD CO.

(Circuit Court of Appeals, Second Circuit. February 10, 1913.)

No. 117.

1. PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted to restrain infringement of a patent, although infringement is shown, where the right to maintain the suit depends on the decision of the Supreme Court in another suit pending before it, which was brought by the same complainant and decided adversely to him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489-495; Dec. Dig. § 301.*]

Grounds for denial of preliminary injunction in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

2. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—RIGHT TO MAINTAIN.

The fact that in one circuit a patent has been adjudged invalid, and the owner enjoined from bringing suit for its infringement, does not deprive a prior licensee thereunder, who has an exclusive license to vend in a limited territory in another circuit, where the patent has been sustained, from there maintaining a suit in equity to protect such rights as he may have; and in such suit he may of right join the owner of the legal title to the patent as a complainant, even without the latter's consent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Northern District of New York; George W. Ray, Judge.

Suit in equity by James D. Hurd, the Consolidated Rubber Tire Company, and the Rubber Tire Wheel Company against the James Goold Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

This cause comes here upon appeal from an order granting a preliminary injunction. The suit is one for infringement of the well-known Grant patent for rubber-tired wheels. The defendant is a dealer in this circuit, who buys his tires from the Goodyear Company at Akron, Ohio, and affixes them to vehicles here. The opinion of the District Judge will be found in 197 Fed. 756.

H. A. Toulmin, of Washington, D. C., for appellant.

W. E. Ward, of New York City, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. It is unnecessary to recite the history of the litigation under this patent or to set forth in detail the facts of this case. Reference may be made to the opinion in the court below and to our certification of questions to the Supreme Court in the suit of the same plaintiff against Seim and Reissig, December 7, 1911. 191 F. R. 832, 112 C. C. A. 346. The questions certified have not yet been reached for argument in the Supreme Court.

[1] It is manifest that the answers to those questions will have a controlling influence on the determination of this suit. They deal with the rights which complainant may have in the territory covered by his earlier exclusive license, and with the status of tires made in the circuits where the patent has been held invalid under the opinion in *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, in view of the fact that the Supreme Court has held this patent valid and infringed by such tires in *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. The circumstance that we certified these questions to the Supreme Court indicates that we were in doubt as to the answers to be given. While such a doubt exists as to the fundamental propositions on which complainant must rely, we think a preliminary injunction should not be granted, and for that reason have concluded to reverse the order appealed from. Inasmuch, however, as a favorable answer to those questions might induce complainant to bring the matter again before the District Court, in this cause, we think it desirable to express an opinion on some of the other questions which have been argued here.

[2] Complainant has joined with himself two corporations who hold the legal title to the patent. These corporations have been enjoined in the Sixth circuit from maintaining suits for infringement. These injunctions, of course, bind the corporations against which they were issued; but we cannot see how they can operate to interfere with Hurd's legal rights (assuming that the answers to the certified questions indicate that he has such rights) or with the

course which equity practice indicates he should follow in vindication of those rights. That practice authorizes him, as holder of an exclusive territorial license, to present his licensors as co-complainants, even against their will and in spite of their protests. Whether they may say, in response to his request, "we will not appear" because we are dissatisfied with you, or because a court has told us we must not, is a matter of indifference to Hurd. Despite these objections, he has brought them in as co-complainants. Whether his doing so exposes them to punishment for contempt is a matter to be decided when it comes up; we have a definite opinion about that, but it is not for us now to express it. We think it strains the doctrine of comity beyond the breaking point to contend that, in order to uphold the hands of the enjoining court, we should deprive Hurd, over whom that court never had any jurisdiction, of the regular and orderly equitable procedure to maintain his legal rights, assuming that the deliverance of the Supreme Court on the certified question may indicate that he has legal rights, which he can maintain against users of infringing tires in his territory.

We fully concur with Judge Ray in the finding that the defense of laches is not made out by the proofs.

On the question of infringement, we think the District Judge did not quite correctly appreciate what was held by this court and by the Supreme Court as to the differences between the Grant patent and the prior art. No court has held that in the Grant structure the tire must be held so loosely that it will rise from the metal channel to any appreciable extent, so that "dust, dirt, and mud" would enter the channel with the natural results of such action. All that is held is that it must yield sufficiently when it strikes a lateral obstruction to prevent being broken and injured by the blow. It is distinguished in this regard from tires of the prior art which were held in the channel by cement, and which were destroyed after a short period of use because they would not yield. There is a model of the alleged infringing tire in this case, the accuracy of which, as we understand it, is conceded. It is covered absolutely by the language of both claims; to us it looks like a Chinese copy of the structure we found to infringe in an earlier case. That Goold *thinks* he has drawn his wires so tight that there will not be any tilting is of no moment. There is concededly a layer of elastic rubber under the two wires, and, however tightly they may be drawn, the degree of tilting will necessarily depend on the direction and force of the blow. On the record now before us, we are satisfied that infringement is shown.

For the reason, however, expressed at the outset of this opinion, we think that this order should be reversed, without prejudice to any other application for relief, should complainant be advised to make one, after the decision of the Supreme Court shall have been announced, with costs of this appeal to appellant.

TURNER BRASS WORKS et al. v. APPLIANCE MFG. CO.

(Circuit Court, N. D. Illinois, E. D. April 5, 1909.)

No. 28,979.

1. PATENTS (§ 73*)—ANTICIPATION—PRIOR PATENT.

On an issue of anticipation by a prior patent, taken in connection with the prior art, where the patents are not for the same thing, so that no question arises of priority of invention as between the two patentees, the prior patent as an anticipation dates only from the time of its issuance, when its disclosures were given to the public.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. § 73.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMOBILE BUMPER.

The Harroun patent, No. 873,544, for an automobile bumper, was not anticipated, and, although of narrow scope, discloses novelty and invention; also *held* infringed.

In Equity. Suit by the Turner Brass Works and Ray W. Harroun against the Appliance Manufacturing Company. On final hearing. Decree for complainants.

See, also, 164 Fed. 195.

George T. May, Jr., of Chicago, Ill. (Frederick W. Moore, of Chicago, Ill., of counsel), for complainants.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill. (William B. Davies, of Chicago, Ill., of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainants seek to restrain defendant from infringement of claims 1, 2, 3, 5, 6, and 7 of patent No. 873,544, granted to said Harroun December 10, 1907, on application filed March 29, 1906, for an automobile bumper. The device, as stated by complainant at page 7 of its brief, is duly covered by claims 1, 2, and 3, which read as follows, viz.:

"1. In an automobile bumper, a rail extending across the front of an automobile attached to the frame by horizontal arms running through eyebolts at the frame ends and supported by brackets at the rear ends, backed up by springs surrounding said horizontal arms.

"2. In an automobile bumper or fender, the combination of a rail, two supporting rods connected at their ends to said rail, guides adapted to be secured to opposite sides of an automobile wherein said rods are slidably supported between their ends, cushioning means for said rail, and guide brackets adapted to be secured to opposite sides of an automobile, in which said rods are slidably supported near their rear extremities.

"3. In an automobile bumper or fender, the combination of a rail, two supporting rods connected to said rail and extending rearward therefrom, guides, adapted to be secured to opposite sides of an automobile, wherein said rods are respectively slidably supported between their ends, other guides, adapted to be secured to opposite sides of an automobile, wherein said rods are respectively slidably supported near their rear ends, and coiled springs, surrounding said rods, each with one end arranged for movement with the rod and its other end abutting against a guide."

The defense concedes infringement, and rests solely on want of patentable novelty. It is apparent, from an inspection of the bumper, that the elements are all old. The patentee has sought to adapt what has been heretofore applied to many other arts to the automobile art.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In doing this he claims to have exercised invention. This last-named field for mechanical and inventive skill has developed very rapidly and vastly, so that the slightest advances are readily availed of.

Among the obvious improvements required has been some satisfactory protection against injury to lamps, radiators, and other comparatively frail appliances located at the forward end of the car. To meet that demand, several devices have been provided, notably that of the patent to F. R. Simms, No. 814,171, granted March 6, 1906, on application filed September 26, 1905, for "buffer for use on motor vehicles." This patent is cited in anticipation of claims 1, 2, and 3 of the patent in suit, and more nearly approaches these claims than does any other adduced in the record. None of the other automobile patents cited, nor all of them combined, are deemed to have anticipated the patent in suit; nor do the citation from analogous arts disclose it. They are all practically arranged with a view to protecting persons found in the path of the car, rather than to protect the lamps or other forward appliances, and disclose no thought of the accomplishment of the ends sought for by Harroun.

[1] As to the Simms patent, complainant insists that inasmuch as it was granted after the invention of the Harroun patent, although upon an application filed prior to the date of complainant's invention, yet, under the language of the answer and the rule laid down in *Bates v. Coe*, 98 U. S. 33, 25 L. Ed. 68, *American Roll Paper Co. v. Weston* (C. C.) 45 Fed. 689, *Howes v. McNeal* (C. C.) 17 Blatchf. 396, 4 Fed. 151, *Anderson v. Collins*, 122 Fed. 458, 58 C. C. A. 669, and *Diamond Drill & Machine Co. v. Kelly Bros.* (C. C.) 120 Fed. 286, it is available as a part of the prior art only from the date of its grant. The contention is deemed to be well taken. The pleadings do not raise the defense that the patentee was not the original inventor, as was the case in *Barnes Automatic Sprinkler Co. v. Walworth Mfg. Co. et al.*, 60 Fed. 605, 9 C. C. A. 154. The distinction is clearly pointed out by Judge Woods in the case last cited, and by Judge Archbald in *Diamond Drill & Machine Co. v. Kelly*, *supra*.

[2] While many of the elements of the patent in suit are shown in the prior art cited, there is, as above stated, no one of them which meets the combinations shown in the several claims in suit. Whether patentable novelty is shown, independent of the prior art, is also questioned by defendant. Bearing in mind what has been said with reference to the automobile art, and the importance of improvements therein, it requires no great acumen to discover some elements of invention in the Harroun bumper. The economy hit upon in substituting the eyebolt as a guide in place of the ordinary bolt employed in securing the forward end of the spring to the car frame, the location and arrangement of the rail support, the double guide for the sliding rods which carries the rail, together with the method of their adjustment, the resilient cushioning means, and the devices for making rigid and latterly movable the rail, all form a combination which is new.

Taking into consideration the disclosures of the analogous arts, the invention must be held to be narrow, but sufficiently broad, however, to entitle complainant, in the case made, to the injunctive relief against defendant which he prays for; and it is ordered accordingly.

PALMER et al. v. SUPERIOR MFG. CO.

(District Court, N. D. New York. March 17, 1913.)

1. PATENTS (§ 328*)—INFRINGEMENT—APPARATUS FOR INVERTING TUBULAR FABRICS.

The Palmer patent, No. 878,995, for an apparatus for inverting tubular fabrics, *held* not so clearly infringed by a machine used by defendant as to justify the granting of a preliminary injunction.

2. WORDS AND PHRASES—"AGAINST."

"Against," as applied to motion, means in an opposite direction to, so as to meet.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 258, 259.]

In Equity. Suit by William B. Palmer and Jesse V. Palmer against the Superior Manufacturing Company. On motion for preliminary injunction. Motion denied.

Edmonds & Peck, of New York City, for complainants.

Walter E. Ward, of Albany, N. Y., for defendant.

RAY, District Judge. Complainants allege infringement by defendant of claim 1 of the patent to Wm. B. Palmer, No. 878,995, granted February 11, 1908, and which was the subject of consideration by this court in *Palmer v. Jordan Machine Co.* (C. C.) 186 Fed. 496, and on appeal by the Circuit Court of Appeals (Second Circuit) in *Palmer v. Jordan Mach. Co.*, 192 Fed. 42, 112 C. C. A. 454, and which court on said appeal reversed the holding below as to claim 1 of the Palmer patent and held it valid and infringed. In that suit the validity of the Palmer patent was conceded. The defendant here has been using one of the infringing machines, which was made by said Jordan Machine Company. Since the decision of that case the defendant has made certain changes in such machine which it now claims avoids infringement, in view of the patent to C. W. Gove, No. 769,648, of September 6, 1904. The defendant also contests the validity of the Palmer patent in view of the prior art, but I am not impressed with such defense. I think the question is one of infringement, having in view the decision of the Circuit Court of Appeals in giving construction to the Palmer patent, its consideration of the Gove patent, and the changes made in the construction of defendant's machine. In view of the fact that the defendant here claims that it has a noninfringing machine, considering the fact it has left out the "yielding means for forcing said feed rolls against said tube" found and claimed in the Palmer patent, and insists it has no means whatever for so forcing the feed rolls against the tube, in the sense that the feed rolls are pushed or moved against the tube (which receives the fabric), and as it has placed spring-pressed anti-friction rolls in the said tube, which was done by Gove in a way, it is proper to see what the Circuit Court of Appeals said as to equivalents and inquire whether the defendant now uses the combination of claim 1 of the patent in suit with an allowable equivalent for said "yielding means

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for forcing said feed rolls against said tube." The Circuit Court of Appeals, speaking of the Palmer patent, said:

"What the inventor was seeking to protect was his method of advancing the fabric (on the receiving tube) by rolls which pressed against it (the fabric) by yielding pressure, whether that pressure was produced inside or outside of the rolls (feed rolls) by a spring or its equivalent."

I cannot doubt that the defendant now advances the fabric on the tube by feed rolls which press against the fabric and with the fabric interposed against these anti-friction, or idle rollers, located in the tube itself, and which yield on pressure because of the springs connected therewith. This is not the exact method of Palmer's patent as primarily he had his yielding means in or directly connected with his feed rolls, or rather attached to the uprights carrying said feed rolls. The defendant, Jordan Machine Company, in the case referred to, transferred the yielding means to the feed rolls themselves, and this was held an infringement. Palmer had no idle or anti-friction rollers in the tube. Jordan did, but he had no springs there. There was, of course, co-action between the feed rolls and the idle rollers, or anti-friction rollers, and both acted on the fabric to carry it forward on the tube. In defendant's machine as now constructed the feed rollers are solid and unyielding, but the coacting idle rollers are yielding, so that this part of the tube and consequently the fabric is pressed against the feed rolls. That is, instead of yielding means pressing the fabric against the tube and carrying the fabric forward, yielding means press the fabric on the tube against the feed rollers as such fabric is advanced on the tube by such rollers. Gove is the only machine in the prior art. The Circuit Court of Appeals held that Palmer is entitled to a fair range of equivalents. The defendant has done more than to substitute in his machine complained of, the "spreader" of Gove. In Gove that spreader was no part, properly speaking, of the tube. The "spreader" was held between the feed rolls attached to uprights which would swing until fastened in position, and the end of the fabric was opened and extended on this spreader which contained the idle rollers moved outwardly by a spring or springs so as to coact with the feed rollers and move forward the fabric between them. The feed rollers proper were unyieldingly set in the swinging frame and could not approach each other, or the tube. But the defendant has no spreader like Gove's held between the feed rolls and indirectly attached to uprights, and it has dispensed with the swinging frame of Gove which carried the feed rolls as well as the "spreader." In defendant's structure, one section of the tube, in no way connected with the frame or uprights carrying the feed rolls, has the idle rollers referred to, and but for Gove this change of location of the springs and the consequent change of operation would not avoid infringement. It is substantially the same construction and combination of elements, operating in substantially the same way to produce the same result.

I do not now see that any further testimony can add to or subtract from the case as now presented on this motion for an injunction pendente lite. In the Palmer patent as shown and described the two up-

rights carrying the feed rolls are drawn towards each other and against the fabric on the supporting tube by means of a coil spring extending from the one upright to the other. Jordan dispensed with this coil spring entirely, and substituted a spring within each of the feed rolls themselves, which with leather strips could and did allow the surface of the feed rolls to yield and approach each other, and consequently to approach and engage the opposite sides of the supporting tube. This was held to constitute "yielding means for forcing said feed rolls against said tube." That is, the springs within the feed rolls supported on rigid uprights allowed the surface of such feed rolls to approach or recede from the supporting tube as the fabric was pushed or pulled forward on such tube. The defendant has now substituted solid feed rolls without springs and without a flexible surface, so that there is no yielding means in either uprights, feed rolls, or supporting tube, but for the fact that he has so-called "idle rollers" or "anti-friction" rollers as the complaint calls them, located in the supporting tube itself (the tube which carries and receives the fabric) and these now have springs which allow such "idle rollers" to move outwardly and inwardly on pressure. The result is that while the feed rolls when in operation are not moved towards or away from the fabric on the tube, or the tube, the fabric on the tube, the idle rollers being within, is pressed outwardly into contract with the feed rolls and against them, and, if an uneven surface is presented, the idle rollers yield and recede into the tube. Prior to the change the feed rolls yielded while now these idle rollers yield. The effect is substantially the same. Palmer has no idle rollers or anti-friction rollers. The defendant says he has no "yielding means for forcing said feed rolls against said tube." Literally this is true. As now constructed, while the feed rolls are adapted to engage the opposite sides of the tube, the feed rolls are not forced against the tube at all in the sense of being *moved* towards and against. "Against" means, as applied to motion, "in an opposite direction to, so as to meet; (a) toward; (b) upon; as to strike against a rock; the rain beats against the window; to ride against the wind." The idle rollers in the tube and inside the fabric thereon are by means of said springs forced outwardly against the feed rolls. The defendant says that he had a perfect right to use these idle rollers in or on his tube, inasmuch as he is only using a tube well known in the prior art and shown in the Gove patent, No. 769,648, of September, 1904, and there described, the spreader being but a section of tube in point of fact, and to which attention has been called. This is true to an extent, but defendant has a different structure as a whole from that of the Gove patent.

Defendant contends that some of the defendant's machines have these springs connected with the idle rollers, and that some do not, and that there is no special advantage in the springs connected with the "idle rollers" or "anti-friction rollers" located in the tube. If so, the springs can be abandoned and without them there is no infringement as "yielding means for forcing said feed rolls against said tube" would certainly be absent.

If certain that this matter could be justly decided on the record made on this motion—that is, that the facts cannot be changed or further light thrown on the case—I should be inclined to grant this motion in the interest of a speedy decision by the Circuit Court of Appeals on the merits. In view of the “spreader” of Gove with its rollers controlled by springs coacting with the fixed feed rolls to move the fabric forward, a doubt is created whether or not the defendant’s machine now infringes. This doubt is more than a shadow; it has merit. Under the new rules which go into effect February 1, 1913, a speedy trial can be had and the evidence taken in open court at Syracuse. Complainants will suffer little by delay as the defendant uses only one machine alleged to infringe. On the other hand, should the injunction be improperly granted, a substantial wrong would be done defendant.

Denied.

SCHMERTZ WIRE GLASS CO. et al. v. WESTERN GLASS CO.

(District Court, N. D. Illinois, E. D. March 17, 1913.)

No. 28,615.

1. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

Where there were devices or processes in the prior art open to the use of an infringer, the measure of profits recoverable by the patentee for the infringement is the difference between the profits made by the use of the patented device or process and that which would have been realized or lost on any other open to defendant’s use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§§ 312, 328*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Evidence *held* sufficient to entitle a complainant to recover substantial profits from an infringer of the Schmertz patent, No. 12,443 (original No. 791,216), for an apparatus and process for manufacturing wire glass.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. §§ 312, 328.*]

3. PATENTS (§ 318*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Defendant, which was a large manufacturer, was using a machine and process in the manufacture of wire glass which infringed complainants’ patent, and a suit was brought for the infringement, in which a preliminary injunction was denied. Defendant was complainants’ only competitor in the business, and, in order to control the market, complainants entered into a contract by which they took and paid for all of defendant’s product during the term of one year pending the suit; the contract providing that it should be without prejudice to the legal claims of either party. Complainants were successful in the suit. *Held*, that they could not recover profits made by defendant during the contract year when it was in effect a licensee, but that the reservation of rights in the contract must be construed to apply only to such rights as they stood when the contract was made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

In Equity. Suit by the Schmertz Wire Glass Company and the Mississippi Wire Glass Company against the Western Glass Company.

On exceptions to master's report on accounting. Exceptions sustained in part.

Edward S. Rogers, of Chicago, Ill. (Arthur J. Baldwin and Drury W. Cooper, both of New York City, of counsel), for complainants.

Offield, Towle, Graves & Offield, of Chicago, Ill. (Chas. K. Offield and Albert H. Graves, both of Chicago, Ill., of counsel), for defendant.

SANBORN, District Judge. On exceptions to master's report on accounting finding nominal damages.

Defendant was decided to be an infringer in this cause ([C. C.] 178 Fed. 977; 185 Fed. 788, 109 C. C. A. 1), and an accounting for damages and profits awarded. Defendant was held to be using substantially the machine, and substantially the process, secured to the patentee in reissue No. 12,443. Upon the issuing of the injunction, and on February 10, 1910, defendant changed its method from the Schmertz process to the so-called European three-step process, which was held not to infringe in (C. C.) 188 Fed. 436, and on appeal, 195 Fed. 760, 115 C. C. A. 459. The master reported that, while defendant had realized profits, they were not proved with sufficient clearness, and that, since the noninfringing process had been open for defendant to use during the whole period of infringement, it was not liable for profits. He also reported that no damages could lawfully be imposed by reason of the infringement. After the master reported, the most important decision on patent accountings since *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, was made by the Supreme Court, that of *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222. The case involved the infringement of an electric converter. A combination of several old elements with two new ones was made by the patentee which gave an exceedingly beneficial result. After a period of infringement defendant changed its converter by leaving out one element of such combination, and thus escaped further infringement. In an accounting the master decided that defendant had made \$134,000 in profits by the infringement, but that these profits were merged in the general business, so that it was impossible to separate them, because no separate account was kept, and the master recommended a decree for the whole \$134,000. On appeal to the Court of Appeals of the Eighth Circuit (173 Fed. 361, 97 C. C. A. 621) it was held that the master erred in finding that the whole commercial value of the infringing converters was due to the patented combination, but was partly the result of improvements made by defendant-appellee; that, as complainant-appellant had failed to separate the profits made by the patent from those made by the defendant's addition, there was no evidence upon which a decree for profits could go; and that the rule as to wrongful confusion of goods did not apply.

A writ of certiorari was granted from the Supreme Court and the decree reversed. It will be observed that there was nothing in the record to suggest any standard of comparison, since there was no converter in the prior art adapted to obtain a result like that secured by the patent device; hence the Supreme Court, in stating the general rules governing the case, was not called upon either to cite or distinguish cases in which it had previously used a standard of comparison,

like *McCreary v. Pennsylvania Canal Co.*, 141 U. S. 467, 12 Sup. Ct. 40, 35 L. Ed. 817.

With this state of facts before it the Supreme Court laid down the following rule:

"Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits. Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. *Hurlbut v. Schillinger*, 130 U. S. 456, 472 [9 Sup. Ct. 584, 32 L. Ed. 1011]. Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits 'unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.' *Elizabeth v. Pavement Co.*, 97 U. S. 126 [24 L. Ed. 1000]. But there are many cases in which the plaintiff's patent is only a part of the machine, and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such a case, if plaintiff's patent only created a part of the profits, he is entitled to recover that part of the net gains. He must, therefore, 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' *Garretson v. Clark*, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371]."

The court further observed that the statute expressly makes the infringer liable for all profits, but the rule as to the burden of proof has been so applied that this statutory right has often been nullified by infringers who had ingenuity enough to smother the patent with improvements made by themselves or third persons. "In such cases the greater the wrong the greater the immunity; the greater the number of improvements the greater the difficulty of separating the profits." The principle that the burden of showing profits is upon the complainant should not be pressed so far as to override others equally important in the administration of justice.

It was further held, however, that, where defendant shows that it uses noninfringing and valuable improvements in connection with its infringement, the burden of apportionment is on the complainant. This may be difficult to meet, but that is no reason why complainant should be denied its rights. It may be impossible to reach a conclusion mathematically exact, but expert or other evidence may be received on this question, in the same manner as in questions relating to state and interstate rates in cases brought to determine whether the former are confiscatory. When complainant shows that witnesses who have kept defendant's books, purchased material, etc., are unable to show what profits have been made, it has sufficiently met the burden cast upon it.

Finally, it was decided that the rule relating to trustees *ex maleficio* applies in patent cases, so that where complainant has made all possible proof of profits, and defendant has made clear proof impossible by inextricably mingling and confusing the parts composing the fund constituting such profits, the whole fund belongs to complainant.

While the full effect of this important case can only be told after the federal courts shall have applied it to the complicated and difficult circumstances appearing in patent accountings, yet it is evident that it marks an epoch in that most unsatisfactory chapter of the patent law. Undoubtedly the generally accepted construction of the Garretson Case has been much modified. As the Supreme Court said in another part of its opinion:

"It may be argued that in its last analysis this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases."

[1] It is not, however, to be inferred that it was intended to change the established rule as to the standard of comparison, since, as has been already stated, the case presented no such question. The patentee is entitled only to the actual advance he has made over the prior art, and the true measure of his recovery is the difference between the profits on the patented device or process and what would have been realized or lost on any other device or process open to defendant's use. *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 194 Fed. 108, 114 C. C. A. 186, in the Circuit Court of Appeals of this circuit.

It was decided by the master that the European method was open to defendant at the beginning of the infringement, and it is urged with much force by its counsel that this conclusion is correct. It is said that the only thing new which Schmertz discovered was his method of wire feed and his combination—what our court of appeals well described as a single tool for the making of wire glass. It is further argued that the record shows that defendant made wire glass experimentally by the European method on one occasion before the infringement began, and on two occasions during its continuance, and that after the injunction was granted "it changed its practice in one day to the European three-step process." Further, that this process can be successfully carried out by the use of a single roll, and without the Schmertz wire carrier or any other. It is therefore confidently asserted that, since this practice antedated Schmertz, was unpatented, and open to use during the whole period of infringement, no profits or damages can be recovered, because Schmertz really never made any advance at all over the prior art. But the argument not only comes too late, but proves too much; it proves, if of any force whatever, that the Court of Appeals was wrong in its conclusion that the Schmertz reissue was valid. That decision was that the European three-step practice did not anticipate. Such is the binding conclusion between these parties. If so, it is most clear that defendant's return to that practice does not close or even narrow the gap between it and the Schmertz discovery. Defendant's real argument is that the patent in suit is invalid.

[2] The master also decided that no clear or sufficient evidence of the amount of profits appears from the evidence, and that nominal damages only could be awarded. On this point the question is whether evidence sufficient to fairly satisfy the rule of *Westinghouse Co. v. Wagner Co.* is to be found in this record. I have carefully read the whole of the evidence. Mr. Ryon, defendant's manager, re-

peatedly testified that every item and element bearing on the subject of cost had been produced and put in evidence. The accounts were thoroughly and carefully kept, but there was no separation of cost between wire glass and other kinds produced. Estimates, however, and other corroborative proofs, appear, from which it is not difficult to get a pretty clear notion of the cost of producing the different products. The amount received for the sale of both sorts was carefully kept. It is not necessary to apply the rule of confusion of goods, since the amounts of profits on the wire glass can be ascertained with reasonable and sufficient certainty.

[3] Complainants also claim either as profits or damages the sum of \$36,000 paid by them to defendant under a contract covering the year 1908. It appears that defendant's infringement began early in 1907, and this suit for an injunction was promptly brought, but a motion for temporary restraint denied. At the same time complainants had an infringement suit pending against the Pittsburg Plate Glass Company in which a temporary injunction had been granted. In November, 1907, a short term probatory was fixed in the Pittsburg case, so that it was inconvenient for complainants to follow up both cases at the same time. Defendant was the only competitor. In order, therefore, to protect the market, and enable complainants to prosecute vigorously the Pittsburg case, they entered into a contract with defendant for the year 1908 providing in substance as follows: This contract was between defendant, the Mississippi Wire Glass Company, and Tyler & Hippach, a jobbing corporation in Chicago buying and selling glass, and is dated January 3, 1908. Defendant agreed not to make or sell any wire glass except under the contract during the year 1908. It was to have the right to make and sell to the Mississippi Wire Glass Company a certain amount of quarter inch rough wire glass at eight cents per foot, and also sold it all merchantable wire glass then on hand at certain prices; but, if the Mississippi Company should reject any, Tyler & Hippach were to take it at the same price. The Mississippi Company agreed to pay defendant \$3,000 a month, or \$36,000 in all; and it was provided that the contract was made without prejudice to any of the alleged legal claims of the respective parties. This contract was completely carried out by all its parties.

It is evident that the agreement referred to radically changed the relations of the parties for the year 1908. For that period defendant, instead of being a trespasser on complainants' property, was a tenant or licensee. Complainants' remedies were in personam and ex contractu only. Had defendant used the patented machine and process only in that year no infringement suit could have been maintained. It had the option and right to use what the patent secured, and was paid \$36,000 for ceasing infringement and alleged price cutting, and in order that complainants might have a free hand to prosecute the Pittsburg case. Now, after being thus enabled to maintain the monopoly, and give all their energies to a most important and critical litigation, after receiving these valuable benefits, it is argued that complainants may not only retain them but get back the

money paid for them also. This result, it is claimed, follows from the contract reservation referred to.

The stipulated reservation ought not to be given so unjust an effect if it can be interpreted to mean anything else. It means, I think, that the claims of all parties as to alleged infringement before the contract period commenced, or after it should end, were not to be affected. Surely it ought not to be so construed as to permit one party to repudiate the contract itself, and treat it as if it never had any existence. Any and all use of the patented machine and process, any and all sales of the product, were licensed and encouraged by the patent owner. Such owner received valuable benefits by reason of the contract relation, and cannot now be permitted to repudiate the consequences of that relation.

It follows, further, from the contract relation that defendant cannot be charged with any price cutting in 1908, alleged to have broken the market, and compelled complainants to reduce their schedule rates on polished wire glass. They claim \$80,000 damages on account of reductions they were compelled to make by reason of alleged price cutting by defendant in 1908. On this subject the findings and conclusions of the master are approved.

The only question remaining is the amount of profits to be repaid by defendant for its infringement during the two periods before and after the contract term; that is, for 1907, and January 1, 1909, to February 10, 1910.

Taking the figures from defendant's account books, and allowing for profits on nonwire glass for 1907 and January 1, 1909, to February 10, 1910, amounting to \$16,789.57, the account should, I think, be stated as follows:

| | | |
|--|-------------|-------------|
| Increase of assets in 1907, less \$2,500 paid in capital... | \$14,139.74 | |
| Increase January 1, 1909, to September 20, 1909, including \$18,000 dividends paid..... | 24,681.38 | |
| Increase September 20, 1909, to February 10, 1910..... | 20,520.92 | |
| Amount expended for patent litigation..... | 6,630.62 | \$65,792.66 |
| | 65,792.66 | |
| Deduct profits on non-wire glass during same periods.. | 16,789.57 | 49,003.09 |
| Interest at 5 per cent. on net profits of \$49,003.09 from July 1, 1909, to April 1, 1913, 3 years, 9 months.... | | 9,188.08 |
| Gross amount for profits chargeable to defendant.. | | \$58,191.17 |
| Deductions for Interest on Capital. | | |
| 5 per cent. interest on \$72,503.68, capital in 1907, for 1 year | \$ 3,625.18 | |
| 5 per cent. on \$131,797.70 capital January 1, 1909, for 8 months, 20 days..... | 4,729.55 | |
| 5 per cent. on \$138,479.08 capital September 20, 1909, for 4 months, 20 days..... | 2,692.60 | 11,047.33 |
| Net sum chargeable to defendant for profits..... | | \$47,143.84 |

The figures for profits on nonwire glass during the infringing periods were taken from the figures found in complainants' brief (page 19).

The figures for defendant's gross profits during the infringing period, and for interest on capital, were taken from the accounting record (pages 621-623).

In computing interest in favor of complainants on defendant's net profits on wire glass July 1, 1909, was taken as an average date between the beginning and end of the infringing period, excluding the year 1908.

A decree should be entered for complainants April 1, 1913, for \$47,143.84, with costs.

In re O'BRIEN.

(District Court, N. D. Texas, at Dallas. March 1, 1913.)

No. 907.

BANKRUPTCY (§ 396*)—BUSINESS HOMESTEAD—ABANDONMENT.

Where a bankrupt, who was a tailor, had erected a brick building on the property in question which he divided into two stores, renting one as a drug store and previously using the other as a grocery store, but, having failed in this long prior to the bankruptcy, moved into a house in the rear of the lot in which he continued to carry on his tailoring business, he thereby abandoned the brick building as a business homestead and was not entitled to have the same set aside in bankruptcy as exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.*]

In the matter of the bankruptcy proceedings of M. J. O'Brien. On exceptions of the Blair & Hughes Company to the trustee's report setting aside certain property to the bankrupt as an exempt homestead. Exceptions sustained.

Allen & Flanary, of Dallas, Tex., for trustee.

MEEK, District Judge. The bankrupt, M. J. O'Brien, in his schedules claimed as exempt to him under the laws of Texas, lot 1, block B-624, located at the corner of Washington and Thomas avenues in the city of Dallas. He claimed this property was occupied by him as a family and business homestead. The trustee of the estate filed a report setting apart this property to the bankrupt as the head of a family. Blair & Hughes Company, a creditor of the bankrupt, excepted to the report of the trustee and charged that the bankrupt was not entitled to all this property as a homestead, for the reason that he had abandoned a part of same; that he erected a one-story brick building containing two storerooms, on the corner of the lot, and is and has long been renting these storerooms for profit; that he has not used any part of this brick building as a family or business homestead. This creditor prayed that the bankrupt's claim to this portion of the property as exempt be denied. Depositions were taken before the referee as to the construction and subsequent use of this building on the bankrupt's lot. Thereafter the referee held that the exceptions of Blair & Hughes Company should be overruled and that the entire lot with its buildings

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

should be set aside to the bankrupt as exempt. Thereupon the creditor asks this review of the action of the referee.

I quote the facts found by the referee from the testimony as follows :

"M. J. O'Brien, the bankrupt, is 65 years of age. He has been a resident citizen of Dallas, Tex., for 15 years. He has always been, and is now, a journeyman tailor, by trade, making his livelihood in the exercise of his said trade. In the year 1889, he purchased a lot in the city of Dallas, Tex., located on the corner of Washington avenue and Thomas avenue, being 50 by 150 feet, upon which was at that time a two-story frame dwelling, fronting on Washington avenue. For this lot with the improvements thereon he paid the sum of \$640 in cash. At the time he made this purchase he was at the head of a family consisting of himself, wife, and four sons and three daughters. He bought the lot and dwelling for a home for himself and family and for the purpose of pursuing his occupation of a tailor, moved on it for that purpose in 1889 with his family, and since then he has been occupying without interruption said property as a home, and pursuing, in addition thereto, on said premises his trade and business as a tailor, which consisted principally of cleaning, scouring, and mending clothes. In 1908 he had the dwelling moved to the rear of the lot so that it thereafter faced Thomas avenue, and built over that part of the lot facing Washington avenue a one-story brick building of about 40 feet front and 50 feet in depth, which cost him \$1,000. His original purpose and intention was to use this building for a place of business for himself and sons; but, he testifies, he found it too large for his small business as a tailor, so he constructed a wooden partition therein, thus dividing the building into two stores of practically equal dimensions. One of these stores, to wit, the one directly on the corner of Washington and Thomas avenues, he rented to a druggist, who thereafter conducted a drug store therein, and, although it has changed hands several times, it has been continuously since that time, and is now, being used and rented for a drug store. The other half of the building, which had a door in its rear, he has practically used continuously as a place of business for himself until a very short time before the filing of his petition herein.

"At first he conducted therein a tailor shop where he plied his trade, then he went into the grocery business with his son R. T. O'Brien, retaining about 14 feet in the rear thereof for cleaning and pressing clothes. Most of his work, however, was done in his dwelling; the rear door of the grocery store being used as a means of ingress and egress to that portion of the lot upon which his dwelling was situated. The grocery store was under the management of the bankrupt's son, the bankrupt furnishing the capital therefor. It soon proved a failure, and he, as he testifies, 'went broke' in the early part of 1908. It was thereafter rented to one Wadlington, who took a lease on the premises, and it was thereafter successively occupied by Cern, Dendiger, and others, who also conducted a small grocery business therein, which, like that conducted by the bankrupt and his son, they did apparently without success. The bankrupt, however, continued his tailoring business in his dwelling upon which he had his sign as a tailor. His customers usually came through the grocery store to its rear door, which was their most convenient mode of access to the dwelling. There was no fence between his dwelling and the store building or division line, except a wire and some flowers growing between them. When his wife died in the winter of 1908, the flowers died soon afterwards, as he testified, for want of her care, and there is not now anything indicating a separation of the storehouse from the dwelling. Since the death of his wife, one of his sons, Joseph Edward O'Brien, and his wife, have made their home with him, and he has been, and is now, still following his trade as a tailor, whenever he can get work and the infirmities of his years do not prevent. The evidence is undisputed that the bankrupt owns no other real estate, or home, and that the value of this lot does not exceed \$2,300, with all the improvements thereon; at the time of its designation as a homestead by his occupancy thereof in 1898, it did not exceed in value \$1,000. It may be material to state that the only source of income

the bankrupt possesses is from his trade and the rental of the drug store, the amount of which appears in the testimony to have been \$20 per month. The other store was unoccupied and closed up at the time of the filing of the petition herein, where he testified he had some implements of his trade stored."

A perusal of the evidence reveals that the referee is substantially correct in his summarization of the facts. But I do not consider that the facts as summarized by the referee warrant or give support to his order setting apart this entire property to the bankrupt as exempt. From the time the bankrupt moved his residence to the rear of the lot and constructed the brick storehouse in 1908 down to the time of bankruptcy, the storeroom on the corner of Washington and Thomas avenues was rented for profit to different druggists and is now rented and used as a drug store. The bankrupt has never been interested in the drug business conducted in the corner storeroom. In my opinion this part of the building has never been impressed with the homestead character since its erection.

Upon completion of the building the bankrupt occupied and used the other storeroom as a grocery store for a short time and then failed in business. He also used a small section in the rear of the storeroom for a time in carrying on a sort of tailoring and cleaning establishment, but abandoned that use. Thereafter he rented this storeroom to various persons for the conduct of a grocery business. There is not in the record or in the findings of the referee anything indicating that this abandonment of use by the bankrupt was of a temporary nature. On the contrary, it is clearly shown to have been a permanent abandonment. In my opinion this part of the brick building lost its character of homestead prior to the institution of the voluntary proceeding in bankruptcy. The age, infirmities, and necessities of the bankrupt may not be considered in determining the question whether this store building should be set aside to him as exempt. The Supreme Court of Texas, speaking through Associate Justice Stayton, says:

"To preserve the place of business, which is separate and distinct from the home, as a part of the homestead, two things must concur: (1) The head of a family must have a calling or business to which the property is adapted and reasonably necessary. (2) Such property must be used as a place to exercise the calling or business of the head of the family." *Shryock & Rowland v. Latimer*, 57 Tex. 674.

These two things do not concur in the present case. See, also, *Har-gadene v. Whitfield*, 71 Tex. 482, 9 S. W. 475; *Pfeiffer v. McNatt*, 74 Tex. 640, 12 S. W. 821. It is also well established by the courts of Texas that the owner of a parcel or lot of land in a town or city occupied by him as the homestead of his family may abandon a part thereof by devoting it to a purpose inconsistent with its use as a part of a homestead. *Langston v. Maxey*, 74 Tex. 155, 12 S. W. 27; *Wynne v. Hudson*, 66 Tex. 1, 17 S. W. 110; *O'Brien v. Woeltz*, 94 Tex. 149, 58 S. W. 943, 59 S. W. 535, 86 Am. St. Rep. 829; *Carothers v. Lange* (Tex. Civ. App.) 55 S. W. 580.

A proper order will be entered setting aside the action of the referee in so far as he sets aside as exempt the brick building.

McDERMOTT v. HANNON et al.

(District Court, W. D. New York. March 18, 1913.)

1. COURTS (§ 262*)—FEDERAL COURTS—JURISDICTION—SUBJECT-MATTER—WILL CONTEST.

A plenary action between citizens of diverse citizenship to set aside the probate of a will within two years after probate, as authorized by Code Civ. Proc. N. Y. § 2653a, is a proceeding which does not arise out of probate, and is not related to administration or ancillary to probate, and is therefore within the jurisdiction of the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

2. COURTS (§ 489*)—FEDERAL COURTS—JURISDICTION—STATE STATUTES.

The fact that Code Civ. Proc. N. Y. § 2653a, authorizing the maintenance of an action to set aside the probate of a will within two years, declares that the action may be in the Supreme Court of the county in which the probate was had, could not prevent the maintenance of such action in the federal courts, where the parties are of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

In Equity. Action by Cecelia McDermott against Bridget Hannon and others. On demurrer to complaint. Overruled.

Simon Fleischmann, of Buffalo, N. Y., and William H. Earl, of Lockport, N. Y., for plaintiff.

William Brennan, Jr., of Buffalo, N. Y., and Alfred W. Gray, of Niagara Falls, N. Y., for defendants.

HAZEL, District Judge. This action was brought pursuant to section 2653a of the Code of Civil Procedure of the state of New York, which substantially provides that any person interested as devisee, legatee, or otherwise, in any will admitted to probate in this state, may, within two years, question the validity of the probate thereof in an action in the Supreme Court for the county in which such probate was had. The will in question, which purports to relate to real and personal property, was admitted to probate in the county of Niagara, where the testator lived and where his property was located. After alleging the diversity of citizenship of the parties, and their relationship to the testator, and that the matter in dispute, exclusive of interest and costs, involves upwards of \$3,000, the complaint specifically alleges that the testator at the time of making the will was of unsound mind, that the will was secured by fraud and undue influence, and that the probate thereof was invalid. A demurrer has been interposed, principally on the ground that the court is without jurisdiction of the subject-matter of the action.

[1] It is argued, *inter alia*, that whenever power to probate a will is given to a probate or surrogate's court, the decree of such court is final, and not subject to review in this court. With such argument as a general proposition there is no disagreement. If the controversy herein had arisen out of probate proceedings, or if it related to ad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ministration, or to procedure ancillary to probate, this court would have no right to interfere by either removal, review, or plenary action. But this action is not of that description, having been instituted to determine the validity of the probate, pursuant to the statute of the state creating such right, and accordingly this court, in view of the diversity of citizenship, has the same power to hear and decide as the Supreme Court for the county of Niagara would have, had the action been brought therein. The rights and remedies available under the statute in question to citizens of the state in the state court may be enforced in a federal court, the rule being that the latter shall conform as nearly as may be to the practice and mode of procedure provided for by the state laws (section 914, U. S. R. S. [U. S. Comp. St. 1901, p. 684]), and it makes no difference whether the right exists in law or equity (*Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Williams v. Crabb et al.*, 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425; *Richardson v. Green*, 61 Fed. 423, 9 C. C. A. 565; *Case of Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101).

The latter case, to which my attention has been directed since the hearing by counsel for the defendants, is thought to be a decisive corroboration of the jurisdiction of this court in such actions. There the question was whether the controversy was independent of the probate, or ancillary to the original procedure, and Mr. Justice White, in delivering the opinion, said:

"First. That as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of the courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action in a suit inter partes, the right to question at law the probate of a will, or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies."

The action arose under the statute of the state of Washington as to probate of wills, the statutory authority for contesting a will being a part of the probate procedure, and as there existed in that state no statutory provision for an independent contest as to the validity of the probate, it was held that, even though there was a diversity of citizenship, jurisdiction to ratify the probate of the will by the superior court was not conferred upon a federal court. The distinction between suits inter partes and controversies arising in the probate procedure, such as actions to annul probate when the probate court has statutory power to apply the remedy, is absolutely clear and definite.

[2] It is suggested by defendants that jurisdiction is expressly given to the Supreme Court of the county where the will was probated, and that this court should not, by assuming jurisdiction, nullify the intention of the Legislature that the trial should be had before a jury of the county wherein the will was probated. To yield to this suggestion would do violence to the rights and remedies of citizens of another state, and would operate to deprive them of the enforcement of

such rights in the forum granted by the national Constitution and laws. 1 Foster, Fed. Pr. § 7, and cases heretofore cited.
The demurrers are overruled.

PULLMAN CO. v. LINKE et al.

(District Court, S. D. Ohio, E. D. April 12, 1913.)

No. 1,505.

1. COMMERCE (§ 80*)—REGULATION—FEDERAL STATUTES.

The acts of Congress relating to interstate commerce were not intended to abrogate the attachment laws of the state, but within their proper sphere the federal acts are paramount.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 80.*]

2. CARRIERS (§ 4*)—SLEEPING CAR COMPANIES—"COMMON CARRIER."

A sleeping car company, by furnishing sleeping cars under contract with a railroad company, to be used by the traveling public, does not acquire the status of a common carrier of goods or passengers unless so declared by constitutional or statutory provision.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

3. COMMERCE (§ 47*)—INTERSTATE COMMERCE—INSTRUMENTALITIES—SLEEPING CARS—ATTACHMENT.

A sleeping car en route from Columbus, Ohio, to Washington, D. C., while waiting at a junction with its passengers, both interstate and intrastate, aboard to be picked up by a through train and carried to destination, was attached under a state writ and detained by the sheriff by force, compelling the passengers to disembark and accept other accommodations. *Held* that, under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), § 1, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1284), extending the term "common carrier" to include sleeping car companies, the car, at the time of its attachment, was an instrumentality of interstate commerce and was not subject to attachment under a state writ which would directly interfere with its operation in such commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.*]

At Law. Action by the Pullman Company against William Linke and others. On final hearing. Judgment for plaintiff.

Squire, Sanders & Dempsey, of Cleveland, Ohio, and Emmett Tompkins, of Columbus, Ohio (H. T. Wilcoxon, of Chicago, Ill., and T. M. Kirby and Wm. J. Duncan, both of Cleveland, Ohio, of counsel), for plaintiff.

Fitzgibbon & Montgomery, of Newark, Ohio, for defendant Linke.

Kibler & Kibler and F. M. Black, all of Newark, Ohio, for defendants Gillett and another.

SATER, District Judge. The question for decision is: Was the sleeping car in question, under the facts disclosed, subject to attachment?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff is an Illinois corporation. Prior to November 20, 1909, it had furnished a sleeping car, "Eufaula," to be used and which in fact was regularly used by the Baltimore & Ohio Railroad Company for the accommodation and transportation of passengers between the cities of Columbus, Ohio, and Washington, D. C., and intermediate stations. The car, as a part of one of the railroad company's trains, on the date named left Columbus, its initial starting point, on its east-bound trip, carrying passengers who had purchased from the railroad company continuous transportation and from the plaintiff through sleeping car accommodations on such car to points beyond as well as within Ohio; some of them being destined for Washington City. When the car reached Newark, Ohio, at 7:50 p. m., it was detached from the train and shoved by an engine on a side track to be attached to the railroad company's through train due at 8:10 p. m., coming from Chicago, Ill., and bound for eastern points, including the city of Washington. The side track physically connected the railroad company's tracks leading to Columbus with its main east and west bound tracks. While the car was on the side track with its passengers aboard, awaiting the arrival of the train from Chicago, which was on time, Linke, as sheriff of Licking county, Ohio, who was armed with a writ of attachment which had been issued in an action brought in the state court against the plaintiff by Gillett, levied upon the car, chained it to the track, and, notwithstanding the protests of passengers aboard and the railroad company's employes, refused permission to such employes and those of the plaintiff to place the car in the east-bound train to be carried to its destination. When the yard crew, in obedience to instructions from their superiors, were about to couple to the car, Linke produced a revolver and threatened to shoot any one that interfered with the car or attempted to move it. A suggestion was made by the station master, out of regard for the passengers, that, if a sleeping car was to be seized, the levy be postponed until the following morning, when a west-bound car which would have completed its journey, save a distance of about 33 miles from Newark to Columbus, could be taken; but Linke, and Gillett and his counsel, declined to act upon such suggestion. The passengers in the car, to continue their respective journeys, were compelled to abandon it and take such places as could be found for them in the New York sleepers in the east-bound train. The train was delayed about ten minutes on account of the attachment of the car and transferring the passengers. Gillett and his counsel actively aided and abetted the sheriff in his seizure and detention of the car. Subsequently, to avoid the car's continued interference with traffic, it was removed to another track, where it still remains. The plaintiff, having other property within the jurisdiction of the state court subject to attachment, appeared thereafter in that court for the purpose of its motion only, and moved for a dissolution of the attachment. The motion was sustained, but before the court had acted upon it Gillett filed an amended petition and caused a second writ of attachment to be issued and levied upon the car. This attachment was also dissolved. Before its dissolution, Gillett, whose counsel all the while remained

the same, instituted a second suit on the same claim and caused another writ of attachment to issue whereby the car was again seized. This action is still pending in the state court, and the car has thus been continuously held by virtue of a writ. The plaintiff in an appropriate manner demanded the return of the car, but the defendants at all times refused and still refuse to surrender it, and still retain it in their possession awaiting the determination of the suit pending in the state court in which the last writ of attachment was issued. The plaintiff brought this action against Linke, Gillett, and his counsel, charging the malicious and willful seizure of the car and its conversion to their own use and praying recovery of the car's full value.

[1] That the statute under which the seizure was made is a valid state law, enacted to enable creditors to collect their debts and for no other or ulterior purpose, and evinces no conscious purpose to regulate directly or indirectly interstate commerce, is not controverted; nor is it claimed, nor can it be successfully asserted, that the acts of Congress relating to interstate commerce were intended to abrogate the attachment laws of the state. Within their proper sphere, the federal acts are paramount; but beyond that, the state law, whose purpose is wholesome, is operative as against all that come within its provisions. *Davis v. C., C. & St. L. Ry. Co.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. In that case the warning is sounded that interference with interstate commerce by the enforcement of attachment laws of a state must not be exaggerated. But when there is incompatibility between the obligations an interstate carrier has to its creditors and the obligations it has to the public, either from the nature of its services or under the acts of Congress, the instrumentalities of interstate commerce transportation are, for the time being, "immune from judicial process," and are "put apart in a kind of civil sanctuary," being, under such circumstances, exempt from attachment and, of course, from execution as well, by reason of the provisions of such acts for continuity of transportation and avoidance of transshipment of freight and passengers. *Davis v. C., C. & St. L. Ry. Co.*, 217 U. S. page 176, 30 Sup. Ct. 468, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

[2] A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers (*Lemon v. Palace Car Co.* [C. C.] 52 Fed. 262; *Elliott, Railroads*, § 1616; *Beale, Innkeepers & Hotels*, § 342; *Hutchinson, Carriers*, § 1130; 25 Am. & Eng. Ency. Law, 1110, 1111), unless declared to be such by some constitutional or statutory provision. It merely furnishes accommodations to the passengers of another company and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling. 6 Cyc. 656; *Elliott, Railroads*, § 1618. Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. L. 584, provides that the term "common carrier" as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status at the time of the seizure of the car was in legal con-

templation the same as that of an interstate carrier. The car, moreover, was an instrumentality of commerce and was when seized actually employed as such in interstate transportation.

[3] It is asserted by the plaintiff and denied by the defendants that, in view of the facts disclosed, the acts of Congress, and the commerce clause of the national Constitution, the car in question at the time of its seizure was "immune from judicial process." The views of the state courts, when required to decide upon the liability of cars to judicial process when in given attitudes and employed in interstate commerce, have been discordant, as noted in the Davis Case. No attempt will be made to review the cases there cited, or others of a kindred character which diligent counsel have pressed upon the court, or those in which the courts have passed upon the right to levy upon instrumentalities employed in the transportation of the United States mail (*Harmon v. Moore*, 59 Me. 428; *Parker v. Porter*, 6 La. 169), and which are claimed to be analogous to the case at bar. The situation of the car involved in the present case was unlike not only that of any car whose seizure was under consideration in any of the cases cited, but also that of the instrumentalities employed in the carriage of the United States mails whose attachment provoked the rule announced in the *Harmon* and the *Parker* Cases, respectively. The car was not empty, or idle, or waiting for return shipment, or unnecessarily delayed in the course of business, or in process of loading or unloading, or awaiting the commencement of a journey or the next trip. It had already entered upon a lengthy and continuous journey, bearing interstate passengers who were in no wise connected with or concerned in the controversy between Gillett and the plaintiff and who had acquired by purchase from the railroad company and the plaintiff for the whole of their respective journeys the valuable contractual rights of transportation and sleeping car accommodations on that particular car. *Beale, Innkeepers & Hotels*, § 365; 6 Cyc. 656; 25 Am. & Eng. Ency. Law, 1111, 1112. The switching of it from one train to another was an essential part of its journey, and while being so switched it was still in use in interstate commerce. The temporary suspension of its movements was but an incident in and did not take it out of the course of its transportation or impart to it a local character only. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. Having started with its load of human freight on its ultimate passage from Columbus to Washington City and being in the course of transportation to another state, it had ceased to be governed exclusively by the domestic law and had begun to be and was governed and protected by the national law of commercial regulation. *Coe v. Errol*, 116 U. S. 517, 525, 6 Sup. Ct. 475, 29 L. Ed. 715.

The impounding of the car delayed (briefly though it was) the transportation of all the passengers both in the car and on the train to which it was to be attached, and, in disregard of their rights and the policy of Congress favoring continuous lines and continuous carriage (section 5258, R. S. U. S. [U. S. Comp. St. 1901, p. 3564]), enforced the transshipment of interstate passengers. The transportation of passengers from one state to another is, in its nature national, is com-

merce between the states, is beyond the reach of state legislation, and admits of and requires uniformity of regulation through Congress, affecting alike all the states. *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 483, 485, 486, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *County of Mobile v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238; *Barnes, Interstate Transportation*, § 28; *Railroad Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527. The attachment levied on plaintiff's car directly stopped, though temporarily, the delivery and required the transshipment of interstate passengers. It not merely incidentally and indirectly affected interstate commerce, but bore upon it so directly as to amount to its regulation. The state law, though enacted in the exercise of powers not controverted, may not be so used as to produce such a result, and the attachment must therefore be held invalid. 20 *Harvard Law Review*, 319, 320; *Galveston Ry. Co. v. Tex.*, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Louisville & Nashville R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298. If the writ of attachment is susceptible of the application made of it by the defendants, litigants may at their pleasure cause the transshipment of interstate freight and passengers with its incident delay, and thereby produce great inconvenience, discomfort, and hardship, and necessarily interfere directly with the freedom of interstate commerce, continuous and rapid transportation, and the conduct of carriers in the management and disposition of their interstate business. But this may not be done. *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547.

The charge of conversion is established, and judgment may be entered for the plaintiff; the amount thereof to be the sum agreed upon by the parties in case the plaintiff should prevail.

PATTERSON v. BUCKNALL S. S. LINES, Limited.

(District Court, S. D. New York. April 1, 1913.)

REMOVAL OF CAUSES (§ 58*)—RIGHT TO REMOVE—CITIZENSHIP—WHOLE SUIT REMOVABLE.

Where plaintiff took an assignment of ten causes of action, some of the assignors being citizens of the United States and others aliens, and sued defendant, an alien corporation, on all of them in a single suit, he could not deprive defendant of the right to remove the whole suit by virtue of the causes of action previously owned by the citizen assignors, because of the joinder of the claims held by the alien assignors, which were not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 110; Dec. Dig. § 58.*]

At Law. Action by Edward H. Patterson against The Bucknall Steamship Lines, Limited. Plaintiff sued as assignee of ten separate causes of action, the assignors in some instances being citizens of the United States, and in others aliens, and defendant was an alien corporation. On motion to remand. Denied.

Hunt, Hill & Betts, of New York City, for plaintiff.

Convers & Kirlin, of New York City (John M. Woolsey, of counsel, of New York City), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. If sued in a state court by the citizen assignor of any of these causes of action, this alien defendant would have the right to remove the cause to a federal court. It cannot be deprived of that right because the assignee of such causes of action has joined it with other nonremovable causes of action in a similar suit. The motion to remand is therefore denied. Plaintiff has no ground to complain that this disposition of the cause leaves the nonremovable causes of action here for trial. His own conduct in unnecessarily uniting them all in one suit has brought the situation about.

Motion to remand is denied.

MEMORANDUM DECISIONS

CAUSEY v. UNITED STATES.† (Circuit Court of Appeals, Fifth Circuit. April 12, 1913.) No. 2,420. Appeal from the District Court of the United States, for the Eastern District of Louisiana; Wm. I. Grubb, Judge. T. M. Miller and J. L. Bradford, both of New Orleans, La., for appellant. Charlton R. Beattie, U. S. Atty., of New Orleans, La. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. A majority of the judges are of opinion that the evidence submitted in the court below on the trial of this case fully justifies the finding that the appellant, in obtaining and perfecting his homestead entry, was guilty of such fraud as warrants the decree below vacating the patent. Affirmed.

COMMONWEALTH BANK OF BALTIMORE v. GILL et al. (Circuit Court of Appeals, Fourth Circuit. March 12, 1907.) No. 658. Appeal from the District Court of the United States for the District of Maryland. See, also, 137 Fed. 694. Robert Biggs and Edgar H. Gans, both of Baltimore, Md., for appellant. John E. Semmes and John Hinkley, both of Baltimore, Md., for appellees. Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. We find no error in the order appealed from. Affirmed.

FISHEL-NESSLER CO. v. FISHEL & CO. et al. (Circuit Court of Appeals, Second Circuit. October 22, 1912.) Appeal from the District Court of the United States for the Southern District of New York. On motion for leave to file agreed statement of facts as record on appeal. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The record is returned to the District Court, with instructions to include therein the testimony offered by defendants attacking the validity of the patent.

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO. (Circuit Court of Appeals, Fifth Circuit. April 1, 1913. Rehearing Denied May 5, 1913.) No. 2,458. In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Action at law by the Louisville & Nashville Railroad Company against the Western Union

† Rehearing denied June 2, 1913.

Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed. George Denegre, Joseph Paxton Blair, and Victor Leovy, all of New Orleans, La., for plaintiff in error. Charles Payne Fenner, of New Orleans, La., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. We find no error in the rulings in the court below. The judgment is therefore affirmed.

MAYOR AND ALDERMEN OF CITY OF VICKSBURG v. HENSON. (Circuit Court of Appeals, Fifth Circuit. April 8, 1913. Rehearing Denied April 15, 1913.) No. 2,480. Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge. Action between the Mayor and Aldermen of the City of Vicksburg and W. A. Henson, receiver of the Vicksburg Waterworks. From a judgment in favor of the latter, the former appeals. Motion to dismiss appeal overruled, and decree affirmed. George Anderson, O. W. Catchings, and John Brunini, all of Vicksburg, Miss., and Charles Payne Fenner, of New Orleans, La., for appellants. J. C. Bryson and J. Hirsh, both of Vicksburg, Miss., and T. M. Miller, Wm. C. Dufour, and H. Generes Dufour, all of New Orleans, La., for appellee. Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. The motion to dismiss this appeal is overruled. On the merits, a majority of the judges being of opinion that the decree of the Circuit Court in No. 41 of the docket, affirmed by the Supreme Court in *Vicksburg v. Vicksburg Waterworks*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253, constitutes an estoppel against the city of Vicksburg in the present suit, the decree appealed from should be, and it is, affirmed.

PYLE v. TEXAS TRANSPORT & TERMINAL CO. et al.† (five cases). (Circuit Court of Appeals, Fifth Circuit. April 8, 1913.) Nos. 2,389-2,393. Appeals from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Actions by J. A. E. Pyle as trustee in bankruptcy, etc., against the Texas Transport & Terminal Company and others and the Bank de Mulhouse, against the Texas Transport & Terminal Company and others and the Comptoir d'Escompte de Mulhouse, against the Texas Transport & Terminal Company and others and Paul Chardin, against the Texas Transport & Terminal Company and others and the Société Générale, and against the Texas Transport & Terminal Company and others and the Credit Havrais. From decrees in favor of the defendants (192 Fed. 725), plaintiff appeals. Affirmed. Wm. C. Dufour, and H. Generes Dufour, both of New Orleans, La., for appellant. George Denegre, Joseph Paxton Blair, and George H. Terriberry, all of New Orleans, La., for appellees. Before PARDEE and SHELBY, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. The appeals in the above numbered and entitled cases are affirmed, on the authority of *Lovell v. Newman & Son*, 192 Fed. 753, 113 C. C. A. 39, and *Hentz & Co. v. Lovell*, 192 Fed. 762, 113 C. C. A. 48.

† Rehearing denied June 2, 1913.